



MISSISSIPPI CODE 1972
Annotated

Crimes
(§ 97-1-1 to)
(§ 97-9-129)

Title 97

TABLE OF CONTENTS

VOLUME 21

TITLE 97. CRIMES

CHAP. No.	BEGINNING SECTION
1. Conspiracy, Accessories and Attempts.....	97-1-1
3. Crimes Against the Person	97-3-1
5. Offenses Affecting Children	97-5-1
7. Crimes Against Sovereignty or Administration of Government	97-7-1
9. Offenses Affecting Administration of Justice.....	97-9-1

TITLE 97 — Continued in Volume 21A



Digitized by the Internet Archive
in 2021 with funding from
Public.Resource.Org

MISSISSIPPI CODE

1972

ANNOTATED

ADOPTED AS THE OFFICIAL CODE OF THE
STATE OF MISSISSIPPI
BY THE
1972 SESSION OF THE LEGISLATURE

VOLUME TWENTY-ONE CRIMINAL PROCEDURE

§§ 97-1-1 to 97-9-129

CONTAINING PERMANENT PUBLIC STATUTES OF MISSISSIPPI
TO THE END OF THE 2020 REGULAR
LEGISLATIVE SESSION



LexisNexis®

QUESTIONS ABOUT THIS PUBLICATION?

For EDITORIAL QUESTIONS concerning this publication, or REPRINT PERMISSION, please call:
800-833-9844

For CUSTOMER SERVICE ASSISTANCE concerning replacement pages, shipments, billing or other matters, please call:

Customer Service Department at	800-833-9844
Outside the United States and Canada	518-487-3000
FAX	518-487-3584

For INFORMATION ON OTHER MATTHEW BENDER PUBLICATIONS, please call:

Your account manager or	800-223-1940
Outside the United States and Canada	518-487-3000

Copyright © 1973—2020

by

THE STATE OF MISSISSIPPI

All rights reserved.

LexisNexis and the Knowledge Burst logo are registered trademarks, and Michie is a trademark of Reed Elsevier Properties, Inc., used under license. Matthew Bender is a registered trademark of Matthew Bender Properties, Inc.

ISBN 978-1-5221-9391-3 (Volume 21)

ISBN 0-327-09628-4 (Code set)



LexisNexis®

Matthew Bender & Company, Inc.

555 Middle Creek Parkway, Colorado Springs, CO 80921

www.lexisnexis.com

PREFACE

The Mississippi Code of 1972, which became effective on November 1, 1973, is the culmination of nearly four years of effort on the part of the Legislature, the Attorney General's office and the publishers, which brings together provisions of general statutory law having a common subject matter into a more orderly and logical framework of code titles and chapters, and employing a modern and effective section numbering system. A major by-product of the code revision will be the state-owned magnetic computer tape containing the Mississippi Code of 1972, which will be of invaluable assistance to the Legislature and to the state.

The enabling act for the code was a recommendation of the Mississippi State Bar, which resulted in the consideration and passage of Senate Bill 1964, Chapter 465, Laws of 1970, signed into law by Governor John Bell Williams.

The Code Committee provided for in that act was comprised of A. F. Summer, Attorney General, Heber Ladner, Secretary of State, Representative Edgar J. Stephens, Jr., Chairman, House Appropriations Committee, Senator William G. Burgin, Jr., Chairman, Senate Appropriations Committee, Representative H. L. Meredith, Jr., Chairman, House Judiciary "A" and Judiciary en banc Committees, Senator E. K. Collins, Chairman, Senate Judiciary "A" and Judiciary en banc Committees, Representative Ney McKinley Gore, Jr., Chairman, House Judiciary "B" Committee, and Senator William E. Alexander, Chairman, Senate Judiciary "B" Committee. In 1972, Representative Marby Robert Penton and Senator Herman B. Decell, Chairman of House and Senate Judiciary "B" Committees, respectively, became members of the Committee, replacing Representative Gore and Senator Collins, Senator Alexander having been appointed Chairman of Senate Judiciary "A" and Judiciary en banc Committees. The Deputy Attorney General, Delos H. Burks, served the Code Committee as Secretary. Special Assistant Attorney General Fred J. Lotterhos, under the supervision of the Attorney General, was assigned the principal responsibility for the supervision of the recodification, including the consideration and treatment of some 16,000 sections of code manuscript.

Final legislative approval was given to the Mississippi Code of 1972 by passage of Senate Bill 2034, Laws of 1972, which was signed by Governor William L. Waller on April 26, 1972.

The Code Committee is of the opinion that the recodification has been thoroughly and well accomplished, and will result in a greatly improved repository of the general statutory law of the state.

A. F. SUMMER
ATTORNEY GENERAL

PUBLISHER'S FOREWORD

This 2020 Replacement Volume 21 of the Mississippi Code of 1972 Annotated represents material appearing in the original 1973 bound volume, the 2000 Replacement Volume 21, the 2006 Replacement Volume 21, and the 2014 Replacement Volume 21A, as well as reflecting amendments, repeals, and new Code provisions enacted by the Mississippi Legislature through the 2020 Regular Legislative Session.

This volume contains the text of Chapters 1 through 9 of Title 97 of the Mississippi Code of 1972 Annotated, as amended through the 2020 Regular Legislative Session. Chapters 11 through 45 of Title 97 appear in Volume 21A.

Case annotations are included based on decisions of the State and federal courts in cases arising in Mississippi. Many of these cases were decided under the former statutes in effect prior to the enactment of the Code of 1972. These earlier cases have been moved to pertinent sections of the Code where they may be useful in interpreting the current statutes. Annotations to collateral research references are also included.

To better serve our customers by making our annotations more current, LexisNexis has changed the sources that are read to create annotations for this publication. Rather than waiting for cases to appear in printed reporters, we now read court decisions as they are released by the courts. A consequence of this more current reading of cases, as they are posted online on LexisNexis, is that the most recent cases annotated may not yet have print reporter citations. These will be provided, as they become available, through later publications.

This publication contains annotations taken from decisions of the Mississippi Supreme Court and the Court of Appeals decisions and decisions of the appropriate federal courts. These cases will be printed in the following reporters:

- Southern Reporter, 3rd Series
- United States Supreme Court Reports
- Supreme Court Reporter
- United States Supreme Court Reports, Lawyers' Edition, 2nd Series
- Federal Reporter, 3rd Series
- Federal Supplement, 3rd Series
- Federal Rules Decisions
- Bankruptcy Reporter

Additionally, annotations have been taken from the following sources:

- American Law Reports, 6th Series
- American Law Reports, Federal 2nd Series
- Mississippi College Law Review
- Mississippi Law Journal

Finally, published Opinions of the Attorney General and opinions of the Ethics Commission have been examined for annotations.

PUBLISHER'S FOREWORD

A comprehensive Index appears at the end of this volume.

Visit the LexisNexis website at <http://www.lexisnexis.com> for an online bookstore, technical support, customer support, and other company information.

For further information or assistance, please call us toll-free at (800) 833-9844, fax us toll-free at (800) 643-1280, e-mail us at customer.support@bender.com, or write to: Mississippi Code Editor, LexisNexis, 555 Middle Creek Parkway, Colorado Springs, CO 80921.

December 2020

LexisNexis

User's Guide

This guide is designed to help both the lawyer and the layperson get the most out of the Mississippi Code of 1972 Annotated. Information about key features of the Code and suggestions for its more effective use are given under the following headings:

- Advance Code Service
- Advance Sheets
- Amendment Notes
- Analyses
- Code Status
- Comparable Legislation from other States
- Court Rules
- Cross References
- Editor's Notes
- Effective Dates
- Federal Aspects
- History Notes
- Index
- Joint Legislative Committee Notes
- Judicial Decisions
- Opinions of the Attorney General
- Organization and Numbering System
- Placement of Notes
- Replacement Volumes
- Research and Practice References
- Statute Headings
- Tables

If you have a question not addressed by the User's Guide, or comments about your Code service, you may contact us by calling us toll-free at (800) 833-9844, faxing us toll-free at (800) 643-1280, e-mailing us at customer.support@bender.com, or writing to Mississippi Code Editor, LexisNexis, 555 Middle Creek Parkway, Colorado Springs, CO 80921.

ADVANCE CODE SERVICE

Three times a year, at roughly quarterly intervals between delivery of Code supplement pocket parts, we publish the Mississippi Advance Code Service pamphlets. These pamphlets contain updated statutory material and annotations to Attorney General opinions, research and practice references, and recent court decisions construing the Code. Each pamphlet is cumulative, so that each is a "one-stop" source of case notes updating those in your Code bound volumes and pocket parts.

ADVANCE SHEETS

The Advance Sheets consist of a series of pamphlets issued in the spring. The series reproduces the acts passed by the Mississippi Legislature and

USER'S GUIDE

approved by the Governor during the legislative session. Features include tables showing the impact of legislation on sections of the Mississippi Code of 1972 Annotated, and a cumulative index. These pamphlets enable the user to receive a preview of approved legislation prior to supplement availability, and serve as an excellent source of legislative history.

AMENDMENT NOTES

Every time a Code provision is amended, we prepare a note describing the effect of the amendment. By reading the note, you can ascertain the impact of the change without having to check the former statute itself.

Amendment notes are retained in the Supplement until the bound volume is replaced, at which time notes from all but the last two years are deleted.

Amendment notes are retained online indefinitely.

ANALYSES

Each title, chapter, and article appearing in a bound volume or supplement is preceded by an analysis. The analysis details the scope of the title, chapter, and article and enables you to see at a glance the content of the title, chapter, and article without resorting to a page-by-page examination in the bound volume or supplement.

CODE STATUS

The Mississippi Code of 1972 Annotated is Mississippi's official code and is considered evidence of the statute law of the State of Mississippi (see § 1-1-8). The Code was enacted by Chapter 394 of the Laws of 1972, which was signed by the Governor on April 26, 1972.

Title 1, Chapters 1 through 5 of the Code contain statutes governing the status and construction of the Code.

COMPARABLE LEGISLATION FROM OTHER STATES

Notes to comparable legislation from other states appear for uniform laws, interstate compacts, statutory provisions pertaining to reciprocity and cooperation with other states, and various important statutes of general interest. Other states' statutes that are similar in subject matter and scope to those of Mississippi are cited, generally, under the first section of the chapter or article to which they pertain. Occasionally, comparable legislation pertains to only one section, in which case it is cited under that section rather than at the chapter or article level.

See also *Federal Aspects*.

USER'S GUIDE

COURT RULES

The Mississippi Court Rules are published separately by LexisNexis in a fully annotated softcover volume which is replaced annually and supplemented semi-annually.

The Court Rules volume contains statewide rules of procedure of the state courts, the local rules of the United States district courts and bankruptcy courts for Mississippi, and the rules of the United States Court of Appeals for the Fifth Circuit. Rules are received from the courts and edited only for stylistic consistency. For further information, see the Preface to the Mississippi Court Rules volume.

CROSS REFERENCES

Cross references refer you to notes under other Code sections, that may affect a law or place it in context. Cross references also are used under repealed provisions to refer you to an existing law on a similar subject. Cross references do not cite all related statutes, however, since these can be identified by using the General Index.

See also *Comparable Legislation from other States and Federal Aspects*.

EDITOR'S NOTES

Editor's notes are notes prepared by the Publisher that contain information about important or unusual features of a law, or special circumstances surrounding passage of the law, that are not apparent from the law's text.

See also *Effective Dates*.

EFFECTIVE DATES

Absent a specific effective date provision within an act, Mississippi laws generally take effect upon approval date, which is the date the act is signed into law by the Governor.

FEDERAL ASPECTS

Notes to federal legislation that is similar in subject matter and scope to the laws of Mississippi are referenced throughout the Code. In addition, the Code contains the United States Code Service citation for any federal law that is referred to in a Mississippi statute by its popular name or by its session law designation.

See also *Comparable Legislation from other States*.

HISTORY NOTES

Each section of the Code is followed by a brief note showing the acts of the Legislature on which it is based, including the act that originally enacted the section and any subsequent amendments.

USER'S GUIDE

The history note follows the section text, preceding any other annotations for the section. Information in the history note is listed in chronological order, first by Codes, then by Laws, with the most recent information listed last. If a section has been renumbered, the former number will appear in the history note.

The tables volume should also be consulted when researching the history of a statutory section, since it contains cross reference tables that provide a statutory citation for each section of the session laws and the date each act went into effect.

INDEX

The Code is completely indexed in two softcover Index volumes, which are updated and replaced annually. In addition, each volume of the Code is followed by its own index. As accurate and thorough as the Index is, your best defense against index wild goose chases is familiarity with indexing techniques. To that end, an explanatory Foreword to the Index appears in the first Index volume.

JOINT LEGISLATIVE COMMITTEE NOTES

Joint Legislative Committee notes are included in the Code to describe codification decisions made by the Mississippi Joint Legislative Committee on Compilation, Revision and Publication of Legislation. Examples of Committee actions that warrant the inclusion of a note are the integration of multiple amendments to a single Code section during the same legislative session, and the correction of typographical errors appearing in the Code.

JUDICIAL DECISIONS

Every reported case from the Supreme Court of Mississippi, the Court of Appeals of Mississippi, federal district courts for Mississippi, the federal Fifth Circuit Court of Appeals and the United States Supreme Court has been read for constructions of Mississippi law. These constructions are noted under pertinent sections of the statutes or Mississippi Constitution provisions, under the heading "Judicial Decisions." Where a decision has been reviewed by a higher court, subsequent judicial history and disposition is noted in the case note if such disposition has any bearing on the annotated material. Where two or more decisions state the same rule of law, the case citations are cumulated under one case note.

Case notes are grouped together under headings called "catchlines." The catchlines identify the basic subject matter of the case notes and assist the user in locating pertinent notes. Catchlines are numbered and arranged thematically, with "In general" first. Where there are two or more catchlines, an analysis, listing all the catchlines, precedes the annotations.

USER'S GUIDE

Frequently, statutes carry notes to cases that arose under earlier laws on the same subject. Case notes are retained so long as the editor believes the note will have some relevance under current law, though of course the relevance may be diminished by later changes in the law. These case notes appear under the heading "Decisions under former law."

OPINIONS OF THE ATTORNEY GENERAL

Opinions of the Attorney General for the State of Mississippi have been read for constructions of Mississippi law. Notes describing the subject matter of the opinions have been placed under relevant Code provisions under the heading "Opinions of the Attorney General."

ORGANIZATION AND NUMBERING SYSTEM

The Code is organized by titles, chapters, articles, subarticles, undesignated centered headings and sections. Analyses at the beginning of each title, chapter, article, and subarticle help you understand the internal arrangement of each Code unit (see *Analyses*).

Odd numbers are generally used for the numbering of titles, chapters and sections. Even numbers have been used for some chapters and sections so that a particular new chapter or section might be logically placed with other chapters and sections dealing with the same or similar subject matter. Similarly, the use of numbers with decimal points has been used for some sections in order that they may be inserted among other sections pertaining to the same subject.

The title, chapter, and section for each Code section is revealed by its section number. Thus, in the designation "§ 1-3-65," the first digit ("1") means the provision is in Title 1 ("Laws and Statutes"); the second ("3") indicates Chapter 3 ("Construction of Statutes"); and the last two digits ("65") mean the 65th section in that chapter ("Construction of terms generally").

Articles and subarticles are not reflected by section number designations.

Within sections, subsections and paragraphs usually are designated following this pattern: (1)(a)(i)1. or (1)(a)(i)A. A distinctive indention scheme is applied to suggest the relative value of each unit within this hierarchy.

PLACEMENT OF NOTES

Where a note pertains to a single statute section, it will of course be set out following that section. In many instances, however, a note applies equally to several statute sections or to an entire chapter or article. If the pertinent sections are scattered, or few in number, the note will be duplicated for each section. But where the note applies to all or most of the sections in a chapter or article, we prevent the space-consuming repetition of notes by placing the note at the very beginning of the chapter or article.

USER'S GUIDE

REPLACEMENT VOLUMES

The Code is periodically updated and streamlined by the replacement of volumes. Although a current set of the Code contains all currently applicable statutes, we encourage you to retain replaced volumes and their supplement pockets parts for historical reference.

RESEARCH AND PRACTICE REFERENCES

Citations to references in American Jurisprudence, American Jurisprudence Pleading and Practice, American Jurisprudence Proof of Facts, American Jurisprudence Trials, American Law Reports, First through Sixth Series, ALR Federal, Corpus Juris Secundum, various other treatises and practice guides, and Mississippi law journals are given under this heading, wherever the references appear to discuss the statute under which the citation appears, or a topic related to the statute. These citations are intended only to give you a starting point for your library research. The Mississippi law journals include Mississippi Law Journal and Mississippi College Law Review.

STATUTE HEADINGS

Headings or “catchlines” for Code sections and subsections are generally created and maintained by the publisher. They are mere catchwords and are not to be deemed or taken as the official title of a section or as a part of the section. Your suggestions for the improvement of particular catchlines are invited.

TABLES

The Mississippi Code of 1972 Annotated contains several tables that can assist you in your research. These are published in the Statutory Tables volume of the Code, and include the following:

- Sections of the Code of 1930 carried into the Code of 1942.
- Sections of the Code of 1942 carried into the Code of 1972.
- Allocation of Acts of Legislature, 1931 — 1972.
- Allocation of Acts of Legislature, 1972 — present.
- Consolidated Tables of amendments and repeals of 1942 Code sections.
- Consolidated Tables of amendments and repeals of 1972 Code sections.

GENERAL OUTLINE OF TITLES AND CHAPTERS

CONSTITUTION OF THE UNITED STATES	Volume 1
CONSTITUTION OF MISSISSIPPI	Volume 1
AMENDMENTS	Volume 1

TITLE 1. LAWS AND STATUTES

		Beginning Section
CHAPTER	1. Code of 1972	1-1-1
	3. Construction of Statutes	1-3-1
	5. Session Laws and Journals	1-5-1

TITLE 3. STATE SOVEREIGNTY, JURISDICTION AND HOLIDAYS

CHAPTER	1. State Sovereignty Commission [Repealed]	3-1-1
	3. State Boundaries, Holidays, and State Emblems	3-3-1
	5. Acquisition of Land by United States Government	3-5-1
	7. Compact for a Balanced Budget	3-7-1

TITLE 5. LEGISLATIVE DEPARTMENT

CHAPTER	1. Legislature	5-1-1
	3. Legislative Committees	5-3-1
	5. Interstate Cooperation	5-5-1
	7. Lobbying [Repealed]	5-7-1
	8. Lobbying Law Reform Act of 1994	5-8-1
	9. Agency Review	5-9-1
	11. Abolishment of Agencies	5-11-1

TITLE 7. EXECUTIVE DEPARTMENT

CHAPTER	1. Governor	7-1-1
	3. Secretary of State	7-3-1
	5. Attorney General	7-5-1
	7. State Fiscal Officer; Department of Audit	7-7-1
	9. State Treasurer	7-9-1
	11. Secretary of State; Land Records	7-11-1
	13. Mississippi Administrative Reorganization Act	7-13-1
	15. Executive Branch Reorganization Study Com- mission [Repealed]	7-15-1
	17. Mississippi Executive Reorganization Act of 1989	7-17-1

GENERAL OUTLINE

TITLE 9. COURTS

		Beginning Section
CHAPTER	1. Provisions Common to Courts	9-1-1
	3. Supreme Court	9-3-1
	4. Court of Appeals of the State of Mississippi	9-4-1
	5. Chancery Courts	9-5-1
	7. Circuit Courts	9-7-1
	9. County Courts	9-9-1
	11. Justice Courts	9-11-1
	13. Court Reporters and Court Reporting	9-13-1
	15. Judicial Council [Repealed]	9-15-1
	17. Court Administrators	9-17-1
	19. Commission on Judicial Performance	9-19-1
	21. Administrative Office of Courts	9-21-1
	23. Drug Courts	9-23-1
	25. Veterans Treatment Courts	9-25-1
	27. Rivers McGraw Mental Health Diversion Pilot Program Act	9-27-1

TITLE 11. CIVIL PRACTICE AND PROCEDURE

CHAPTER	1. Practice and Procedure Provisions Common to Courts	11-1-1
	3. Practice and Procedure in Supreme Court	11-3-1
	5. Practice and Procedure in Chancery Courts	11-5-1
	7. Practice and Procedure in Circuit Courts	11-7-1
	9. Practice and Procedure in County Courts and Justice Courts	11-9-1
	11. Venue of Actions	11-11-1
	13. Injunctions	11-13-1
	15. Arbitration and Award	11-15-1
	17. Suits to Confirm Title or Interest and to Remove Clouds on Title	11-17-1
	19. Ejectment	11-19-1
	21. Partition of Property	11-21-1
	23. Trial of Right of Property	11-23-1
	25. Unlawful Entry and Detainer	11-25-1
	27. Eminent Domain	11-27-1
	29. Sequestration	11-29-1
	31. Attachment in Chancery Against Nonresident, Absent or Absconding Debtors	11-31-1
	33. Attachment at Law Against Debtors	11-33-1
	35. Garnishment	11-35-1
	37. Replevin	11-37-1
	38. Claim and Delivery	11-38-1

GENERAL OUTLINE

TITLE 11. CIVIL PRACTICE AND PROCEDURE (Cont'd)

	Beginning Section
39. Quo Warranto	11-39-1
41. Mandamus; Prohibition	11-41-1
43. Habeas Corpus	11-43-1
44. Compensation to Victims of Wrongful Conviction and Imprisonment	11-44-1
45. Suits by and Against the State or Its Political Subdivisions	11-45-1
46. Immunity of State and Political Subdivisions From Liability and Suit for Torts and Torts of Employees	11-46-1
47. Lis Pendens	11-47-1
49. Rights and Duties of Attorneys, Generally	11-49-1
51. Appeals	11-51-1
53. Costs	11-53-1
55. Litigation Accountability Act of 1988	11-55-1
57. Structured Settlements	11-57-1
59. Uniform Interstate Depositions and Discovery Act	11-59-1
61. Mississippi Religious Freedom Restoration Act	11-61-1
62. Protecting Freedom of Conscience from Govern- ment Discrimination Act	11-62-1
63. Application of Foreign Law	11-63-1
65. Enforcement of Federal Laws, Orders, Rules ...	11-65-1
67. Asbestos Bankruptcy Trust Claims Transpar- ency Act	11-67-1
69. Liability Exemption for Furnishing Information Concerning Insurance Fraud	11-69-1
71. Mississippi Back-to-Business Liability Assur- ance and Health Care Emergency Response Liability Protection Act	11-71-1

TITLE 13. EVIDENCE, PROCESS AND JURIES

CHAPTER	1. Evidence	13-1-1
	3. Process, Notice, and Publication	13-3-1
	5. Juries	13-5-1
	7. State Grand Jury Act	13-7-1

TITLE 15. LIMITATIONS OF ACTIONS AND PREVENTION OF FRAUDS

CHAPTER	1. Limitation of Actions	15-1-1
	3. Prevention of Frauds	15-3-1

GENERAL OUTLINE

TITLE 17. LOCAL GOVERNMENT; PROVISIONS COMMON TO COUNTIES AND MUNICIPALITIES

		Beginning Section
CHAPTER	1. Zoning, Planning and Subdivision Regulation ..	17-1-1
	2. Building Codes	17-2-1
	3. Promotion of Trade, Conventions and Tourism	17-3-1
	5. Jails, Waterworks and Other Improvements	17-5-1
	7. Removal of Local Governments in Emergencies	17-7-1
	9. Lease of Mineral Lands other than Sixteenth Section or "In Lieu" Lands	17-9-1
	11. Gulf Regional District Law	17-11-1
	13. Interlocal Cooperation of Governmental Units	17-13-1
	15. Human Resource Agencies	17-15-1
	17. Solid Wastes Disposal	17-17-1
	18. Mississippi Hazardous Waste Facility Siting Act of 1990	17-18-1
	19. Appropriations to Planning and Development Districts	17-19-1
	21. Finance and Taxation	17-21-1
	23. Rural Fire Truck Acquisition Assistance Programs	17-23-1
	25. General Provisions Relating to Counties and Municipalities	17-25-1
	27. Municipal Historical Hamlet Act	17-27-1
	29. Mississippi Entertainment District Act	17-29-1

TITLE 19. COUNTIES AND COUNTY OFFICERS

CHAPTER	1. County Boundaries	19-1-1
	2. County Government Reorganization Act	19-2-1
	3. Board of Supervisors	19-3-1
	4. County Administrator	19-4-1
	5. Health, Safety and Public Welfare	19-5-1
	7. Property and Facilities	19-7-1
	9. Finance and Taxation	19-9-1
	11. County Budget	19-11-1
	13. Contracts, Claims and Transaction of Business with Counties	19-13-1
	15. Records and Recording	19-15-1
	17. County Auditors	19-17-1
	19. Constables	19-19-1
	21. Coroners	19-21-1
	23. County Attorneys	19-23-1
	25. Sheriffs	19-25-1
	27. Surveyors and Surveys	19-27-1

GENERAL OUTLINE

TITLE 19. COUNTIES AND COUNTY OFFICERS (Cont'd)

	Beginning Section
29. Local and Regional Railroad Authorities	19-29-1
31. Public Improvement Districts	19-31-1

TITLE 21. MUNICIPALITIES

CHAPTER		
	1. Classification, Creation, Abolition, and Expansion	21-1-1
	3. Code Charters	21-3-1
	5. Commission Form of Government	21-5-1
	7. Council Form of Government	21-7-1
	8. Mayor-Council Form of Government	21-8-1
	9. Council-Manager Plan of Government	21-9-1
	11. Municipal Elections [Repealed]	21-11-1
	13. Ordinances	21-13-1
	15. Officers and Records	21-15-1
	17. General Powers	21-17-1
	19. Health, Safety, and Welfare	21-19-1
	21. Police and Police Departments	21-21-1
	23. Municipal Courts	21-23-1
	25. Fire Departments and Fire Districts	21-25-1
	27. Public Utilities and Transportation	21-27-1
	29. Employees' Retirement and Disability Systems	21-29-1
	31. Civil Service	21-31-1
	33. Taxation and Finance	21-33-1
	35. Municipal Budget	21-35-1
	37. Streets, Parks and Other Public Property	21-37-1
	38. Acquisition or Lease of Real Property from Federal Government for Parks, Recreation, and Tourism	21-38-1
	39. Contracts and Claims	21-39-1
	41. Special Improvements	21-41-1
	43. Business Improvement Districts	21-43-1
	45. Tax Increment Financing	21-45-1
	47. Delta Natural Gas District	21-47-1

TITLE 23. ELECTIONS

CHAPTER		
	1. Qualification of Candidates and Registration of Political Parties [Repealed]	23-1-1
	3. Corrupt Practices [Repealed]	23-3-1
	5. Registration and Elections [Repealed]	23-5-1
	7. Voting Machines and Electronic Voting System [Repealed]	23-7-1

GENERAL OUTLINE

TITLE 23. ELECTIONS (Cont'd)

	Beginning Section
9. Absentee Ballot [Repealed]	23-9-1
11. Presidential Election Law [Repealed]	23-11-1
13. Mississippi Presidential Preference Primary and Delegate Selection Law [Repealed]	23-13-1
15. Mississippi Election Code	23-15-1
17. Amendments to Constitution by Voter Initiative	23-17-1

TITLE 25. PUBLIC OFFICERS AND EMPLOYEES; PUBLIC RECORDS

CHAPTER	1. Public Officers; General Provisions	25-1-1
	3. Salaries and Compensation	25-3-1
	4. Ethics in Government	25-4-1
	5. Removals From Office	25-5-1
	7. Fees	25-7-1
	9. Statewide Personnel System	25-9-1
	11. Social Security and Public Employees' Retire- ment and Disability Benefits	25-11-1
	13. Highway Safety Patrol Retirement System	25-13-1
	14. Government Employees Deferred Compensation Plan Law	25-14-1
	15. Group Insurance for Public Employees	25-15-1
	17. Cafeteria Fringe Benefit Plans	25-17-1
	19. Public Employer-Assisted Housing Program	25-19-1
	31. District Attorneys	25-31-1
	32. Public Defenders	25-32-1
	33. Notaries Public	25-33-1
	34. Revised Mississippi Law on Notarial Acts	25-34-1
	41. Open Meetings	25-41-1
	43. Administrative Procedures	25-43-1.101
	45. Permit and Licensing Procedures	25-45-1
	51. State Depository for Public Documents	25-51-1
	53. Mississippi Department of Information Technol- ogy Services (MDITS)	25-53-1
	55. Lost Records	25-55-1
	57. Destruction of Records [Repealed]	25-57-1
	58. Geographic Information System	25-58-1
	59. Archives and Records Management	25-59-1
	60. Local Government Records	25-60-1
	61. Public Access to Public Records	25-61-1
	62. Disclosure of Personal Information of Section 501(c) Entirely	25-62-1
	63. Digital Signature Act	25-63-1

GENERAL OUTLINE

TITLE 25. PUBLIC OFFICERS AND EMPLOYEES; PUBLIC RECORDS (Cont'd)

	Beginning Section
65. Agency, University and Community/Junior College Internal Auditing Program	25-65-1

TITLE 27. TAXATION AND FINANCE

CHAPTER		
	1. Assessors and County Tax Collectors	27-1-1
	3. Department of Revenue	27-3-1
	4. Board of Tax Appeals	27-4-1
	5. Motor Vehicle Comptroller	27-5-1
	7. Income Tax and Withholding	27-7-1
	8. Mississippi S Corporation Income Tax Act	27-8-1
	9. Estate Tax	27-9-1
	10. Uniform Estate Tax Apportionment Act	27-10-1
	11. Amusement Tax [Repealed]	27-11-1
	13. Corporation Franchise Tax	27-13-1
	15. Statewide Privilege Taxes	27-15-1
	17. Local Privilege Taxes	27-17-1
	19. Motor Vehicle Privilege and Excise Taxes	27-19-1
	21. Finance Company Privilege Tax	27-21-1
	23. Chain Store Privilege Tax [Repealed]	27-23-1
	25. Severance Taxes	27-25-1
	27. Vending and Amusement Machine Taxes	27-27-1
	29. Ad Valorem Taxes—General Provisions	27-29-1
	31. Ad Valorem Taxes—General Exemptions	27-31-1
	33. Ad Valorem Taxes—Homestead Exemptions	27-33-1
	35. Ad Valorem Taxes—Assessment	27-35-1
	37. Ad Valorem Taxes—Payments in Lieu of Taxes	27-37-1
	38. Ad Valorem Taxes—Telecommunications Tax Reform	27-38-1
	39. Ad Valorem Taxes—State and Local Levies	27-39-1
	41. Ad Valorem Taxes—Collection	27-41-1
	43. Ad Valorem Taxes—Notice of Tax Sale to Owners and Lienors	27-43-1
	45. Ad Valorem Taxes—Redemption of Land Sold for Taxes	27-45-1
	47. Ad Valorem Taxes—Assignment of Tax Liens ..	27-47-1
	49. Ad Valorem Taxes—Insolvencies	27-49-1
	51. Ad Valorem Taxes—Motor Vehicles	27-51-1
	53. Ad Valorem Taxes—Mobile Homes	27-53-1
	55. Gasoline and Motor Fuel Taxes	27-55-1
	57. Tax on Oils	27-57-1
	59. Liquefied Compressed Gas Tax	27-59-1

GENERAL OUTLINE

TITLE 27. TAXATION AND FINANCE (Cont'd)

	Beginning Section
61. Interstate Commercial Carriers Motor Fuel Tax	27-61-1
63. Motor Vehicle Fueling Centers [Repealed]	27-63-1
65. Sales Tax	27-65-1
67. Use or Compensating Taxes	27-67-1
68. Uniform Sales and Use Tax Administration Law	27-68-1
69. Tobacco Tax	27-69-1
70. Nonsettling-Manufacturer Cigarette Fee	27-70-1
71. Alcoholic Beverage Taxes	27-71-1
73. Tax Refunds	27-73-1
75. Reciprocal Collection of Taxes	27-75-1
77. Appellate Review for Taxpayers Aggrieved by Certain Actions of the Department of Revenue	27-77-1
101. Annual Reports by Departments of Government, State-Supported Institutions and Taxing Entities	27-101-1
103. State Budget	27-103-1
104. State Fiscal Affairs	27-104-1
105. Depositories	27-105-1
106. Iran Divestment Act of 2015	27-106-1
107. Disaster Relief	27-107-1
109. Cruise Vessels	27-109-1
111. Payment Credit Vouchers as Credit Against In- come and Corporation Franchise Tax Liabili- ties [Repealed effective July 1, 2018]	27-111-1
113. Facilitating Business Rapid Response to State Declared Disasters Act of 2015	27-113-1
115. Alyce G. Clarke Mississippi Lottery Law	27-115-1
117. Israel Support Act of 2019	27-117-1

TITLE 29. PUBLIC LANDS, BUILDINGS AND PROPERTY

CHAPTER	1. Public Lands	29-1-1
	3. Sixteenth Section and Lieu Lands	29-3-1
	5. Care of Capitol, Old Capitol, State Office Build- ings and Executive Mansion	29-5-1
	7. Mineral Leases of State Lands	29-7-1
	9. Inventories of State Property	29-9-1
	11. Energy Conservation in Public Buildings [Repealed]	29-11-1
	13. Flood Insurance for State-Owned Buildings	29-13-1
	15. Public Trust Tidelands	29-15-1
	17. State Agency Repair and Renovation	29-17-4

GENERAL OUTLINE

TITLE 31. PUBLIC BUSINESS, BONDS AND OBLIGATIONS

		Beginning Section
CHAPTER	1. General Provisions Relative to Public Contracts	31-1-1
	3. State Board of Public Contractors	31-3-1
	5. Public Works Contracts	31-5-1
	7. Public Purchases	31-7-1
	8. Acquisition of Public Buildings, Facilities, and Equipment Through Rental Contracts	31-8-1
	9. Surplus Property Procurement Commission	31-9-1
	11. State Construction Projects	31-11-1
	13. Validation of Public Bonds	31-13-1
	15. Refunding Bonds	31-15-1
	17. State Bonds; Retirement of Bonds	31-17-1
	18. Variable Rate Debt Instruments	31-18-1
	19. Public Debts	31-19-1
	21. Registered Bonds	31-21-1
	23. Mississippi Private Activity Bonds Allocation Act	31-23-1
	25. Mississippi Development Bank Act	31-25-1
	27. Mississippi Bond Refinancing Act	31-27-1
	29. Institute for Technology Development	31-29-1
	31. Mississippi Telecommunications Conference and Training Center	31-31-1

TITLE 33. MILITARY AFFAIRS

CHAPTER	1. Definitions and General Provisions Relating to the Military Forces	33-1-1
	3. Commander in Chief, Military Department, and Governor's Staff	33-3-1
	4. Mississippi Military Family Relief Fund	33-4-1
	5. The Militia and Mississippi State Guard	33-5-1
	7. National Guard	33-7-1
	9. Property and Finances	33-9-1
	11. Training Facilities	33-11-1
	13. Mississippi Code of Military Justice	33-13-1
	15. Emergency Management and Civil Defense	33-15-1

TITLE 35. WAR VETERANS AND PENSIONS

CHAPTER	1. State Veterans Affairs Board	35-1-1
	3. Military Veterans; Miscellaneous Provisions	35-3-1
	5. Guardianship of Veterans	35-5-1
	7. Veterans' Home Purchase Law	35-7-1
	9. Pensions [Repealed]	35-9-1

GENERAL OUTLINE

TITLE 37. EDUCATION

	Beginning Section
CHAPTER	
1. State Board of Education	37-1-1
3. State Department of Education	37-3-1
4. Mississippi Community College Board	37-4-1
5. County Boards of Education and Superintendents	37-5-1
6. Mississippi Uniform School Law	37-6-1
7. School Districts; Boards of Trustees of School Districts	37-7-1
9. District Superintendents, Principals, Teachers, and Other Employees	37-9-1
11. General Provisions Pertaining to Education	37-11-1
12. Mississippi Student Religious Liberties Act of 2013	37-12-1
13. Curriculum; School Year and Attendance	37-13-1
14. Mary Kirkpatrick Haskell-Mary Sprayberry Public School Nurse Act of 2007	37-14-1
15. Public Schools; Records, Enrollment and Trans- fer of Pupils	37-15-1
16. Statewide Testing Program	37-16-1
17. Accreditation of Schools	37-17-1
18. Superior-Performing, Exemplary and School At- Risk Schools Programs	37-18-1
19. Teacher Compensation	37-19-1
20. Remedial Education	37-20-1
21. Early Childhood Education	37-21-1
22. State Funds for School Districts	37-22-1
23. Exceptional Children	37-23-1
24. Mississippi Youth Concussion Law	37-24-1
25. Driver Education and Training	37-25-1
26. State Court Education Fund	37-26-1
27. Agricultural High Schools	37-27-1
28. Mississippi Charter Schools Act of 2013	37-28-1
29. Junior Colleges	37-29-1
31. Vocational Education	37-31-1
33. Civilian Vocational Rehabilitation	37-33-1
35. Adult Education	37-35-1
37. Public Schools; Accounting and Auditing	37-37-1
39. Public Schools; Purchases	37-39-1
41. Transportation of Pupils	37-41-1
43. Textbooks	37-43-1
45. State Aid to Public Schools	37-45-1
47. State Aid for Construction of School Facilities	37-47-1

GENERAL OUTLINE

TITLE 37. EDUCATION (Cont'd)

	Beginning Section
49. Loans to Students	37-49-1
51. Financial Assistance to Children Attending Non- sectarian Private Schools	37-51-1
53. Summer Normals [Repealed]	37-53-1
55. School Libraries	37-55-1
57. Taxation	37-57-1
59. School Bonds and Obligations	37-59-1
61. Expenditure of School Funds; Budgets	37-61-1
63. Educational Television	37-63-1
65. Closing of Public Schools and Institutions of Higher Learning	37-65-1
67. Distance Learning Collaborative Act of 2016 ...	37-67-1
68. Equity in Distance Learning Act	37-68-1
69. The Energy Academy Act	37-69-1
71. Mississippi Learn to Earn Act	37-71-1
101. Institutions of Higher Learning; General Provisions	37-101-1
102. Off-campus Instructional Programs	37-102-1
103. Residency and Fees of Students Attending or Applying for Admission to Educational Institutions	37-103-1
104. Mississippi Educational Facilities Authority Act for Private, Nonprofit Institutions of Higher Learning	37-104-1
105. Campuses and Streets of State Institutions of Higher Learning	37-105-1
106. Post-Secondary Education Financial Assistance	37-106-1
107. Scholarships for Children of Deceased or Dis- abled Law Enforcement Officers or Firemen [Repealed]	37-107-1
108. Scholarships for Children of Prisoners of War or Men Missing in Action	37-108-1
109. Medical Education Loans and Scholarships. [Repealed]	37-109-1
110. Mississippi Public Management Graduate In- tern Program	37-110-1
111. Fraternities, Sororities and Other Societies	37-111-1
113. Mississippi State University of Agriculture and Applied Science	37-113-1
115. University of Mississippi	37-115-1
117. Mississippi University for Women	37-117-1
119. University of Southern Mississippi	37-119-1
121. Alcorn State University	37-121-1

GENERAL OUTLINE

TITLE 37. EDUCATION (Cont'd)

	Beginning Section
123. Delta State University	37-123-1
125. Jackson State University	37-125-1
127. Mississippi Valley State University	37-127-1
129. Nursing Schools and Scholarships	37-129-1
131. Teachers Demonstration and Practice Schools	37-131-1
132. Student Teachers	37-132-1
133. Technical Institutes	37-133-1
135. Compacts with Other States	37-135-1
137. School Asbestos Hazard Elimination Act [Repealed]	37-137-1
138. Asbestos Abatement Accreditation and Certifica- tion Act	37-138-1
139. Mississippi School for Mathematics and Science	37-139-1
140. Mississippi School of the Arts	37-140-1
141. The University Research Center Act of 1988 ...	37-141-1
143. Omnibus Loan or Scholarship Act of 1991	37-143-1
144. Mississippi Rural Physicians Scholarship Program	37-144-1
145. Mississippi Opportunity Loan Program Act	37-145-1
146. Mississippi Rural Dentists Scholarship Program	37-146-1
147. Mississippi University Research Authority Act	37-147-1
148. Strengthening Mississippi Academic Research Through Business Act	37-148-1
149. Mississippi Teacher Center	37-149-1
151. Mississippi Accountability and Adequate Educa- tion Program Act of 1997	37-151-1
152. Commission on Restructuring the Mississippi Adequate Education Program (MAEP)	37-152-1
153. Workforce Training and Education Consolidation Act	37-153-1
154. State Longitudinal Data System	37-154-1
155. College Savings Plans of Mississippi	37-155-1
157. Student Tuition Assistance	37-157-1
159. Mississippi Teacher Scholarship Programs	37-159-1
160. Teach for America Act	37-160-1
161. Mississippi Education Reform Act of 2006	37-161-1
163. Education Achievement Council	37-163-1
165. Conversion Charter School Act of 2010	37-165-1
167. New Start School Program [Repealed]	37-167-1
169. Mississippi Autism Advisory Committee	37-169-1
171. Use of School Property by Public for Recreation and Sports	37-171-1

GENERAL OUTLINE

TITLE 37. EDUCATION (Cont'd)

	Beginning Section
173. Dyslexia Therapy Scholarship for Students with Dyslexia Program	37-173-1
175. Mississippi Speech-Language Therapy Scholar- ship for Students with Speech-Language Im- pairments Program	37-175-1
177. Literacy-Based Promotion Act	37-177-1
179. Districts of Innovation	37-179-1
181. Equal Opportunity for Students with Special Needs Act	37-181-1
183. Postsecondary Education COVID-19 Mitigation Relief Program Act	37-183-1
185. Independent Schools' COVID-19 Assistance Grant Program Act.	37-185-1
187. Mississippi Pandemic Response Broadband Availability Act	37-187-1

TITLE 39. LIBRARIES, ARTS, ARCHIVES AND HISTORY

CHAPTER	1. State Law Library; Legislative Reference Bureau	39-1-1
	3. Libraries and Library Commission	39-3-1
	5. Archives and History	39-5-1
	7. Antiquities	39-7-1
	9. Trusts to Promote Arts and Sciences	39-9-1
	11. Mississippi Arts Commission	39-11-1
	13. Historic Preservation Districts and Landmarks	39-13-1
	15. Municipal and County Funds to Support the Arts	39-15-1
	17. Mississippi Sports Hall of Fame and Dizzy Dean Museum	39-17-1
	19. Museum Unclaimed Property Act	39-19-1
	21. Mississippi Craft Center	39-21-1
	23. Mississippi Children's Museum	39-23-1
	25. Mississippi Arts and Entertainment Center	39-25-1
	27. Mississippi Blues Commission	39-27-1
	29. Mississippi Commission on the Holocaust	39-29-1
	31. Mississippi Bicentennial Celebration Commis- sion [Repealed effective July 1, 2019]	39-31-1
	32. Mississippi Country and Western Music Commission	39-32-1
	33. Mississippi Country Music Trail	39-33-1
	35. Mississippi Sesquicentennial of the American Civil War Commission	39-35-1
	37. Mississippi Heritage, History and Culture Trail Program	39-37-1

GENERAL OUTLINE

TITLE 39. LIBRARIES, ARTS, ARCHIVES AND HISTORY (Cont'd)

	Beginning Section
39. Mississippi Civil Rights Museum Advisory Commission	39-39-1

TITLE 41. PUBLIC HEALTH

CHAPTER	1. Mississippi Department of Public Health [Repealed]	41-1-1
	3. State Board of Health; Local Health Boards and Officers	41-3-1
	4. Department of Mental Health	41-4-1
	5. Governing Authorities for State Hospitals and Institutions	41-5-1
	7. Hospital and Health Care Commissions	41-7-1
	9. Regulation of Hospitals; Hospital Records	41-9-1
	10. Medical Records	41-10-1
	11. State Charity Hospitals; Mississippi Children's Rehabilitation Center	41-11-1
	13. Community Hospitals	41-13-1
	15. Department for the Prevention of Insanity [Repealed]	41-15-1
	17. State Mental Institutions	41-17-1
	19. Facilities and Services for Individuals with an Intellectual Disability or Mental Illness	41-19-1
	20. Mental Health Accessibility	41-20-1
	21. Individuals with Mental Illness or an Intellec- tual Disability	41-21-1
	22. Hemophilia	41-22-1
	23. Contagious and Infectious Diseases; Quarantine	41-23-1
	24. Sickle Cell Testing Program	41-24-1
	25. Disinfection and Sanitation of Buildings and Premises	41-25-1
	26. Mississippi Safe Drinking Water Act of 1997 ...	41-26-1
	27. Mosquito Control	41-27-1
	28. Diabetes	41-28-1
	29. Poisons, Drugs and Other Controlled Substances	41-29-1
	30. Alcoholism and Alcohol Abuse Prevention, Con- trol and Treatment	41-30-1
	31. Commitment of Alcoholics and Drug Addicts for Treatment	41-31-1
	32. Commitment of Alcoholics and Drug Addicts to Private Treatment Facilities	41-32-1
	33. Tuberculosis and Respiratory Diseases; Tubercu- losis Sanatorium	41-33-1

GENERAL OUTLINE

TITLE 41. PUBLIC HEALTH (Cont'd)

	Beginning Section
34. Health Care Practice Requirements Pertaining to Transmission of Hepatitis B and HIV	41-34-1
35. Eye Inflammation of Young	41-35-1
36. Determination of Death	41-36-1
37. Autopsies	41-37-1
39. Disposition of Human Bodies or Parts	41-39-1
41. Surgical or Medical Procedures; Consents	41-41-1
42. Family Planning	41-42-1
43. Cemeteries and Burial Grounds	41-43-1
45. Sexual Sterilization [Repealed]	41-45-1
47. Transportation and Possession of Parakeets and Other Birds [Repealed]	41-47-1
49. Regulation of Hotels and Innkeepers	41-49-1
51. Animal and Poultry By-Products Disposal or Rendering Plants	41-51-1
53. Rabies Control in Dogs and Cats	41-53-1
55. Public Ambulance Service	41-55-1
57. Vital Statistics	41-57-1
58. Medical Radiation Technology	41-58-1
59. Emergency Medical Services	41-59-1
60. Emergency Medical Technicians — Paramedics — Use of Automated External Defibrillator ..	41-60-1
61. State Medical Examiner	41-61-1
63. Evaluation and Review of Professional Health Services Providers	41-63-1
65. [Reserved]	
67. Mississippi Individual On-Site Wastewater Dis- posal System Law	41-67-1
69. [Reserved]	
71. Home Health Agencies	41-71-1
73. Hospital Equipment and Facilities Authority Act ..	41-73-1
75. Ambulatory Surgical Facilities	41-75-1
77. Licensing of Birthing Centers	41-77-1
79. Health Problems of School Children	41-79-1
81. Perinatal Health Care	41-81-1
83. Utilization Review of Availability of Hospital Resources and Medical Services	41-83-1
85. Mississippi Hospice Law of 1995	41-85-1
86. Mississippi Children's Health Care Insurance Program Act	41-86-1
87. Early Intervention Act for Infants and Toddlers ..	41-87-1
88. Mississippi Child Immunization Act of 1994	41-88-1
89. Infant Mortality Reduction	41-89-1

GENERAL OUTLINE

TITLE 41. PUBLIC HEALTH (Cont'd)

	Beginning Section
90. Hearing Impairment of Infants and Toddlers ...	41-90-1
91. Central Cancer Registry	41-91-1
93. Osteoporosis Prevention and Treatment Educa- tion Act	41-93-1
95. Mississippi Health Policy Act of 1994	41-95-1
97. State Employee Wellness and Physical Fitness Programs	41-97-1
99. Qualified Health Center Grant Program	41-99-1
101. Mississippi Council on Obesity Prevention and Management	41-101-1
103. Task Force on Heart Disease and Stroke Prevention	41-103-1
105. Healthcare Coordinating Council	41-105-1
107. Health Care Rights of Conscience	41-107-1
109. Leonard Morris Chronic Kidney Disease Leader- ship Task Force	41-109-1
111. Child Death Review Panel	41-111-1
112. Maternal Mortality Review Committee	41-112-1
113. Tobacco Education, Prevention and Cessation Program	41-113-1
114. Restrictions on Tobacco Use in Public Facilities	41-114-1
115. Tanning Facilities	41-115-1
117. Nurse-Family Partnership Pilot Program	41-117-1
119. Health Information Technology Act	41-119-1
121. Requirements for Advertisements for Health Care Services	41-121-1
123. Office of Mississippi Physician Workforce	41-123-1
125. Prescribed Pediatric Extended Care Centers (PPEC)	41-125-1
127. Telemedicine Services	41-127-1
129. Umbilical Cord Blood Banking Program Act ...	41-129-1
131. Right to Try Act	41-131-1
133. Lay Caregivers for Hospital Patients	41-133-1
135. Support and Promotion of Breast-Feeding in Mississippi	41-135-1

TITLE 43. PUBLIC WELFARE

CHAPTER	1. Department of Human Services and County De- partments of Public Welfare	43-1-1
	3. Blind Persons	43-3-1
	5. Schools for the Blind and Deaf	43-5-1
	6. Rights and Liabilities of Persons with Disabilities	43-6-1

GENERAL OUTLINE

TITLE 43. PUBLIC WELFARE (Cont'd)

	Beginning Section
7. Council on Aging	43-7-1
9. Old Age Assistance	43-9-1
11. Institutions for the Aged or Infirm	43-11-1
12. Medicaid and Human Services Transparency and Fraud Prevention Act	43-12-1
13. Medical Assistance for the Aged; Medicaid	43-13-1
14. Mississippi Statewide System of Care for Chil- dren and Youth	43-14-1
15. Child Welfare	43-15-1
16. Child Residential Home Notification Act	43-16-1
17. Temporary Assistance to Needy Families	43-17-1
18. Interstate Compact on the Placement of Children	43-18-1
19. Support of Natural Children	43-19-1
20. Child Care Facilities	43-20-1
21. Youth Court	43-21-1
23. Family Courts [Repealed]	43-23-1
24. State Central Registry of Child Abuse Reports; Wide Area Telephone Service for Reporting Child Abuse [Repealed]	43-24-1
25. Interstate Compacts Relating to Juveniles	43-25-1
26. Department of Child Protection Services	43-26-1
27. Department of Youth Services	43-27-1
28. Mississippi Achieving a Better Life Experience (ABLE) Act	43-28-1
29. Persons with Disabilities	43-29-1
30. Mississippi Disability Resource Commission	43-30-1
31. Poor Persons	43-31-1
33. Housing and Housing Authorities	43-33-1
35. Urban Renewal and Redevelopment	43-35-1
37. Acquisition of Real Property Using Public Funds	43-37-1
39. Relocation Assistance	43-39-1
41. Emergency and Disaster Assistance [Repealed]	43-41-1
43. Administration of Social Security Funds	43-43-1
45. Adult Protective Services [Repealed]	43-45-1
47. Mississippi Vulnerable Persons Act	43-47-1
49. Mississippi Welfare Restructuring Program Act of 1993 [Repealed]	43-49-1
51. Family Preservation Act of 1994	43-51-1
53. Mississippi Leadership Council on Aging	43-53-1
55. Mississippi Commission for National and Com- munity Service	43-55-1
57. Comprehensive Plan for Provision of Services to Disabled Persons [Repealed]	

GENERAL OUTLINE

TITLE 43. PUBLIC WELFARE (Cont'd)

	Beginning Section
59. Mississippi Commission on the Status of Women	43-59-1
61. Mississippi Seniors and Indigents Rx Program	43-61-1

TITLE 45. PUBLIC SAFETY AND GOOD ORDER

CHAPTER	1. Department of Public Safety	45-1-1
	2. Law Enforcement Officers and Fire Fighters Death and Disability Benefits Trust Funds ...	45-2-1
	3. Highway Safety Patrol	45-3-1
	4. County Jail Officers Training Program	45-4-1
	5. Law Enforcement Officers' Training Academy ..	45-5-1
	6. Law Enforcement Officers Training Program ...	45-6-1
	7. County Patrol Officers	45-7-1
	9. Weapons	45-9-1
	10. Novelty Lighters	45-10-1
	11. Fire Protection Regulations, Fire Protection and Safety in Buildings	45-11-1
	12. Mississippi Fire Safety Standard and Firefighter Protection Act [For contingent repeal of this chapter, see § 45-12-21]	45-12-1
	13. Fireworks and Explosives	45-13-1
	14. Radiation Protection Program	45-14-1
	15. High Voltage Power Lines	45-15-1
	17. Civil Emergencies	45-17-1
	18. Emergency Management Assistance Compact ..	45-18-1
	19. Subversive Groups and Subversive Activities ...	45-19-51
	21. Rock Festivals	45-21-1
	23. Boiler and Pressure Vessel Safety	45-23-1
	25. Identification Cards for Non-Drivers. [Repealed]	45-25-1
	27. Mississippi Justice Information Center	45-27-1
	29. Records	45-29-1
	31. Sex Offense Criminal History Record Informa- tion Act	45-31-1
	33. Registration of Sex Offenders	45-33-1
	35. Identification Cards	45-35-1
	37. Prevention of Youth Access to Tobacco Act	45-37-1
	39. Statewide Crime Stoppers Advisory Council	45-39-1
	41. Mississippi Silver Alert System	45-41-1
	43. William Lee Montjoy Pool Safety Act	45-43-1
	45. Mississippi Conveyance Safety Act	45-45-1
	47. DNA Data Bank	45-47-1
CHAPTER	49. Requirements for Operation of Amusement Rides	45-49-1

GENERAL OUTLINE

TITLE 47. PRISONS AND PRISONERS; PROBATION AND PAROLE

	Beginning Section
1. County and Municipal Prisons and Prisoners ..	47-1-1
3. Removal of Prisoners	47-3-1
4. Privately Operated Correctional Facilities	47-4-1
5. Correctional System	47-5-1
7. Probation and Parole	47-7-1

TITLE 49. CONSERVATION AND ECOLOGY

CHAPTER	1. General Provisions	49-1-1
	2. Department of Environmental Quality	49-2-1
	3. Fisheries and Wildlife Research	49-3-1
	4. Mississippi Department of Wildlife, Fisheries and Parks	49-4-1
	5. Fish, Game and Bird Protection and Refuges ...	49-5-1
	6. Motor Vehicle and Boat Replacement Program	49-6-1
	7. Hunting and Fishing	49-7-1
	8. Importation, Sale and Possession of Inherently Dangerous Wild Animals	49-8-1
	9. Mussels	49-9-1
	10. Wildlife Violator Compact	49-10-1
	11. Private Shooting Preserves	49-11-1
	13. Commercial Quail	49-13-1
	15. Seafood	49-15-1
	17. Pollution of Waters, Streams, and Air	49-17-1
	18. Mississippi Liability of Persons Responding to Oil Spills Act	49-18-1
	19. Forests and Forest Protection	49-19-1
	20. Mississippi River Timberlands Control Act [Repealed]	49-20-1
	21. Interstate Environmental Compact	49-21-1
	23. Outdoor Advertising	49-23-1
	25. Junkyards	49-25-1
	26. Channel Maintenance Act	49-26-1
	27. Coastal Wetlands Protection Act	49-27-1
	28. Shoreline and Beach Preservation Districts	49-28-1
	29. Environmental Protection Council [Repealed] ..	49-29-1
	31. Mississippi Multimedia Pollution Prevention Act	49-31-1
	33. Mississippi Agricultural and Forestry Activity Act	49-33-1
	35. Mississippi Brownfields Voluntary Cleanup and Redevelopment; Remediation of Property on National Priorities List	49-35-1

GENERAL OUTLINE

TITLE 49. CONSERVATION AND ECOLOGY (Cont'd)

	Beginning Section
37. Statewide Scientific Information Management	49-37-1

TITLE 51. WATERS, WATER RESOURCES, WATER DISTRICTS, DRAINAGE, AND FLOOD CONTROL

CHAPTER	1. Navigable Waters	51-1-1
	2. Mississippi Marine Litter Act	51-2-1
	3. Water Resources; Regulation and Control	51-3-1
	4. Mississippi Scenic Streams Stewardship Act ...	51-4-1
	5. Subsurface Waters; Well Drillers	51-5-1
	7. Water Management Districts	51-7-1
	8. Joint Water Management Districts	51-8-1
	9. Development of Region Bordering Pearl River; Pearl River Valley Water Supply District; Met- ropolitan Area Water Supply Act	51-9-1
	11. Pearl River Basin Development District	51-11-1
	13. Tombigbee Valley Authority and Water Manage- ment District	51-13-1
	15. Pat Harrison Waterway Commission and District	51-15-1
	17. Big Black River Basin District	51-17-1
	19. West Central Mississippi Waterway Commission [Repealed]	51-19-1
	21. Lower Mississippi River Basin Development Dis- trict [Repealed]	51-21-1
	23. Lower Yazoo River Basin District. [Repealed] ..	51-23-1
	25. Yellow Creek Watershed Authority	51-25-1
	27. Tennessee-Tombigbee Waterway Compact	51-27-1
	29. Drainage Districts with Local Commissioners	51-29-1
	31. Drainage Districts with County Commissioners	51-31-1
	33. Provisions Common to Drainage Districts and Swamp Land Districts	51-33-1
	35. Flood Control	51-35-1
	37. Watershed Districts	51-37-1
	39. Storm Water Management Districts	51-39-1
	41. Public Water Authorities	51-41-1

TITLE 53. OIL, GAS, AND OTHER MINERALS

CHAPTER	1. State Oil and Gas Board	53-1-1
	3. Development, Production and Distribution of Gas and Oil	53-3-1
	5. Geological and Mineral Survey	53-5-1
	7. Surface Mining and Reclamation of Land	53-7-1

GENERAL OUTLINE

TITLE 53. OIL, GAS, AND OTHER MINERALS (Cont'd)

	Beginning Section
9. Surface Coal Mining and Reclamation of Land	53-9-1
10. Interstate Mining Compact	53-10-1
11. Mississippi Geologic Sequestration of Carbon Dioxide Act	53-11-1

TITLE 55. PARKS AND RECREATION

CHAPTER		
	1. Mississippi Recreational Advisory Council [Repealed]	55-1-1
	3. State Parks and Forests	55-3-1
	5. Federal Parks and National Parkways	55-5-1
	7. Bridge and Park Commissions	55-7-1
	9. County and Municipal Facilities	55-9-1
	11. Harrison County Parkway	55-11-1
	13. Natchez Trace Parkway	55-13-1
	15. Commemorative Parks and Monuments	55-15-1
	17. International Gardens of Mississippi	55-17-1
	19. Bienville Recreational District	55-19-1
	21. Mississippi Zoological Park and Garden Districts	55-21-1
	23. Mississippi Veterans Memorial Stadium	55-23-1
	24. Mississippi Coast Coliseum Commission	55-24-1
	25. Rails-to-Trails Recreational District	55-25-1

TITLE 57. PLANNING, RESEARCH AND DEVELOPMENT

CHAPTER		
	1. Mississippi Development Authority	57-1-1
	3. Agriculture and Industry Program	57-3-1
	4. Industrial Development Fund	57-4-1
	5. Industrial Parks and Districts	57-5-1
	7. Sale or Development of Airport Lands, or Other Lands, for Industrial Purposes	57-7-1
	9. Industrial Plant Training	57-9-1
	10. Small Business Assistance	57-10-1
	11. Market and Industrial Studies and Research ...	57-11-1
	13. Research and Development Center	57-13-1
	15. Marine Resources	57-15-1
	17. Forest Products Utilization Laboratory [Repealed]	57-17-1
	18. Renewable Natural Resources Research Act of 1994	57-18-1
	19. Food Technology Laboratory	57-19-1
	21. State Chemical Laboratory	57-21-1
	23. Pharmaceutical Product Development and Utilization	57-23-1

GENERAL OUTLINE

TITLE 57. PLANNING, RESEARCH AND DEVELOPMENT (Cont'd)	
	Beginning Section
25. Southern States Energy Compact	57-25-1
26. Tourism Project Incentive Program; Theme Parks, Entertainment Centers, Scenic Attrac- tions, etc.	57-26-1
27. Regional Tourist Promotion Councils	57-27-1
28. Tourism Project Incentive Program; Entertain- ment Districts, etc.	57-28-1
29. Travel and Tourism	57-29-1
30. Family-Oriented Enterprises	57-30-1
31. County Industrial Development Authorities	57-31-1
32. Southeast Mississippi Industrial Council	57-32-1
33. Southern Growth Policies Agreement	57-33-1
34. Alabama-Mississippi Joint Economic Develop- ment Authority	57-34-1
35. Tennessee River Valley Association	57-35-1
36. Chickasaw Trail Economic Development Com- pact [Repealed]	57-36-1
37. Transportation Planning Council [Repealed]	57-37-1
39. Energy and Transportation Planning	57-39-1
40. Energy Infrastructure Revolving Loan Program	57-40-1
41. Financing Industrial Enterprise Projects	57-41-1
43. Railroad Revitalization	57-43-1
44. Local Governments Freight Rail Service Projects	57-44-1
45. Mississippi-Louisiana-Alabama Rapid Rail Transit Compact	57-45-1
46. Mississippi Railroad Improvements Fund	57-46-1
47. Southeast Interstate Low-Level Radioactive Waste Management Compact	57-47-1
49. Nuclear Waste Storage and Disposal	57-49-1
51. Enterprise Zones [Repealed]	57-51-1
53. Corporate Headquarters Incentive Program [Repealed]	57-53-1
54. Advanced Technology Initiative [Repealed]	57-54-1
55. Universities Research Institutes	57-55-1
56. Mississippi Technology Transfer Office	57-56-1
57. Export Trade Development	57-57-1
59. Mississippi Capital Companies [Repealed]	57-59-1
61. Mississippi Business Investment Act	57-61-1
62. Mississippi Advantage Jobs Act	57-62-1
63. Statewide Economic Development and Planning Act	57-63-1
64. Regional Economic Development	57-64-1
65. Mississippi International Trade Institute	57-65-1

GENERAL OUTLINE

TITLE 57. PLANNING, RESEARCH AND DEVELOPMENT (Cont'd)

	Beginning Section
67. Mississippi Superconducting Super Collider Act	57-67-1
69. Mississippi Minority Business Enterprise Act ..	57-69-1
71. Mississippi Small Enterprise Development Finance Act	57-71-1
73. Economic Development Reform Act	57-73-1
75. Mississippi Major Economic Impact Act	57-75-1
77. Venture Capital Act of 1994	57-77-1
79. Mississippi Small Town Development Act	57-79-1
80. Growth and Prosperity Act	57-80-1
81. Mississippi Science and Technology Commission [Repealed]	57-81-1
83. Mississippi Technology, Inc. Liaison Committee	57-83-1
85. Mississippi Rural Impact Act	57-85-1
87. Mississippi Broadband Technology Development Act	57-87-1
89. Mississippi Motion Picture Incentive Act	57-89-1
91. Economic Redevelopment Act	57-91-1
93. Mississippi Existing Industry Productivity Loan Program	57-93-1
95. Mississippi Job Protection Act	57-95-1
97. Mississippi Delta Revitalization Act of 2006	57-97-1
99. Mississippi Major Economic Impact Withholding Rebate Incentive Program	57-99-1
100. Existing Industry Withholding Rebate Incentive Program	57-100-1
101. Mississippi Major Economic Impact Authority Component Construction Material Costs Re- bate Program	57-101-1
103. Technology Based Business Capital Assistance Programs	57-103-1
105. Qualified Equity Investment Tax Credits and Public Entity Financing Arrangements	57-105-1
107. Mississippi Workforce Training Projects	57-107-1
111. Mississippi Small Business and Existing For- estry Industry Enterprise Participating Loan Program	57-111-1
113. Business Enterprise Tax Exemptions	57-113-1
115. Mississippi Small Business Investment Com- pany Act	57-115-1
117. Mississippi Health Care Industry Zone Act [Re- pealed effective July 1, 2022]	57-117-1
119. Gulf Coast Restoration Fund	57-119-1

GENERAL OUTLINE

TITLE 57. PLANNING, RESEARCH AND DEVELOPMENT (Cont'd)

	Beginning Section
121. 2020 COVID-19 Mississippi Business Assistance Act	57-121-1
123. Coronavirus Recovery Funds	57-123-1

TITLE 59. PORTS, HARBORS, LANDINGS AND WATERCRAFT

CHAPTER	1. Harbor or Port Commissions; Powers of Political Subdivision; Pilotage	59-1-1
	3. Ports of Entry	59-3-1
	5. State Ports and Harbors	59-5-1
	6. Compact for Development of Deep Draft Harbor and Terminal	59-6-1
	7. County and Municipal Harbors	59-7-1
	9. County Port Authority or Development Commission	59-9-1
	11. County Port and Harbor Commission	59-11-1
	13. Harbor Improvements by Coast Counties	59-13-1
	15. Small Craft Harbors	59-15-1
	17. State Inland Ports	59-17-1
	19. Landings	59-19-1
	21. Boats and Other Vessels	59-21-1
	23. Alcohol Boating Safety Act	59-23-1
	25. Certificates of Title for Boats and Other Vessels	59-25-1

TITLE 61. AVIATION

CHAPTER	1. Transportation Commission	61-1-1
	3. Airport Authorities	61-3-1
	4. Mississippi Wayport Authority Act	61-4-1
	5. Acquisition, Disposition and Support of Airport Facilities	61-5-1
	7. Airport Zoning	61-7-1
	9. Incorporation of Airport Into Corporate Bound- aries of Municipality	61-9-1
	11. Operation of Aircraft; Certification and Licens- ing of Pilots and Aircraft	61-11-1
	13. Aircraft for Use of Governor, State Departments and Agencies	61-13-1
	15. Registration of Aircraft	61-15-1
	17. Concealing or Misrepresenting Aircraft Identifi- cation Number; Non-Conforming Aircraft Fuel Containers	61-17-1
	19. Aviation Hazards	61-19-1

GENERAL OUTLINE

TITLE 63. MOTOR VEHICLES AND TRAFFIC REGULATIONS

		Beginning Section
CHAPTER	1. Driver's License	63-1-1
	2. Mandatory Use of Safety Seat Belts	63-2-1
	3. Traffic Regulations and Rules of the Road	63-3-1
	5. Size, Weight and Load	63-5-1
	7. Equipment and Identification	63-7-1
	9. Traffic Violations Procedure	63-9-1
	10. Nonresident Traffic Violator Compact	63-10-1
	11. Implied Consent Law	63-11-1
	13. Inspection of Motor Vehicles	63-13-1
	15. Motor Vehicle Safety — Responsibility	63-15-1
	16. Public Safety Verification and Enforcement Act [Repealed effective July 1, 2022]	63-16-1
	17. Manufacture, Sales and Distribution	63-17-1
	19. Motor Vehicle Sales Finance Law	63-19-1
	21. Motor Vehicle Titles	63-21-1
	23. Abandoned Motor Vehicles	63-23-1
	25. Motor Vehicle Chop Shop, Stolen and Altered Property Act	63-25-1
	27. Disclosure of Use of Nonoriginal Replacement Parts	63-27-1
	29. Mississippi Vehicle Protection Product Act	63-29-1
	31. Operating Off-Road Vehicles	63-31-1
	33. Miscellaneous Provisions	63-33-1

TITLE 65. HIGHWAYS, BRIDGES AND FERRIES

CHAPTER	1. Transportation Department	65-1-1
	2. State Transportation Arbitration Board	65-2-1
	3. State Highway System	65-3-1
	4. Economic Development Highway Act	65-4-1
	5. Controlled Access Facilities	65-5-1
	7. Public Roads and Streets; Private Way	65-7-1
	9. State Aid Roads in Counties	65-9-1
	10. County Major Feeder Road System [Repealed]	65-10-1
	11. County Highway Aid	65-11-1
	13. Highway and Street Revenue Bond Authority	65-13-1
	15. County Funds for Roads and Bridges	65-15-1
	17. County Road Officials	65-17-1
	18. Local System Road Program	65-18-1
	19. Separate Road Districts	65-19-1
	21. Bridges; General Provisions	65-21-1
	23. Bridges; Boundary and Other Waters	65-23-1

GENERAL OUTLINE

TITLE 65. HIGHWAYS, BRIDGES AND FERRIES (Cont'd)

	Beginning Section
25. Mississippi River Bridges	65-25-1
26. Tennessee-Tombigbee Waterway Bridges	65-26-1
27. Ferries; General Provisions	65-27-1
29. Ferries in Certain Counties	65-29-1
31. Hospitality Stations on Highways	65-31-1
33. Sea Walls	65-33-1
37. Local System Bridge Replacement and Rehabilitation Program	65-37-1
39. Gaming Counties Bond Sinking Fund	65-39-1
41. Mississippi Scenic Byways	65-41-1
43. Toll Roads and Toll Bridges	65-43-1

TITLE 67. ALCOHOLIC BEVERAGES

CHAPTER	1. Local Option Alcoholic Beverage Control	67-1-1
	3. Sale of Light Wine, Beer, and Other Alcoholic Beverages	67-3-1
	5. Native Wines	67-5-1
	7. Beer Industry Fair Dealing Act	67-7-1
	9. Possession or Transportation of Alcoholic Beverages, Light Wine, or Beer	67-9-1

TITLE 69. AGRICULTURE, HORTICULTURE, AND ANIMALS

CHAPTER	1. Agriculture and Commerce Department; Council on Agriculture	69-1-1
	2. Mississippi Farm Reform Act	69-2-1
	3. Agricultural Seeds	69-3-1
	5. Fairs; Stock Shows; Improvement of Livestock	69-5-1
	7. Markets and Marketing; Domestic Fish Farming	69-7-1
	8. Beef Promotion And Research Program	
	9. Soybean Promotion Board	69-9-1
	10. Rice Promotion Board	69-10-1
	11. Swine	69-11-1
	13. Stock Laws, Estrays	69-13-1
	15. Board of Animal Health; Livestock and Animal Diseases	69-15-1
	17. Livestock Biologics, Drugs and Vaccines	69-17-1
	19. Regulation of Professional Services	69-19-1
	21. Crop Spraying and Licensing of Aerial Applicators	69-21-1
	23. Mississippi Pesticide Law	69-23-1
	24. Fertilizing Materials and Additives	69-24-1
	25. Plants, Plant and Bee Diseases	69-25-1

GENERAL OUTLINE

TITLE 69. AGRICULTURE, HORTICULTURE, AND ANIMALS (Cont'd)

	Beginning Section
26. Pest Control Compact	69-26-1
27. Soil Conservation	69-27-1
28. Protection and Conservation of Agricultural Lands	69-28-1
29. Livestock Brands, Theft or Loss of Livestock and Protective Associations	69-29-1
31. Regulation of Moisture-Measuring Devices	69-31-1
33. Pecan Harvesting	69-33-1
34. Milk Producers Transportation Cost Assistance Loan Program	69-34-1
35. Mississippi Dairy Promotion Act	69-35-1
36. Southern Dairy Compact	69-36-1
37. Mississippi Boll Weevil Management Act	69-37-1
39. Agricultural Liming Materials	69-39-1
41. Mississippi Agribusiness Council Act of 1993 ...	69-41-1
42. Program to Encourage Growth in Mississippi Agribusiness Industry	69-42-1
43. Mississippi Ratite Council and Promotion Board	69-43-1
44. Mississippi Corn Promotion Board	69-44-1
45. Mississippi Agricultural Promotions Program Act	69-45-1
46. Mississippi Land, Water and Timber Resources Act	69-46-1
47. Organic Certification Program	69-47-1
48. Peanut Promotion Board	69-48-1
49. Field Crop Products	69-49-1
51. Ethanol, Anhydrous Alcohol and Wet Alcohol ...	69-51-1
53. Agritourism [Repealed effective July 1, 2018] ..	69-53-1

TITLE 71. LABOR AND INDUSTRY

CHAPTER	1. Employer and Employee	71-1-1
	3. Workers' Compensation	71-3-1
	5. Unemployment Compensation	71-5-1
	7. Drug and Alcohol Testing of Employees	71-7-1
	9. Medical Savings Account Act	71-9-1
	11. Employment Protection Act	71-11-1
	13. Prohibition Against Employer Intimidation Act	71-13-1
	15. Mississippi Employment Fairness Act	71-15-1

TITLE 73. PROFESSIONS AND VOCATIONS

CHAPTER	1. Architects	73-1-1
---------	---------------------	--------

GENERAL OUTLINE

TITLE 73. PROFESSIONS AND VOCATIONS (Cont'd)

	Beginning Section
2. Landscape Architectural Practice	73-2-1
3. Attorneys at Law	73-3-1
4. Auctioneers	73-4-1
5. Barbers	73-5-1
6. Chiropractors	73-6-1
7. Cosmetologists	73-7-1
9. Dentists	73-9-1
10. Dietitians	73-10-1
11. Practice of Funeral Service and Funeral Directing	73-11-1
13. Engineers and Land Surveyors	73-13-1
14. Hearing Aid Dealers	73-14-1
15. Nurses	73-15-1
17. Nursing Home Administrators	73-17-1
19. Optometry and Optometrists	73-19-1
21. Pharmacists	73-21-1
22. Orthotics and Prosthetics	73-22-1
23. Physical Therapists	73-23-1
24. Mississippi Occupational Therapy Practice Act	73-24-1
25. Physicians	73-25-1
26. Physician Assistants	73-26-1
27. Podiatrists	73-27-1
29. Polygraph Examiners	73-29-1
30. Licensed Professional Counselors	73-30-1
31. Psychologists	73-31-1
33. Public Accountants	73-33-1
34. Real Estate Appraisers	73-34-1
35. Real Estate Brokers	73-35-1
36. Registered Foresters	73-36-1
37. Sanitarians	73-37-1
38. Speech Pathologists and Audiologists	73-38-1
39. Veterinarians	73-39-1
41. Athlete Agents [Repealed]	73-41-1
42. Uniform Athlete Agents Law	73-42-1
43. State Board of Medical Licensure	73-43-1
45. Information to Be Included in Prescriptions	73-45-1
47. Occupational Board Compliance Act of 2017	73-47-1
49. Health Care Provider Licensing Boards	73-49-1
50. Licensing, Certifying or Registering Military- trained Individuals or Spouses to Lawfully Practice Occupation	73-50-1
51. Unlicensed Practice of Profession	73-51-1
52. Licensure Records	73-52-1

GENERAL OUTLINE

TITLE 73. PROFESSIONS AND VOCATIONS (Cont'd)

	Beginning Section
53. Licensing and Regulation of Social Workers	73-53-1
54. Marriage and Family Therapists	73-54-1
55. Mississippi Athletic Trainers Licensure Act	73-55-1
57. Mississippi Respiratory Care Practice Act	73-57-1
59. Residential Builders and Remodelers	73-59-1
60. Home Inspectors	73-60-1
61. Tattooing and Body Piercing	73-61-1
63. Registered Professional Geologists Practice Act	73-63-1
65. Professional Art Therapists	73-65-1
67. Professional Massage Therapists	73-67-1
69. Mississippi Electronic Protection Licensing Act	73-69-1
71. Acupuncture Practice Act	73-71-1
73. Mississippi Certified Interior Designer Act	73-73-1
75. Licensed Behavior Analysts	73-75-1

TITLE 75. REGULATION OF TRADE, COMMERCE AND INVESTMENTS

CHAPTER	1. Uniform Commercial Code — Revised Article 1. General Provisions	75-1-101
	2. Uniform Commercial Code — Sales	75-2-101
2A.	Uniform Commercial Code — Leases	75-2A-101
	3. Uniform Commercial Code — Negotiable Instruments	75-3-101
	4. Uniform Commercial Code—Bank Deposits and Collections	75-4-101
4A.	Uniform Commercial Code—Funds Transfers ..	75-4A-101
	5. Uniform Commercial Code—Revised Article 5. Letters of Credit	75-5-101
	6. Uniform Commercial Code—Bulk Transfers	75-6-101
	7. Uniform Commercial Code—Documents of Title	75-7-101
	8. Uniform Commercial Code—Revised Article 8. Investment Securities	75-8-101
	9. Uniform Commercial Code—Secured Transactions	75-9-101
	10. Uniform Commercial Code—Effective Date and Repealer	75-10-101
	11. Uniform Commercial Code—Effective Date and Transition Provisions: 1977 Amendments	75-11-101
	12. Uniform Electronic Transactions Act	75-12-1
	13. Bills, Notes and Other Writings	75-13-1
	15. Mississippi Money Transmitters Act	75-15-1
	17. Interest, Finance Charges, and Other Charges	75-17-1

GENERAL OUTLINE

TITLE 75. REGULATION OF TRADE, COMMERCE AND INVESTMENTS (Cont'd)

	Beginning Section
18. Revolving Charge Agreements; Credit Cards [Repealed]	75-18-1
19. Seals	75-19-1
21. Trusts and Combines in Restraint or Hindrance of Trade	75-21-1
23. Fair Trade Laws	75-23-1
24. Regulation of Business for Consumer Protection	75-24-1
25. Registration of Trademarks and Labels	75-25-1
26. Mississippi Uniform Trade Secrets Act	75-26-1
27. Weights and Measures	75-27-1
29. Sale and Inspection of Food and Drugs	75-29-1
31. Milk and Milk Products	75-31-1
33. Meat, Meat-Food and Poultry Regulation and Inspection	75-33-1
35. Meat Inspection	75-35-1
37. Operation of Frozen Food Locker Plants [Repealed]	75-37-1
39. Sale of Baby Chicks	75-39-1
40. Importation and Sale of Animals or Birds	75-40-1
41. Gins	75-41-1
43. Farm Warehouses	75-43-1
44. Grain Warehouses	75-44-1
45. Commercial Feeds and Grains	75-45-1
47. Commercial Fertilizers	75-47-1
49. Factory-Built Homes	75-49-1
51. Water Heaters	75-51-1
53. Paints, Varnishes and Similar Materials	75-53-1
55. Gasoline and Petroleum Products	75-55-1
56. Antifreeze and Summer Coolants	75-56-1
57. Liquefied Petroleum Gases	75-57-1
58. Mississippi Natural Gas Marketing Act	75-58-1
59. Correspondence Courses	75-59-1
60. Proprietary Schools and Colleges	75-60-1
61. Manufacture and Sale of Jewelry and Optical Equipment	75-61-1
63. Sales of Cemetery Merchandise and Funeral Services	75-63-1
65. Going Out of Business Sales; Unsolicited Goods	75-65-1
66. Home Solicitation Sales	75-66-1
67. Loans	75-67-1
69. Farm Loan Bonds	75-69-1
71. Mississippi Securities Act of 2010	75-71-101

GENERAL OUTLINE

TITLE 75. REGULATION OF TRADE, COMMERCE AND INVESTMENTS (Cont'd)

	Beginning Section
72. Business Takeovers	75-72-1
73. Hotels and Innkeepers	75-73-1
74. Youth Camps	75-74-1
75. Amusements, Exhibitions and Athletic Events	75-75-1
76. Mississippi Gaming Control Act	75-76-1
77. Repurchase of Inventories From Retailers Upon Termination of Contract	75-77-1
79. Pulpwood Scaling and Practices	75-79-1
81. Dance Studio Lessons	75-81-101
83. Health Spas	75-83-1
85. Transient Vendor	75-85-1
87. Contracts Between Out-of-State Principals and Commissioned Sales Representatives	75-87-1
89. Mississippi Commodities Enforcement Act	75-89-1
91. Truth in Music Advertising	75-91-1
93. Fictitious Business Name Registration Act	75-93-1
95. Business of Purchasing Precious Items for Resale	75-95-1

TITLE 77. PUBLIC UTILITIES AND CARRIERS

CHAPTER	1. Public Service Commission	77-1-1
	2. Public Utilities Staff	77-2-1
	3. Regulation of Public Utilities	77-3-1
	5. Electric Power	77-5-1
	6. Municipal Gas Authority of Mississippi Law	77-6-1
	7. Motor Carriers	77-7-1
	8. Transportation Network Companies	77-8-1
	9. Railroads and Other Common Carriers	77-9-1
	11. Gas Pipelines and Distribution Systems	77-11-1
	13. Regulation of Excavations Near Underground Utility Facilities	77-13-1
	15. Local Natural Gas Districts	77-15-1
	17. Mississippi Broadband Enabling Act	77-17-1

TITLE 79. CORPORATIONS, ASSOCIATIONS, AND PARTNERSHIPS

CHAPTER	1. General Provisions Relative to Corporations	79-1-1
	3. Business Corporations [Repealed]	79-3-1
	4. Mississippi Business Corporation Act	79-4-1.01
	5. Business Development Corporations [Repealed]	79-5-1
	6. Foreign Limited Liability Companies [Repealed]	79-6-1

GENERAL OUTLINE

TITLE 79. CORPORATIONS, ASSOCIATIONS, AND PARTNERSHIPS (Cont'd)

	Beginning Section
7. Small Business Investment Companies	79-7-1
9. Professional Corporations [Repealed]	79-9-1
10. Mississippi Professional Corporation Act	79-10-1
11. Nonprofit, Nonshare Corporations and Religious Societies	79-11-1
12. Partnerships [Repealed]	79-12-1
13. Uniform Partnership Act (1997)	79-13-101
14. Mississippi Uniform Limited Partnership Act ..	79-14-101
15. Investment Trusts	79-15-1
16. Mississippi Registration of Foreign Business Trusts Act	79-16-1
17. Agricultural Associations; Conversion to Corpo- rate Form	79-17-1
19. Agricultural Cooperative Marketing Associations	79-19-1
21. Aquatic Products Marketing Association	79-21-1
22. Mississippi Aquaculture Act of 1988	79-22-1
23. Commercial and Proprietary Information	79-23-1
25. Mississippi Shareholder Protection Act	79-25-1
27. Mississippi Control Share Act	79-27-1
29. Revised Mississippi Limited Liability Company Act	79-29-101
31. Mississippi Registration of Foreign Limited Li- ability Partnerships Act [Repealed]	79-31-1
33. Corporate Successor Asbestos-Related Liability in Connection with Mergers or Consolidations	79-33-1
35. The Mississippi Registered Agents Act	79-35-1
37. Mississippi Entity Conversion and Domestica- tion Act	79-37-101
13. Uniform Partnership Act (1997)	79-13-101

TITLE 81. BANKS AND FINANCIAL INSTITUTIONS

CHAPTER	1. Department of Banking and Consumer Finance	81-1-1
	3. Incorporation and Organization of Banks	81-3-1
	5. General Provisions Relating to Banks and Banking	81-5-1
	7. Branch Banks	81-7-1
	8. Regional Banking Institutions	81-8-1
	9. Insolvent Banks	81-9-1
	11. Savings and Loan Associations [Repealed]	81-11-1
	12. Savings Associations Law	81-12-1

GENERAL OUTLINE

TITLE 81. BANKS AND FINANCIAL INSTITUTIONS (Cont'd)

	Beginning Section
13. Credit Unions	81-13-1
14. Savings Bank Law	81-14-1
15. Mississippi Rural Credit Law	81-15-1
17. Farmers' Credit Associations	81-17-1
18. Mississippi S.A.F.E. Mortgage Act	81-18-1
19. Consumer Loan Broker Act	81-19-1
20. Consumer Complaints and Disputes Against Mortgage Companies	81-20-1
21. Insurance Premium Finance Companies	81-21-1
22. Mississippi Debt Management Services Act	81-22-1
23. Interstate Bank Branching	81-23-1
25. The Mississippi International Banking Act	81-25-1
27. Multistate, State and Limited Liability Trust Institutions	81-27-1.001
29. Lender Trade Name and Trademark Use	81-29-1

TITLE 83. INSURANCE

CHAPTER	1. Department of Insurance	83-1-1
	2. Competitive Rating for Property and Casualty Insurance	83-2-1
	3. Commissioner of Insurance, Rating Bureau and Rates	83-3-1
	5. General Provisions Relative to Insurance and Insurance Companies	83-5-1
	6. Registration and Examination of Insurers	83-6-1
	7. Life Insurance	83-7-1
	9. Accident, Health and Medicare Supplement Insurance	83-9-1
	11. Automobile Insurance	83-11-1
	13. Fire Insurance	83-13-1
	14. Homeowners' and Farmowners' Insurance [Repealed]	83-14-1
	15. Title Insurance	83-15-1
	17. Insurance Agents, Solicitors, or Adjusters	83-17-1
	18. Insurance Administrators and Managing Gen- eral Agents	83-18-1
	19. Domestic Companies	83-19-1
	20. Domicile Change for Domestic and Foreign Insurers	83-20-1
	21. Foreign Companies	83-21-1
	22. Mississippi Uniform Disclaimer of Property In- terests Act (2002/2010)'	

GENERAL OUTLINE

TITLE 83. INSURANCE (Cont'd)

	Beginning Section
23. Insolvent Insurance Companies; Insurance Guaranty Association	83-23-1
24. Insurers Rehabilitation and Liquidation Act	83-24-1
25. Co-operative Insurance	83-25-1
27. Surety Companies	83-27-1
29. Fraternal Societies	83-29-1
30. Larger Fraternal Benefit Societies	83-30-1
31. Mutual Companies	83-31-1
33. Reciprocal Insurance	83-33-1
34. Windstorm Underwriting Association	83-34-1
35. Underwriting Association [Repealed]	83-35-1
36. Joint Underwriting Association for Medical Mal- practice Insurance	83-36-1
37. Burial Associations	83-37-1
38. Mississippi Residential Property Insurance Un- derwriting Association Law	83-38-1
39. Bail Bonds and Bondsmen	83-39-1
41. Hospital and Medical Service Associations and Contracts	83-41-1
43. Nonprofit Dental Service Corporations	83-43-1
45. Nonprofit, Community Service Blood Supply Plans	83-45-1
47. Nonprofit Medical Liability Insurance Corporations	83-47-1
48. Medical Malpractice Insurance Availability Act	83-48-1
49. Legal Expense Insurance	83-49-1
51. Dental Care Benefits	83-51-1
52. Guaranteed Asset Protection Waivers	83-52-1
53. Credit Life and Credit Disability Insurance	83-53-1
54. Mississippi Creditor-Placed Insurance Act	83-54-1
55. Risk Retention Act	83-55-1
57. Home Warranties [Repealed].	83-57-1
58. New Home Warranty Act	83-58-1
59. Business Transacted With Producer Controlled Insurer Act	83-59-1
61. Voluntary Basic Health Insurance Coverage Law	83-61-1
62. Health Savings Accounts	83-62-1
63. Small Employer Health Benefit Plans	83-63-1
64. Health Discount Plans	83-64-1
65. Regulation of Vehicle Service Contracts	83-65-101
67. Utilization of Modern Systems for Holding and Transferring Securities Without Physical Delivery	83-67-1

GENERAL OUTLINE

TITLE 83. INSURANCE (Cont'd)

	Beginning Section
69. Interstate Insurance Product Regulation Compact	83-69-1
71. Unfair Discrimination Against Subjects of Abuse in Health, Life, and Disability Income Insurance	83-71-1
73. Portable Electronics Insurance	83-73-1
75. Homeowners Insurance Discount for Hurricane or Windstorm Damage Mitigation	83-75-1
77. Health Care Sharing Ministries	83-77-1
79. Property Insurance Clarity Act	83-79-1
81. Mississippi Direct Primary Care Act	83-81-1
83. Limited Lines Travel Insurance Act	83-83-1
85. Own Risk and Solvency Assessment Act	83-85-1

TITLE 85. DEBTOR-CREDITOR RELATIONSHIP

CHAPTER	1. Assignment for Benefit of Creditors	85-1-1
	3. Exempt Property	85-3-1
	5. Joint and Several Debtors	85-5-1
	7. Liens	85-7-1
	8. Uniform Federal Lien Registration Act	85-8-1
	9. Debt Adjusting or Credit Arranging [Repealed].	85-9-1
	11. Mississippi Uniform State Tax Lien Registration Act	85-11-1
	13. Automated Data Match System for Identifying and Seizing Financial Assets of Obligors Identified by Department of Revenue	85-13-1

TITLE 87. CONTRACTS AND CONTRACTUAL RELATIONS

CHAPTER	1. Gambling and Future Contracts	87-1-1
	3. Power and Letters of Attorney	87-3-1
	5. Principal and Surety	87-5-1
	7. Improvements to Real Property	87-7-1
	9. General Provisions	87-9-1

TITLE 89. REAL AND PERSONAL PROPERTY

CHAPTER	1. Land and Conveyances	89-1-1
	2. Liability of Recreational Landowners	89-2-1
	3. Acknowledgments	89-3-1
	5. Recording of Instruments	89-5-1
	6. Mississippi Plane Coordinate System	89-6-1
	7. Landlord and Tenant	89-7-1

GENERAL OUTLINE

TITLE 89. REAL AND PERSONAL PROPERTY (Cont'd)

	Beginning Section
8. Residential Landlord and Tenant Act	89-8-1
9. Condominiums	89-9-1
11. Escheats	89-11-1
12. Uniform Disposition of Unclaimed Property Act	89-12-1
13. Party Fences	89-13-1
15. Party Walls	89-15-1
17. Salvage	89-17-1
19. Mississippi Conservation Easements	89-19-1
21. Uniform Disclaimer of Property Interests Act ..	89-21-1
22. Mississippi Uniform Disclaimer of Property Interests Act (2002/2010)	89-22-1
23. Mississippi Uniform Environmental Covenants Act	89-23-1
25. Mississippi Uniform Statutory Rule Against Perpetuities	89-25-1

TITLE 91. TRUSTS AND ESTATES

CHAPTER	1. Descent and Distribution	91-1-1
	3. Uniform Simultaneous Death Law	91-3-1
	5. Wills and Testaments	91-5-1
	7. Executors and Administrators	91-7-1
	8. Mississippi Uniform Trust Code	91-8-101
	9. Trusts and Trustees	91-9-1
	11. Fiduciary Security Transfers	91-11-1
	13. Fiduciary Investments	91-13-1
	15. Release of Powers of Appointment	91-15-1
	17. Mississippi Principal and Income Act of 2013 ..	91-17-101
	19. Gifts to Minors [Repealed]	91-19-1
	20. Transfers to Minors	91-20-1
	21. Uniform Transfer-on-Death Security Registration Act	91-21-1
	23. Revised Uniform Fiduciary Access to Digital Assets Act	91-23-1
	25. Mississippi Uniform Estate Tax Apportionment Act	91-25-1
	27. Mississippi Real Property Transfer-On-Death Act	91-27-1
	29. Effect of Dissolution of Marriage	91-29-1
	31. Uniform Partition of Heir Property	91-31-1

TITLE 93. DOMESTIC RELATIONS

CHAPTER	1. Marriage	93-1-1
---------	-------------------	--------

GENERAL OUTLINE

TITLE 93. DOMESTIC RELATIONS (Cont'd)

	Beginning Section
3. Husband and Wife	93-3-1
5. Divorce and Alimony	93-5-1
7. Annulment of Marriage	93-7-1
9. Bastardy	93-9-1
11. Enforcement of Support of Dependents	93-11-1
12. Enforcement of Child Support Orders from Foreign Jurisdictions	93-12-1
13. Guardians and Conservators	93-13-1
14. Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act	93-14-101
15. Mississippi Termination of Parental Rights Law	93-15-1
16. Grandparents' Visitation Rights	93-16-1
17. Adoption, Change of Name, and Legitimation of Children	93-17-1
19. Removal of Disability of Minority	93-19-1
20. Guardianship and Conservatorship	93-20-101
21. Protection from Domestic Abuse	93-21-1
22. Uniform Interstate Enforcement of Domestic Violence Protection Orders	93-22-1
23. Uniform Child Custody Jurisdiction Act [Repealed]	93-23-1
25. Uniform Interstate Family Support Act	93-25-1
27. Uniform Child Custody Jurisdiction and Enforcement Act	93-27-101
29. Uniform Child Abduction Prevention Act	93-29-1
31. Supporting and Strengthening Families Act	93-31-1

TITLE 95. TORTS

CHAPTER	1. Libel and Slander	95-1-1
	3. Nuisances	95-3-1
	5. Trespass	95-5-1
	7. Liability Exemption for Donors of Food	95-7-1
	9. Liability Exemption for Volunteers and Sports Officials	95-9-1
	11. Liability Exemption for Equine and Livestock Activities	95-11-1
	13. Liability Exemption for Noise Pollution by Sportshooting Ranges	95-13-1
	15. Liability Exemption for Report of Suspicious Activity or Behavior	95-15-1

TITLE 97. CRIMES

CHAPTER	1. Conspiracy, Accessories and Attempts	97-1-1
---------	---	--------

GENERAL OUTLINE

TITLE 97. CRIMES (Cont'd)

	Beginning Section
3. Crimes Against the Person	97-3-1
5. Offenses Affecting Children	97-5-1
7. Crimes Against Sovereignty or Administration of Government	97-7-1
9. Offenses Affecting Administration of Justice	97-9-1
11. Offenses Involving Public Officials	97-11-1
13. Election Crimes	97-13-1
15. Offenses Affecting Highways, Ferries and Waterways	97-15-1
17. Crimes Against Property	97-17-1
19. False Pretenses and Cheats	97-19-1
21. Forgery and Counterfeiting	97-21-1
23. Offenses Affecting Trade, Business and Professions	97-23-1
25. Offenses Affecting Railroads, Public Utilities and Carriers	97-25-1
27. Crimes Affecting Public Health	97-27-1
29. Crimes Against Public Morals and Decency	97-29-1
31. Intoxicating Beverage Offenses	97-31-1
32. Tobacco Offenses	97-32-1
33. Gambling and Lotteries	97-33-1
35. Crimes Against Public Peace and Safety	97-35-1
37. Weapons and Explosives	97-37-1
39. Dueling	97-39-1
41. Cruelty to Animals	97-41-1
43. Racketeer Influenced and Corrupt Organization Act (RICO)	97-43-1
44. Mississippi Streetgang Act	97-44-1
45. Computer Crimes and Identity Theft	97-45-1

TITLE 99. CRIMINAL PROCEDURE

CHAPTER	1. General Provisions; Time Limitations; Costs ...	99-1-1
	3. Arrests	99-3-1
	5. Bail	99-5-1
	7. Indictment	99-7-1
	9. Process	99-9-1
	11. Jurisdiction and Venue	99-11-1
	13. Insanity Proceedings	99-13-1
	15. Pretrial Proceedings	99-15-1
	17. Trial	99-17-1
	18. Office of State Public Defender	99-18-1
	19. Judgment, Sentence, and Execution	99-19-1

GENERAL OUTLINE

TITLE 99. CRIMINAL PROCEDURE (Cont'd)

	Beginning Section
20. Community Service Restitution	99-20-1
21. Fugitives From Other States	99-21-1
23. Peace Bonds	99-23-1
25. Forms	99-25-1
27. Proceedings for Intoxicating Beverage Offenses	99-27-1
29. Vagrancy Proceedings	99-29-1
31. Obscene Publications Proceedings [Repealed] ..	99-31-1
33. Prosecutions Before Justice Court Judges	99-33-1
35. Appeals	99-35-1
36. Victim Assistance Coordinator	99-36-1
37. Restitution to Victims of Crimes	99-37-1
38. Crime Victim's Escrow Account Act	99-38-1
39. Post-Conviction Proceedings	99-39-1
40. Indigent Appeals Division	99-40-1
41. Mississippi Crime Victims' Compensation Act ..	99-41-1
43. Mississippi Crime Victims' Bill of Rights	99-43-1
45. Statewide Automated Victim Information and Notification System	99-45-1
47. Victim of Domestic Violence, Sexual Assault or Stalking Address Confidentiality Program	99-47-1
49. Preservation and Accessibility of Biological Evidence	99-49-1

MISSISSIPPI CODE
1972
ANNOTATED

VOLUME TWENTY-ONE

TITLE 97.
CRIMES

Chapter 1.	Conspiracy, Accessories and Attempts.	97-1-1
Chapter 3.	Crimes Against the Person.	97-3-1
Chapter 5.	Offenses Affecting Children.	97-5-1
Chapter 7.	Crimes Against Sovereignty or Administration of Government.	97-7-1
Chapter 9.	Offenses Affecting Administration of Justice. ...	97-9-1

CHAPTER 1.
CONSPIRACY, ACCESSORIES AND ATTEMPTS

Sec.	
97-1-1.	Conspiracy.
97-1-3.	Accessories before the fact.
97-1-5.	Accessories after the fact; punishment.
97-1-6.	Directing or causing felony to be committed by person under age of seventeen years.
97-1-7.	Attempt to commit offense; punishment.
97-1-9.	Attempt to commit offense; no conviction if offense completed.

§ 97-1-1. Conspiracy.

- (1) If two (2) or more persons conspire either:
 - (a) To commit a crime; or
 - (b) Falsely and maliciously to indict another for a crime, or to procure to be complained of or arrested for a crime; or
 - (c) Falsely to institute or maintain an action or suit of any kind; or
 - (d) To cheat and defraud another out of property by any means which are in themselves criminal, or which, if executed, would amount to a cheat, or to obtain money or any other property or thing by false pretense; or
 - (e) To prevent another from exercising a lawful trade or calling, or doing any other lawful act, by force, threats, intimidation, or by interfering or threatening to interfere with tools, implements, or property belonging to or used by another, or with the use of employment thereof; or
 - (f) To commit any act injurious to the public health, to public morals, trade or commerce, or for the perversion or obstruction of justice, or of the due administration of the laws; or

(g) To overthrow or violate the laws of this state through force, violence, threats, intimidation, or otherwise; or

(h) To accomplish any unlawful purpose, or a lawful purpose by any unlawful means; such persons, and each of them, shall be guilty of a felony and upon conviction may be punished by a fine of not more than Five Thousand Dollars (\$5,000.00) or by imprisonment for not more than five (5) years, or by both.

(2) Where one (1) or more of the conspirators is a law enforcement officer engaged in the performance of official duty or a person acting at the direction of a law enforcement officer in the performance of official duty, any remaining conspirator may be charged under this section if the alleged conspirator acted voluntarily and willfully and was not entrapped by the law enforcement officer or person acting at the direction of a law enforcement officer.

(3) Where the crime conspired to be committed is capital murder or murder as defined by law or is a violation of Section 41-29-139(b)(1), Section 41-29-139(c)(2)(D) or Section 41-29-313(1), being provisions of the Uniform Controlled Substances Law, the offense shall be punishable by a fine of not more than Five Hundred Thousand Dollars (\$500,000.00) or by imprisonment for not more than twenty (20) years, or by both.

(4) Where the crime conspired to be committed is a misdemeanor, then upon conviction said crime shall be punished as a misdemeanor as provided by law.

HISTORY: Codes, 1892, § 1006; 1906, § 1084; Hemingway's 1917, § 810; 1930, § 830; 1942, § 2056; Laws, 1954, Ex. ch. 20; Laws, 1968, ch. 343, § 1; Laws, 1981, ch. 488, § 1; Laws, 2007, ch. 500, § 1, eff from and after July 1, 2007.

Cross References — Conspiracy under Mississippi Code of Military Justice, see §§ 33-13-461 et seq.

Conspiracy to obtain payment or allowance by false or fraudulent Medicaid claim, see § 43-13-211.

Disqualification of persons convicted of conspiracy to commit crime to hold office in labor organizations, etc., see § 71-1-49.

Prohibition against attorneys encouraging litigation, see §§ 73-3-57, 73-3-59.

Trusts and combines in restraint or hindrance of trade, see §§ 75-21-1 et seq.

Conspiracy to defraud the state, see §§ 97-7-11 through 97-7-15.

Conspiracy to prevent holding public office or discharging its duties, see §§ 97-7-17, 97-7-19.

Conspiracy to stir up litigation, see § 97-9-11.

Conspiracy by member or employee of Mississippi Transportation Commission, see § 97-15-5.

Conspiracy to prevent persons from engaging in lawful work, see § 97-23-41.

Conspiracy for unlawful restraint or boycott of trade or business, see § 97-23-85.

Conspiracy to impede railroads, public utilities, and carriers, see § 97-25-43.

Criminal enterprise under Racketeer Influenced and Corrupt Organization Act, see §§ 97-43-1 et seq.

Statute of limitation for prosecution for conspiracy, see § 99-1-5.

Imposition of standard state assessment in addition to all court imposed fines or other penalties for any felony violation, see § 99-19-73.

JUDICIAL DECISIONS

ANALYSIS

1. In general; validity.
2. —First Amendment considerations.
3. Elements; generally.
4. —Overt act requirement.
5. Relation to underlying crime.
6. Relation to accessory before, after, fact.
7. Entrapment.
8. Indictment.
9. Evidence.
10. —Admissibility.
11. —Circumstantial.
12. —Hearsay.
13. —Proof of subsequent offense.
14. —Sufficiency.
15. —Sufficiency; conspiracy.
16. —Other.
17. Practice and procedure; trial.
18. —Jury instructions.
19. Penalties.
20. Sentencing.

1. In general; validity.

By its very nature, "conspiracy" is joint or group offense requiring concert of free will and, furthermore, conspiracy requires union of minds of conspirators. *Franklin v. State*, 676 So. 2d 287, 1996 Miss. LEXIS 308 (Miss. 1996).

A defendant's convictions for both murder-for-hire capital murder under § 97-3-19(2)(d) and conspiracy to commit capital murder under this section violated the constitutional protection against double jeopardy, since the definition of murder-for-hire in § 97-3-19(2)(d) completely encompasses the agreement or conspiracy to commit capital murder. *Colosimo v. Senatobia Motor Inn*, 662 So. 2d 552, 1995 Miss. LEXIS 479 (Miss. 1995).

This section, in conjunction with § 83-19-31 and former § 83-19-73 [see now § 83-19-31], is not void for vagueness due to the lack of written accounting procedures to be used to determine the minimum capital and surplus requirements of an insurance company. *Gardner v. State*, 531 So. 2d 805, 1988 Miss. LEXIS 481 (Miss. 1988).

In a prosecution for conspiracy to sell heroin, the trial court properly overruled defendant's plea in bar based on the two

year statute of limitations, where defendant was shown to be a conspirator in a drug-selling ring, and where the proof showed that a co-conspirator, tried jointly with defendant, had illegally sold heroin to a narcotics agent within the two-year span prior to the indictment of defendant; once a defendant is established as being a conspirator, he remains a part of the conspiracy until he has extricated himself therefrom by communicating his abandonment in a manner reasonably expected to reach his co-conspirators. *Norman v. State*, 381 So. 2d 1024, 1980 Miss. LEXIS 1922 (Miss. 1980).

When two or more persons are confederated for purpose of murdering another, and in furtherance of such common design such person is killed by one of the conspirators, the killing is the act of each regardless of which inflicted the mortal wound. *Riley v. State*, 208 Miss. 336, 44 So. 2d 455, 1950 Miss. LEXIS 252 (Miss. 1950).

2. —First Amendment considerations.

First Amendment precluded imposition of liability on participants in economic boycott against merchants in locality for all damages resulting from boycott, even though some of them engaged in violence and threats of violence, and even though such violence and threats contributed to success of boycott, because boycott was otherwise nonviolent, politically motivated, and designed to force governmental and economic change and to effectuate rights guaranteed by Constitution itself; however, First Amendment did not bar recovery from those who engaged in violence or threats of violence for losses proximately caused by their unlawful conduct. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 102 S. Ct. 3409, 73 L. Ed. 2d 1215, 1982 U.S. LEXIS 49 (U.S. 1982).

3. Elements; generally.

Conspiracy to commit armed robbery required only the agreement among two or more people to commit the crime, while armed robbery required the use of a deadly weapon which placed an individual

in fear of immediate injury. Actual robbery required the establishment of several different facts than the agreement to commit the act; thus, the offenses were two separate crimes and defendant was not subjected to double jeopardy by convictions for both. *Stovall v. State*, 873 So. 2d 1056, 2004 Miss. App. LEXIS 454 (Miss. Ct. App. 2004).

This section does not require that all persons charged in the conspiracy be convicted for the conviction of one of the conspirators to be valid. *Newell v. State*, 754 So. 2d 1261, 1999 Miss. App. LEXIS 712 (Miss. Ct. App. 1999).

Crime of conspiracy to possess more than one kilogram of marijuana was complete upon agreement to exchange money for marijuana. *Morgan v. State*, 703 So. 2d 832, 1997 Miss. LEXIS 260 (Miss. 1997).

For there to be "conspiracy," there must be recognition on part of conspirators that they are entering into common plan and knowingly intend to further its common purpose; conspiracy agreement need not be formal or express, but may be inferred from circumstances, particularly by declarations, acts, and conduct of alleged conspirators. *Franklin v. State*, 676 So. 2d 287, 1996 Miss. LEXIS 308 (Miss. 1996).

If there is an agreement, then knowledge of that agreement follows. The agreement need not be formal or express but may be inferred from the circumstances, particularly by declarations, acts, and conduct of the alleged conspirators. *Ford v. State*, 546 So. 2d 686, 1989 Miss. LEXIS 317 (Miss. 1989).

The crime of conspiracy is committed when 2 or more persons combine to accomplish an unlawful purpose. Each conspirator must recognize that he is entering into a common plan with the other and each must intend to further a common and unlawful purpose. *Taylor v. State*, 536 So. 2d 1326, 1988 Miss. LEXIS 609 (Miss. 1988).

In order for an individual to be a co-conspirator, there must be a recognition on his part that he is entering into some type of common plan, and knowingly intends to further its common purpose. *Watson v. State*, 521 So. 2d 1290, 1988 Miss. LEXIS 105 (Miss. 1988).

To constitute an individual a co-conspirator, there must be a recognition on

his part that he is entering into some kind of common plan, and knowingly intends to further its common purpose. *McDonald v. State*, 454 So. 2d 488, 1984 Miss. LEXIS 1816 (Miss. 1984).

It is elementary that neither association with conspirators nor knowledge of illegal activity constitutes proof of participation in a conspiracy. *McDonald v. State*, 454 So. 2d 488, 1984 Miss. LEXIS 1816 (Miss. 1984).

At least 2 persons must agree for a conspiracy to exist. *Moore v. State*, 290 So. 2d 603, 1974 Miss. LEXIS 1705 (Miss. 1974).

A conspiracy to commit a crime is a complete offense, separate and distinct from, and does not become merged in, the commission of the crime contemplated by the conspiracy. *Martin v. State*, 197 Miss. 96, 19 So. 2d 488, 1944 Miss. LEXIS 277 (Miss. 1944).

4. —Overt act requirement.

The offense is complete without showing an overt act in furtherance of the conspiracy. *Davis v. State*, 485 So. 2d 1055, 1986 Miss. LEXIS 2778 (Miss. 1986).

Neither at common law nor under this section is an overt act pursuant to the conspiracy necessary for the completion of the crime. *Moore v. State*, 290 So. 2d 603, 1974 Miss. LEXIS 1705 (Miss. 1974).

Neither at common law nor under this section [Code 1942, § 2056] is an overt act pursuant to a conspiracy necessary for the completion of the crime. *Martin v. State*, 197 Miss. 96, 19 So. 2d 488, 1944 Miss. LEXIS 277 (Miss. 1944).

5. Relation to underlying crime.

Because the offenses of possession under Miss. Code Ann. § 41-29-313 and conspiracy were considered separate criminal violations separately punishable, no double jeopardy principle was violated. *Hunt v. State*, 863 So. 2d 990, 2004 Miss. App. LEXIS 13 (Miss. Ct. App. 2004).

Although a substantive offense and a conspiracy to commit are 2 separate offenses, where there is a common nucleus of operative facts existing in both indictments, and where the ultimate fact has been determined in a prior acquittal of the

substantive offense by a final judgment, a conspiracy trial is barred thereafter under the constitutional double jeopardy provision. *Griffin v. State*, 545 So. 2d 729, 1989 Miss. LEXIS 289 (Miss. 1989), limited, *State v. Thomas*, 645 So. 2d 931, 1994 Miss. LEXIS 554 (Miss. 1994).

The prosecution will not be permitted to convict an accused under the guise of a conspiracy charge where it could not proceed on, and convict for, the completed act, because of the entrapment defense. *Barnes v. State*, 493 So. 2d 313, 1986 Miss. LEXIS 2515 (Miss. 1986).

Conspiracy is a complete offense in itself, distinct from the commission of the crime contemplated by the conspiracy, and does not become merged with that crime. *Davis v. State*, 485 So. 2d 1055, 1986 Miss. LEXIS 2778 (Miss. 1986).

One who "conspires" with himself or with another who by law is precluded from coconspirator status is not guilty of crime of conspiracy in Mississippi; person who hires middleman to secure services of third person to commit murder, and middleman, may be convicted of conspiracy on basis of agreement with each other even though third person hired to actually carry out murder is in fact police confidential informant lacking coconspirator status. *James v. State*, 481 So. 2d 805, 1985 Miss. LEXIS 2358 (Miss. 1985).

Where one of 2 persons who conspired to do an illegal act is an officer who acted in the discharge of his duties, or is an informer for the state who entered into the conspiracy for the purpose of informing on the other party, such other person cannot be convicted of conspiracy. *Moore v. State*, 290 So. 2d 603, 1974 Miss. LEXIS 1705 (Miss. 1974).

Since a conspiracy to commit a crime is different from the crime that is the object of the conspiracy, the first necessarily involves joint action while the other does not. *Moore v. State*, 290 So. 2d 603, 1974 Miss. LEXIS 1705 (Miss. 1974).

6. Relation to accessory before, after, fact.

Use of the word "conspiracy" to label certain criminal conduct does not preclude use of the verb "to conspire" and the noun "conspiracy" to connote the sort of partici-

pation and involvement in the planning of a crime which is at least in part requisite to being guilty as an accessory before the fact. *Malone v. State*, 486 So. 2d 360, 1986 Miss. LEXIS 2419 (Miss. 1986).

Although defendant may very well have been an accessory after the fact under § 97-1-5, the state never made a jury issue that he was engaged in a conspiracy under this section, where he had been trying to extricate his brother and a very good friend when he violated the law by possessing and transporting marijuana. *Kennedy v. State*, 454 So. 2d 495, 1984 Miss. LEXIS 2091 (Miss. 1984).

7. Entrapment.

Defendant who was charged with drug offenses following reverse sting operation wherein narcotics officers sold drugs owned by State was not entrapped as matter of law, as drug conspiracy in which defendant was allegedly involved was complete upon an agreement, between defendant and unindicted coconspirator, prior to involvement by law enforcement. *Morgan v. State*, 703 So. 2d 832, 1997 Miss. LEXIS 260 (Miss. 1997).

Adverse sale or reverse undercover operation, in which narcotics officers attempted to sell or furnish marijuana owned by the state to defendant and his colleagues, constituted entrapment, since the predisposition to commit the crime was instigated by the narcotics officers, and the defense of entrapment could be interposed to the charge of conspiracy to possess marijuana without the defendant taking the stand to testify. *Barnes v. State*, 493 So. 2d 313, 1986 Miss. LEXIS 2515 (Miss. 1986).

The prosecution will not be permitted to convict an accused under the guise of a conspiracy charge where it could not proceed on, and convict for, the completed act, because of the entrapment defense. *Barnes v. State*, 493 So. 2d 313, 1986 Miss. LEXIS 2515 (Miss. 1986).

8. Indictment.

Although defendant asserted that the indictment was fatally defective for failure to specify the contraband that defendant conspired to possess in a correctional facility, the two count indictment included

the essential statutory elements of the charges against defendant and provided sufficient notice so that defendant suffered no prejudice in preparing a defense. Furthermore, defendant was procedurally barred from arguing an objection to a multi-count indictment on appeal because defendant failed to raise the objection at trial. *Graham v. State*, 204 So. 3d 329, 2016 Miss. App. LEXIS 113 (Miss. Ct. App. 2016).

Indictment charging defendant conspiracy to possess precursors was not insufficient for failing to include the language “with the intent to unlawfully manufacture a controlled substance” because the crime of conspiracy and the crime of possession of precursors were inherently different and the crime of conspiracy did not merge with the crime of possession of precursors. While the State was required to inform a defendant of the underlying crime to which he conspired, the State did not have to prove every element of the underlying crime in order to prevail on a conspiracy charge; therefore, the indictment did not have to include language that defendant possessed precursors with the intent to manufacture a controlled substance or with knowledge that the precursor chemicals would be used to unlawfully manufacture a controlled substance. *Berry v. State*, 996 So. 2d 782, 2008 Miss. LEXIS 604 (Miss. 2008).

Count I of the indictment charged defendant with conspiring to possess precursor chemicals which were not named or otherwise identified, but it did not charge him with conspiring to possess those unidentified precursors with either the intent to manufacture a controlled substance or with knowledge, or under circumstances where he reasonably should have known, that the precursor chemicals would be used to unlawfully manufacture a controlled substance, and thus the wording used in Count I failed to place defendant on notice as to whether he was being charged with conspiring to commit the crime specified in either Miss. Code Ann. § 41-29-313(1)(a)(i), (1)(a)(ii), or (2)(c)(i); therefore, Count I of the indictment was defective because it failed to allege a crime, and the appellate court had

to reverse and render defendant’s conviction in Count I. *Berry v. State*, 996 So. 2d 793, 2007 Miss. App. LEXIS 422 (Miss. Ct. App. 2007), rev’d, 996 So. 2d 782, 2008 Miss. LEXIS 604 (Miss. 2008).

Conspiracy count of the indictment was fatally defective where no crime was charged; in an assault case, the victim had to be identified in some manner as an essential fact describing the crime. *Sanderson v. State*, 881 So. 2d 878, 2004 Miss. App. LEXIS 35 (Miss. Ct. App.), aff’d in part and rev’d in part, 883 So. 2d 558, 2004 Miss. LEXIS 1199 (Miss. 2004).

It is not necessary that an indictment charging conspiracy include the penalty sections of the code applicable to the underlying crime in order to trigger the conspiracy provisions of this section, and to properly charge a felony. *Gardner v. State*, 531 So. 2d 805, 1988 Miss. LEXIS 481 (Miss. 1988).

Allegation of an overt act pursuant to a conspiracy, in a conspiracy indictment, does not convert the indictment into one for the commission of the crime contemplated by the conspiracy, even though the overt act charged is commission of the crime contemplated by it. *Martin v. State*, 197 Miss. 96, 19 So. 2d 488, 1944 Miss. LEXIS 277 (Miss. 1944).

An indictment charging two defendants with defrauding and conspiring to defraud the state out of the title to tax forfeited public lands by illegally purchasing such lands for a corporation in violation of the public policy of the state as exemplified by Code of 1930, § 6027, while not charging an offense under Code of 1930, § 833, was sufficient to charge a misdemeanor under this section [Code 1942, § 2056], the word “feloniously” in the indictment being mere surplusage. *State v. Russell*, 185 Miss. 13, 187 So. 540, 1939 Miss. LEXIS 144 (Miss. 1939).

An indictment charging the defendant with defrauding and conspiring to defraud the state out of tax forfeited public lands by illegally purchasing such lands for a corporation in violation of § 6027 of the Code of 1930, did not charge an offense under this section [Code 1942, § 2056], the words “shall conspire to defraud the state of Mississippi, or any department or political subdivision thereof, in any man-

ner, or for any purpose,” under the rule of *ejusdem generis* limited their application to the specific acts made offenses under the statute which did not include that charged in the indictment. *State v. Russell*, 185 Miss. 13, 187 So. 540, 1939 Miss. LEXIS 144 (Miss. 1939).

9. Evidence.

Defendants’ conspiracy convictions were proper where the trial court did not err in admitting a letter to the first defendant, pursuant to Miss. R. Evid. 401 and 402, because the critical fact at issue was whether the first defendant was engaged in a conspiracy, and that letter was evidence that tended to make that fact more probable or less probable than without the evidence. *Farris v. State*, 906 So. 2d 113, 2004 Miss. App. LEXIS 1126 (Miss. Ct. App. 2004).

Where the victim claimed that defendant and his accomplice held her down, beat her in the face, and raped her, the trial court properly convicted defendant of two counts of sexual battery and one count of conspiracy to batter. *Norris v. State*, 893 So. 2d 1071, 2004 Miss. App. LEXIS 806 (Miss. Ct. App. 2004), cert. denied, 893 So. 2d 1061, 2005 Miss. LEXIS 122 (Miss. 2005).

In a case where defendant father and defendant adopted son were convicted of conspiracy to commit sexual battery, Miss. Code Ann. §§ 97-1-1 and 97-3-95(1)(d), sexual battery, Miss. Code Ann. § 97-3-95(1)(d), and contributing to the delinquency of a minor, Miss. Code Ann. § 97-5-39(1), none of the issues raised by defendant father rose to the level of reversible error either standing alone or when considered together as the evidence supported the finding that defendant father was the ringleader of the abominable enterprise and he failed to demonstrate any procedural or substantive errors that warranted reversal; thus, defendant father’s convictions and sentences were affirmed. *King v. State*, 857 So. 2d 702, 2003 Miss. LEXIS 450 (Miss. 2003).

Defendant picked up drugs at a house, defendant in truck was stopped by the trooper, the trooper discovered the cocaine under the seat, and the truck belonged to defendant; thus, the evidence showed that

defendant constructively possessed the drugs, that defendant was guilty of conspiracy to possess cocaine and of possession of cocaine with intent to sell, and that the trial court did not err in denying defendant’s motion for judgment notwithstanding the verdict or motion for new trial. *Smith v. State*, 839 So. 2d 489, 2003 Miss. LEXIS 65 (Miss. 2003).

10. —Admissibility.

Defendant’s convictions for capital murder in violation of Miss. Code Ann. § 97-3-19(2)(e), aggravated assault in violation of Miss. Code Ann. § 97-3-7(2), and conspiracy to commit aggravated assault were appropriate because the victim’s autopsy photographs were admissible since their probative value was not outweighed by any danger of undue prejudice and since there was a meaningful evidentiary purpose. *Williams v. State*, 3 So. 3d 105, 2009 Miss. LEXIS 68 (Miss. 2009).

Evidence of an alleged assault on a police officer which occurred during a chase across state lines subsequent to the robbery of a store, was admissible in the ensuing prosecution for robbery and conspiracy to commit robbery, even though the assault charge was dismissed for lack of jurisdiction, since the assault was so interrelated with the events at the store that it constituted a single occurrence. *Jones v. State*, 567 So. 2d 1189, 1990 Miss. LEXIS 559 (Miss. 1990).

Statements made by co-conspirators after the objectives of the conspiracy have either succeeded or failed are inadmissible. *Nixon v. State*, 533 So. 2d 1078, 1987 Miss. LEXIS 2917 (Miss. 1987), cert. denied, 490 U.S. 1102, 109 S. Ct. 2458, 104 L. Ed. 2d 1012, 1989 U.S. LEXIS 2745 (U.S. 1989), overruled, *Wharton v. State*, 734 So. 2d 985, 1998 Miss. LEXIS 576 (Miss. 1998).

At the joint trial of 2 defendants charged with conspiracy to commit murder, admission, in prosecution’s case-in-chief, of co-conspirators’ post-arrest statements, wherein each co-defendant pointed a finger at the other, was reversible error, where these statements fell outside the co-conspirator’s exemption from the hearsay rule, did not interlock in substantial particulars, and were not attended by

other indicia of reliability sufficient to satisfy the conspirators' rights under the confrontation of witnesses clauses of federal and state constitutions. *Mitchell v. State*, 495 So. 2d 5, 1986 Miss. LEXIS 2659 (Miss. 1986), overruled in part, *Smith v. State*, 986 So. 2d 290, 2008 Miss. LEXIS 339 (Miss. 2008).

Threats made by conspirator out of presence of accused inadmissible before conspiracy is established. *Rich v. State*, 124 Miss. 272, 86 So. 770, 1920 Miss. LEXIS 506 (Miss. 1920).

11. —Circumstantial.

Circumstantial evidence is sufficient to establish the existence of a conspiracy. *Watson v. State*, 722 So. 2d 475, 1998 Miss. LEXIS 459 (Miss. 1998).

Existence of conspiracy, and defendant's membership in it, may be proved entirely by circumstantial evidence. *Franklin v. State*, 676 So. 2d 287, 1996 Miss. LEXIS 308 (Miss. 1996).

The trial judge is given great discretion in receiving circumstantial evidence where a defendant is on trial for conspiracy. *Peoples v. State*, 501 So. 2d 424, 1987 Miss. LEXIS 2284 (Miss. 1987).

Conspiracy may be shown by circumstantial evidence. *Pickett v. State*, 139 Miss. 529, 104 So. 358, 1925 Miss. LEXIS 174 (Miss. 1925).

Criminal conspiracy may be proved by the acts of parties, or by circumstances as well as by their agreement. *Osborne v. State*, 99 Miss. 410, 55 So. 52, 1910 Miss. LEXIS 33 (Miss. 1910).

12. —Hearsay.

Statements made by a coconspirator of a party during the course and in furtherance of the conspiracy are not hearsay, but are factual elements of the criminal offense and not mere statements. *Ponthieux v. State*, 532 So. 2d 1239, 1988 Miss. LEXIS 483 (Miss. 1988).

13. —Proof of subsequent offense.

Subsequent offense may be proved, to show criminal knowledge or intent. *King v. State*, 123 Miss. 532, 86 So. 339, 1920 Miss. LEXIS 54 (Miss. 1920).

14. —Sufficiency.

Evidence was sufficient to support defendant's conviction of conspiracy to com-

mit robbery because it showed that he was not only present during the commission of the robbery but he also helped bring it about by knocking on the window of the victim's bedroom to buy drugs, saw the shoe box where the victim kept drugs and money, he returned a second time, he was armed, and did nothing to stop the robbery. Defendant was later seen sorting the money and drugs from the shoe box at a friend's house. *Story v. State*, 296 So. 3d 104, 2019 Miss. App. LEXIS 539 (Miss. Ct. App. 2019), cert. denied, 293 So. 3d 833, 2020 Miss. LEXIS 223 (Miss. 2020).

Sufficient evidence supported defendant's conviction for conspiracy to commit armed robbery because a reasonable juror could accept defendant's confession that he conspired with his brother to rob the restaurant but still reject his claim that no gun was contemplated as a self-serving attempt to minimize his culpability the jury could go on to infer that an armed robbery was agreed as the brother did, in fact, bring a gun into the restaurant and use it in the robbery. *Allen v. State*, 212 So. 3d 98, 2016 Miss. App. LEXIS 718 (Miss. Ct. App. 2016).

Evidence supported defendant's conviction for conspiracy to possess marijuana because defendant confessed to ownership of marijuana that defendant had sent to a house for defendant to sell. Furthermore, the recipient of the package at the house said the recipient was expecting a package, the recipient used a false name to sign for the package, the recipient threw the package to the ground when the recipient spotted officers observing the recipient, defendant came to the house to get the package, and defendant admitted ownership of the package. *Jefferson v. State*, 214 So. 3d 1071, 2016 Miss. App. LEXIS 705 (Miss. Ct. App. 2016), cert. dismissed, 229 So. 3d 118, 2017 Miss. LEXIS 396 (Miss. 2017).

Evidence supported defendant's conviction of conspiracy to possess a controlled substance inside a correctional facility because (1) an officer observed defendant and another inmate stand by the exterior door to a jail's yard, bend down, and retrieve items from underneath the door; (2) an officer found a small opening that could allow someone to slip an item

through the door; and (3) officers found marijuana in envelopes in a blanket that defendant tried to pass to the other inmate when the inmates were searched as they reentered the jail. *Graham v. State*, 204 So. 3d 329, 2016 Miss. App. LEXIS 113 (Miss. Ct. App. 2016).

Evidence supported defendant's conspiracy to commit armed robbery conviction because, after defendant lost money to the victim in a dice game, defendant got in a truck with the victim, while defendant's coconspirators followed close behind as they planned on getting some money and dope from the victim, and, when the victim stopped in a driveway, a coconspirator pulled out a gun and demanded the victim's money. After the victim was shot in a struggle, one of the coconspirators fled with some cash, which the coconspirators later split. *Thomas v. State*, 180 So. 3d 756, 2015 Miss. App. LEXIS 609 (Miss. Ct. App. 2015).

Sufficient evidence existed that defendant did more than merely talk about killing the victim, and instead entered into an agreement that she would be killed; although the jury rejected a murder conviction, another defendant's testimony supported a reasonable inference that this defendant had entered into a common plan to kill the victim and knowingly intended to further that plan's purpose, and thus the evidence was sufficient to support his conviction of conspiracy to commit murder, and the conviction was not against the weight of the evidence. *Hartfield v. State*, 161 So. 3d 125, 2015 Miss. LEXIS 125 (Miss. 2015).

Sufficient circumstantial evidence supported defendant's conviction for conspiracy to distribute under Miss. Code Ann. §§ 97-1-1 (Supp. 2010) and 41-29-139 (Rev. 2009) as the evidence showed that a witness had purchased marijuana at defendant's house, that a large quantity of it was found in multiple locations throughout the house, that the house smelled strongly of it, and that digital scales and packaging materials were also found. Further, defendant admitted that the marijuana belonged to him. *Jackson v. State*, 73 So. 3d 1176, 2011 Miss. App. LEXIS 296 (Miss. Ct. App.), cert. denied, 73 So. 3d 1168, 2011 Miss. LEXIS 523 (Miss. 2011).

Verdict finding defendant guilty of selling cocaine in violation of Miss. Code Ann. § 41-29-139(a)(1) and conspiracy to sell cocaine in violation of Miss. Code Ann. § 97-1-1(a)(1) was not against the overwhelming weight of the evidence as there was testimony from several witnesses, including an accomplice, a narcotics agent, and a police officer, that defendant was involved in the drug sale. In addition, the jury was permitted to watch a video showing defendant's physical behavior during the drug sale negotiations in which defendant was shown talking to the accomplice with his hand over his mouth as the accomplice negotiated with an informant about the price of the cocaine. *Foriest v. State*, 4 So. 3d 385, 2009 Miss. App. LEXIS 36 (Miss. Ct. App. 2009).

Evidence was sufficient to sustain a conviction for conspiracy to commit armed robbery because defendant disguised himself as a woman, entered the bank with his co-defendants, and shuffled around nervously as another defendant attempted to hold up the teller with a handgun, all the while shielding his face from view. Thereafter, defendant was caught attempting to escape from the abandoned safe house and he was still wearing the same women's skirt that he wore during the attempted robbery. *Glenn v. State*, 996 So. 2d 148, 2008 Miss. App. LEXIS 584 (Miss. Ct. App. 2008).

There was sufficient evidence to uphold a conviction for conspiracy to commit armed robbery under Miss. Code Ann. § 97-1-1 where the evidence showed that defendant was in a casino with the other perpetrators, he stood behind one of them as a robbery took place, he ran out with them, and he received a portion of stolen money. *Quawrells v. State*, 938 So. 2d 370, 2006 Miss. App. LEXIS 689 (Miss. Ct. App. 2006).

Where defendant's accomplice cooperated with police and stated in a recorded conversation that defendant had come to Mississippi "to pick up drugs," the evidence was sufficient to support defendant's conviction for conspiracy to distribute marijuana. Police found twenty-seven pounds of marijuana that had been transferred to defendant's vehicle. *Walker v. State*, 911 So. 2d 998, 2005 Miss. App. LEXIS 698 (Miss. Ct. App. 2005).

Where defendant and a conspirator hid their car, attempted to remove tires from a vehicle in a car lot at two o'clock in the morning, and tried to escape when confronted by authorities, the evidence supported his conviction for conspiracy to commit grand larceny. A jury could reasonably infer that defendant lacked consent to remove the tires; the State was not required to present direct testimony that defendant lacked consent. *Brownlee v. State*, 912 So. 2d 1000, 2005 Miss. App. LEXIS 187 (Miss. Ct. App. 2005).

Court properly denied defendant's motion for a judgment notwithstanding the verdict after he was convicted of conspiracy to commit armed robbery because there was nothing to indicate an insufficiency of evidence for fair-minded jurors to convict him of conspiracy pursuant to Miss. Code Ann. § 97-1-1(a)-(h). One witness offered direct testimony as to having seen defendant place a stocking over his face before the commission of the crime; store clerk also identified defendant as one of her assailants. *Young v. State*, 910 So. 2d 26, 2005 Miss. App. LEXIS 5 (Miss. Ct. App. 2005).

There was sufficient evidence to support defendant's conviction under Miss. Code Ann. § 41-29-313 and for conspiracy given that defendant had purchased an unusually large number of pseudoephedrine packages, defendant attempted to conceal the packages from police, and defendant admitted that defendant was requested to purchase the packages by another individual in return for cash when defendant knew that the individual had been involved in the manufacture of methamphetamine. *Hunt v. State*, 863 So. 2d 990, 2004 Miss. App. LEXIS 13 (Miss. Ct. App. 2004).

Although a witness was unable to testify about the correct color of a get-away car, there was sufficient evidence to support convictions for armed robbery and conspiracy to commit armed robbery based on the identification of witnesses and the testimony of another perpetrator. *Quinn v. State*, 873 So. 2d 1033, 2003 Miss. App. LEXIS 1006 (Miss. Ct. App. 2003), cert. denied, 873 So. 2d 1032, 2004 Miss. LEXIS 597 (Miss. 2004).

Defendant and the first co-defendant entered the car, the first co-defendant took

the victim's money at gunpoint which was divided equally, a second co-defendant then shot and killed the victim with the gun defendant had brought, and defendant and the first co-defendant testified that they had planned the robbery, thus, the evidence was sufficient to support defendant's convictions for conspiracy to commit robbery with a deadly weapon, robbery with a deadly weapon, and manslaughter. *Harrington v. State*, 859 So. 2d 1054, 2003 Miss. App. LEXIS 1084 (Miss. Ct. App. 2003).

Defendant picked up drugs at a house, defendant in truck was stopped by the trooper, the trooper discovered the cocaine under the seat, and the truck belonged to defendant; thus, the evidence showed that defendant constructively possessed the drugs, that defendant was guilty of conspiracy to possess cocaine and of possession of cocaine with intent to sell, and that the trial court did not err in denying defendant's motion for judgment notwithstanding the verdict or motion for new trial. *Smith v. State*, 839 So. 2d 489, 2003 Miss. LEXIS 65 (Miss. 2003).

Evidence that the defendant gave a gun to another man who had said he wanted to shoot the victim, told the man the victim was outside, was in the alley with the man who shot the victim when the victim was shot, was seen running from the alley with the other man after the shooting while they both carried guns, and asked the other man "Did you get him?" was sufficient to support a conviction for conspiracy to commit murder. *Brown v. State*, 796 So. 2d 223, 2001 Miss. LEXIS 176 (Miss. 2001).

Evidence was sufficient to establish a conspiracy to commit murder where a witness testified that (1) before the shooting, while he, the defendant, and a coconspirator were together, the coconspirator asked the defendant, "Are you going to do that?" and the defendant responded, "Yeah, I'm fixing to do that," and (2) after the shooting, the coconspirator asked "did you do that?" and the defendant responded "Yeah, I got that m*****f*****." *Ellis v. State*, 778 So. 2d 114, 2000 Miss. LEXIS 242 (Miss. 2000).

Evidence was sufficient to establish a conspiracy to sell cocaine where (1) a

confidential informant testified that upon entering the coconspirator's residence, he was directed to a bedroom, where he found the defendant and the coconspirator, (2) the coconspirator then asked the informant what he wanted, and the informant responded that he wanted to purchase two rocks of crack cocaine, (3) the defendant then retrieved a matchbox and directed the coconspirator to "serve" him, (4) the informant then purchased two rocks of cocaine for \$25, and (5) a police officer listened to the transaction over a radio transmitter with which the informant had been equipped and testified to the events. *Hervey v. State*, 764 So. 2d 457, 2000 Miss. App. LEXIS 95 (Miss. Ct. App. 2000).

Testimony of a co-conspirator was not too late to establish the conspiracy where there was sufficient prior evidence of the existence of a conspiracy based on the testimony of the victims, the arresting officer's investigation, and defendant's own statement. *Applewhite v. State*, 753 So. 2d 1039, 2000 Miss. LEXIS 1 (Miss. 2000).

Conviction reversed where evidence was insufficient to show a recognition on the part of the two sets of conspirators that they were entering into a common plan, knowingly intending to further its common purpose. *Lee v. State*, 756 So. 2d 744, 1999 Miss. LEXIS 382 (Miss. 1999).

Evidence was sufficient to establish a conspiracy to defraud a conservatorship where (1) the defendant and others received what appeared to be an excessive and unreasonable amount of money from the conservatorship, (2) the defendant's decisions with regard to expenditures for security were not warranted, especially as paying family and friends \$25 per hour for questionable security was not justified, and (3) an attorney drafted and submitted petitions and orders for the defendant's unjustifiable expenditures, and a chancellor with whom the defendant had a close personal relationship placed his stamp of approval and the appearance of legality on these conservatorship expenditures by signing the orders. *Morgan v. State*, 741 So. 2d 246, 1999 Miss. LEXIS 256 (Miss. 1999).

Evidence was insufficient to support a conviction for conspiracy to sell a con-

trolled substance arising from the introduction by the defendant's alleged coconspirator of a confidential informant to the defendant and negotiations for a sale of marijuana since one cannot be convicted of conspiring with a confidential informant and since there simply was no evidence that the defendant knew that his alleged coconspirator would bring potential customers to him in order to facilitate the sale of illegal drugs. *McDougle v. State*, 721 So. 2d 660, 1998 Miss. App. LEXIS 1128 (Miss. Ct. App. 1998).

As long as the defendant was furnishing the capital for the acquisition of illegal drugs and the drugs were being purchased at her specific direction or request, she came into constructive possession of the drugs at the time of purchase and was the "owner" of the drugs for purposes of analysis of whether she conspired to commit a crime. *Martin v. State*, 726 So. 2d 1210, 1998 Miss. App. LEXIS 1124 (Miss. Ct. App. 1998).

Evidence was insufficient to support a conviction for conspiracy to sell a controlled substance where a witness admitted that he knew that a third party wanted to buy marijuana and that the defendant was in the business of selling marijuana, but there was no evidence that the defendant knew that the witness would bring potential customers to him in order to facilitate a sale of marijuana. *McDougle v. State*, 721 So. 2d 660, 1998 Miss. App. LEXIS 1128 (Miss. Ct. App. 1998).

Defendant's convictions for sale of controlled substance and conspiracy to sell controlled substance were supported by evidence that defendant sold two rocks of crack cocaine to undercover informant and that defendant conspired with relative to sell, and did sell, two rocks of crack cocaine to undercover officer next day. *Herring v. State*, 691 So. 2d 948, 1997 Miss. LEXIS 37 (Miss. 1997).

Sole evidence of conspiracy, that juvenile defendants went with other boys to "mess with" victim, was insufficient to support their convictions for conspiracy to commit murder; during period defendants and others threw rocks at victim and kicked him, one of boys in group left and returned with gun, with which he shot

victim, and he thereafter pointed gun at one of defendants and another boy because "he knew [they were] gon' to tell it." *Franklin v. State*, 676 So. 2d 287, 1996 Miss. LEXIS 308 (Miss. 1996).

The evidence was insufficient to support a conviction for conspiracy to sell cocaine where the defendant directed the buyer to the seller's house, accompanied the buyer to the door, knocked on the door, told the seller that they wanted to purchase cocaine, and remained with the buyer and seller while the sale took place, but there was no evidence that the seller knew that the defendant would bring the buyer to his home; although an agreement to sell cocaine could possibly be inferred, there was insufficient evidence of the alleged conspirators' recognition that they were "entering into a common plan and knowingly intended to further its common purpose." *Johnson v. State*, 642 So. 2d 924, 1994 Miss. LEXIS 443 (Miss. 1994).

The uncorroborated testimony of an alleged accomplice was insufficient to support a conviction for conspiracy to manufacture marijuana where the accomplice contradicted himself concerning payments allegedly made to him by the defendant, and another witness' testimony substantially impeached that of the accomplice; although the other witness had reasons for bias and a fair-minded juror could reject his testimony as unconvincing, it could not be discarded so completely as to eliminate reasonable doubt, particularly when combined with the accomplice's self-contradictory statements. *Flanagan v. State*, 605 So. 2d 753, 1992 Miss. LEXIS 449 (Miss. 1992).

Evidence that a police officer, while standing outside an apartment door, overheard a conversation between 3 people inside the apartment concerning a sale of cocaine, was insufficient to support a conviction for conspiracy to distribute the cocaine where the statements overheard by the officer were not identified as coming from any particular person. *Mickel v. State*, 602 So. 2d 1160, 1992 Miss. LEXIS 203 (Miss. 1992).

The evidence was insufficient to support a conviction of conspiracy with the intent to distribute cocaine where the only evidence of an agreement were statements

made by unidentified occupants of an apartment—"pass me the pipe," "we have got to get this stuff sold-I need the money," and "there is plenty more where that came from"—which were heard by a police detective just before he entered the apartment, since this evidence did not prove that the defendant himself was engaged in a conspiracy to distribute cocaine, so that only surmise of a criminal conspiracy existed. *Thomas v. State*, 591 So. 2d 837, 1991 Miss. LEXIS 971 (Miss. 1991).

The evidence was sufficient to support a conviction of conspiracy to commit perjury with respect to the death of an infant at the defendant's apartment, where there was testimony that the defendant stated that he didn't want the police to know that he and a friend had been at the apartment, the defendant's daughter, who also resided at the apartment, did not reveal to the police that the defendant had been at the apartment, the daughter stated that she had agreed to stick to that story and she continued in that agreement when she testified before the grand jury, the other resident of the apartment testified that the defendant did not want the police to know that he and a friend had been at the apartment, she did not tell the police that they had been there, and she understood that she and the others had an agreement not to mention that the defendant and his friend had been at the apartment after the baby's death had been discovered. *Smallwood v. State*, 584 So. 2d 733, 1991 Miss. LEXIS 405 (Miss. 1991).

The evidence was insufficient to support a finding that the defendant conspired with her sister to sell cocaine where the only evidence regarding the sister showed that she was present at the time the police searched a trailer she owned and found residues of cocaine, she screamed when the police entered the trailer, she claimed that money found during the search was hers, and a broken test tube with cocaine residue was found in her purse; none of this evidence established an agreement, nor did it imply an agreement, since evidence that the defendant sold cocaine and that her sister may have possessed cocaine for personal use left too much to the realm of speculation and conjecture. *Clayton v. State*, 582 So. 2d 1019, 1991 Miss. LEXIS 366 (Miss. 1991).

The evidence was insufficient to support a conspiracy conviction stemming from attempts to influence jurors, where the only evidence which suggested that the defendant was a member of the conspiracy was that she accompanied her husband when he discussed the conspiracy with a coconspirator, and it was possible that the phraseology used was so general that a disinterested or unknowledgeable bystander would not have understood specifically what they were talking about. *King v. State*, 580 So. 2d 1182, 1991 Miss. LEXIS 319 (Miss. 1991).

The evidence was sufficient to support convictions of conspiracy and bribery stemming from attempts to influence jurors, where the secretary for one of the defendant's attorneys testified that the defendant did some of the talking when he and his father asked her to type up a list containing the jurors' names and that the defendant took the list from her and made photocopies of it, a witness testified that the defendant drove his father to the witness' home where the father discussed the scheme to bribe a juror while the defendant listened, a juror testified that during the trial the defendant and his father entered the store where she worked, though they left without speaking to her, and an investigator testified that he discovered the photocopies of the jury list under the seat of the defendant's truck. *King v. State*, 580 So. 2d 1182, 1991 Miss. LEXIS 319 (Miss. 1991).

The evidence was sufficient to support a conviction for conspiracy, in spite of the defendant's argument that the evidence failed to prove beyond a reasonable doubt that he and the alleged co-conspirator ever agreed to commit a crime or were even acquainted and his suggestion that there was a lack of seriousness in his intentions, where the defendant made substantially incriminating statements to the sheriff, the record included a tape recording of the defendant's conversations with a friend who was allegedly engaged to kill the victim, and the alleged co-conspirator appeared at the time suggested by the plan to find the victim's body. *Mitchell v. State*, 572 So. 2d 865, 1990 Miss. LEXIS 722 (Miss. 1990).

The evidence was insufficient to support a verdict for conspiracy to commit robbery

at a convenience store because there was neither proof of common design nor understood purpose to commit a robbery where the evidence showed only that there were 4 people riding in a car, the owner of the car testified that he stopped at the convenience store in order to let one man buy beer and to let the defendant use the rest room, and he testified that there were no conversations among the 4 before stopping at the store. *Jones v. State*, 567 So. 2d 1189, 1990 Miss. LEXIS 559 (Miss. 1990).

Defendant's conviction of conspiracy to murder her husband was supported by evidence showing that up to 2 days before her husband disappeared she had been living with an alleged coconspirator; that she had kept letters written to her by the alleged coconspirator stating that he wished the husband could be taken out of the picture; that a couple days before the husband's death she gave to the alleged coconspirator a gun her husband had bought for her, and had not questioned the coconspirator about the gun after her husband's disappearance; and on the night when the husband was last seen alive, she had called the husband and told him that her car had stalled at a place not far from where the husband's body was found 2 days later. *Peoples v. State*, 501 So. 2d 424, 1987 Miss. LEXIS 2284 (Miss. 1987).

Defendant's conviction of conspiracy to possess heroin was sustained by evidence showing that she had traveled 2,000 miles from San Diego, California to Jackson, Mississippi with codefendant, that a telephone call to her parents' home notified co-defendant of the arrival of the heroin, that she waited in the car while co-defendant picked up heroin, and that her purse contained a substance used as cutting agent for heroin. *Davis v. State*, 485 So. 2d 1055, 1986 Miss. LEXIS 2778 (Miss. 1986).

15. —Sufficiency; conspiracy.

Sufficient evidence was presented to allow a jury to infer that a conspiracy existed; co-defendant one testified that he, defendant, and co-defendant two had sex with the victim at some point throughout the night and that it happened all at the same time, and the evidence showed the victim's surprise when learning of the

incident, as well as the attempt by defendant and co-defendants to explain and cover-up the incident. *Pugh v. State*, 270 So. 3d 949, 2018 Miss. App. LEXIS 455 (Miss. Ct. App. 2018).

State presented sufficient evidence for fair-minded jurors to convict defendant of conspiracy to commit armed robbery because the evidence clearly showed two men working in agreement with each other to rob a store; the men entered the store together, held up the employees at gunpoint, took the money, and ran off at the same time. *Lenoir v. State*, 224 So. 3d 85, 2017 Miss. LEXIS 79 (Miss. 2017).

Evidence was sufficient to convict defendant of conspiracy because one of the co-conspirator's was seen in defendant's vehicle armed with a shotgun; she followed the instructions of another co-conspirator instructing her to block the road after the victims entered, ensuring that the victims would be exposed to an attack; she drove one of the co-conspirator's away from the scene; and she returned later to look for one of the victims while evidencing hostile intent. *Hayes v. State*, 168 So. 3d 1065, 2013 Miss. App. LEXIS 744 (Miss. Ct. App. 2013), cert. denied, 2014 Miss. LEXIS 297 (Miss. June 12, 2014), cert. denied, 140 So. 3d 940, 2014 Miss. LEXIS 296 (Miss. 2014).

Defendant's conspiracy conviction was not against the overwhelming weight of the evidence because there was strong circumstantial evidence of a prior understanding to kill in the coordinated actions of the participants. *Hayes v. State*, 168 So. 3d 1065, 2013 Miss. App. LEXIS 744 (Miss. Ct. App. 2013), cert. denied, 2014 Miss. LEXIS 297 (Miss. June 12, 2014), cert. denied, 140 So. 3d 940, 2014 Miss. LEXIS 296 (Miss. 2014).

Sufficient evidence supported defendant's conviction for conspiracy to commit murder, even though there was no express agreement between defendant and two co-defendants, because the evidence showed that defendant and co-defendants, while engaged in different acts, all pursued the common object of the victim's death, and the State was not required to prove the existence of an express agreement to murder the victim. *Graham v. State*, 120 So. 3d 382, 2013 Miss. LEXIS 339 (Miss. 2013).

Evidence supported defendant's conviction of conspiracy, as defendant admitted at trial that defendant intended to cook methamphetamine, in a bedroom where defendant's associates were sleeping police officers found 156 dosage units of pseudoephedrine, and in one associate's truck officers found a receipt for the purchase of pseudoephedrine. *Edmonds v. State*, 125 So. 3d 98, 2013 Miss. App. LEXIS 529 (Miss. Ct. App. 2013).

Weight of the evidence was sufficient to convict defendant of conspiracy to commit arson in violation of Miss. Code Ann. § 97-1-1 and attempted arson in violation of Miss. Code Ann. § 97-17-9 because an accomplice's testimony that he and defendant entered into an agreement for him to burn the victim's vehicle was uncontradicted; in addition to the testimony of the accomplice was the of other witnesses who provided additional evidence of defendant's animosity towards the victim. *Bradford v. State*, 102 So. 3d 312, 2012 Miss. App. LEXIS 505 (Miss. Ct. App. 2012).

Evidence was sufficient to convict defendant of conspiracy to commit arson in violation of Miss. Code Ann. § 97-1-1 and attempted arson in violation of Miss. Code Ann. § 97-17-9 because the jury could conclude from an accomplice's testimony that he and defendant entered into an agreement for him to burn the victim's vehicle; the accomplice told the same basic story to the police that he told to the jury, and nothing in the record indicated that the accomplice's testimony was unreasonable, inconsistent, or impeached. *Bradford v. State*, 102 So. 3d 312, 2012 Miss. App. LEXIS 505 (Miss. Ct. App. 2012).

Defendant's conviction for conspiracy under Miss. Code Ann. § 97-1-1(i) was proper because there was direct evidence that defendant and two others walked into the store, while one served as lookout, one took beer, and the other took money. The three argued over who had whose back while robbing the store and later, the three divided the money. *Taylor v. State*, 62 So. 3d 962, 2011 Miss. LEXIS 272 (Miss. 2011).

Evidence was sufficient to support defendant's conviction, pursuant to Miss. Code Ann. § 97-1-1(1)(a), for conspiracy to

bring a controlled substance into a jail; defendant's letters to his girlfriend clearly indicated such a conspiracy and showed that the girlfriend was trying to comply with defendant's request for the contraband. *Green v. State*, 25 So. 3d 1086, 2010 Miss. App. LEXIS 3 (Miss. Ct. App. 2010).

Evidence, including the testimony of defendant's co-conspirator and other witnesses, as well as written statement by defendant and physical evidence, was sufficient to support defendant's conviction of conspiracy to sell a controlled substance, in violation of Miss. Code Ann. § 97-1-1. *Anderson v. State*, 23 So. 3d 1087, 2009 Miss. App. LEXIS 842 (Miss. Ct. App. 2009).

Defendant's convictions for uttering a forgery under Miss. Code Ann. § 97-21-1 and for conspiracy under Miss. Code Ann. § 97-1-1 were affirmed because there was sufficient evidence for the jury to find that defendant possessed the forged checks and attempted to pass these checks off as true and although the co-conspirator was an admitted drug addict, his testimony was not self-contradictory or thoroughly impeached. *Nelson v. State*, 32 So. 3d 534, 2009 Miss. App. LEXIS 601 (Miss. Ct. App. 2009), cert. denied, 31 So. 3d 1217, 2010 Miss. LEXIS 186 (Miss. 2010).

Evidence was sufficient that defendant possessed and conspired to possess illegal amounts of pseudoephedrine intending to use them in an unlawful manner in violation of Miss. Code Ann. 97-1-1(a) because his passenger had an illegal amount of pseudoephedrine, and defendant admitted that he drove her to purchase pills to sell for the eventual manufacture of methamphetamine. *Gales v. State*, 29 So. 3d 65, 2009 Miss. App. LEXIS 629 (Miss. Ct. App. 2009).

Defendant's conviction for conspiracy to commit capital murder was proper pursuant to Miss. Code Ann. § 97-1-1(1)(a) because a witness testified that he scouted the victims' property, arranged a meeting between defendant and another individual, and participated with that individual in an attempt to murder the victims. *Vickers v. State*, 994 So. 2d 200, 2008 Miss. App. LEXIS 208 (Miss. Ct. App.), cert. denied, 998 So. 2d 1010, 2008 Miss. LEXIS 675 (Miss. 2008).

Because there was sufficient evidence to support a conviction on the conspiracy to possess marijuana with intent to sell more than five kilograms of marijuana, the necessary nexus existed to link defendant to the possession of the 25 pounds of marijuana bricks found in the co-conspirator's vehicle; thus, there was sufficient evidence to support her conviction for possession of more than five kilograms of marijuana. *Williams v. State*, 984 So. 2d 989, 2007 Miss. App. LEXIS 376 (Miss. Ct. App. 2007), cert. dismissed, 2008 Miss. LEXIS 332 (Miss. June 26, 2008).

Evidence was sufficient to convict defendant of conspiracy to possess marijuana with intent to sell more than five kilograms of marijuana under Miss. Code Ann. § 97-1-1(a) because a co-conspirator's vehicle contained more than 25 pounds of marijuana, the mere amount of marijuana was sufficient to support a charge of possession with intent to transfer, sell, or distribute more than five kilograms of marijuana, and defendant blocked a deputy's attempt to pull over a co-conspirator's vehicle. *Williams v. State*, 984 So. 2d 989, 2007 Miss. App. LEXIS 376 (Miss. Ct. App. 2007), cert. dismissed, 2008 Miss. LEXIS 332 (Miss. June 26, 2008).

Evidence was sufficient to convict defendant of conspiracy where witness testimony indicated that defendant and another person formed a union of the minds intent on selling cocaine to the agent, and defendant's conduct amounted to circumstantial evidence of an agreement with the other person to sell cocaine. *Dear v. State*, 960 So. 2d 542, 2006 Miss. App. LEXIS 931 (Miss. Ct. App. 2006), cert. denied, 959 So. 2d 1051, 2007 Miss. LEXIS 396 (Miss. 2007).

State's theory of the case was that defendant and the driver of the car that pulled into the victim's driveway had engaged in a prior conspiracy to steal the victim's truck rims, but there was no evidence of a "union of the minds" of defendant and the driver because the evidence showed that (1) when the car pulled into the driveway, defendant ran and hid behind the house and, clearly, if the two parties had been acting in concert defendant would have recognized his co-con-

spirator and not hid; (2) defendant left on foot and not in the car, even though the car was still in the driveway; and (3) although the rims were removed from the truck, defendant made no attempt to put them into the car that was in the driveway; thus, although the appearance of the car in the victim's driveway was somewhat puzzling, a finding that its appearance was due to the furtherance of a conspiracy to steal the rims off of the truck would be an impermissible stretch. Therefore, the evidence was insufficient to support defendant's conviction for conspiracy to commit grand larceny. *Smith v. State*, 881 So. 2d 908, 2004 Miss. App. LEXIS 401 (Miss. Ct. App. 2004).

16. —Other.

Evidence against defendant did not preponderate so heavily against the verdict that the failure to grant a new trial would sanction an unconscionable injustice because the weight of the evidence suggested that store employees should have recognized defendant's voice during the commission of the robbery; though the employees knew defendant from prior encounters, the robber alleged to be defendant wore a hooded sweatshirt partially covering his face when he entered the dimly lit store. *Lenoir v. State*, 224 So. 3d 85, 2017 Miss. LEXIS 79 (Miss. 2017).

In a case where defendant father and defendant adopted son were convicted of conspiracy to commit sexual battery, Miss. Code Ann. §§ 97-1-1 and 97-3-95(1)(d), sexual battery, Miss. Code Ann. § 97-3-95(1)(d), and contributing to the delinquency of a minor, Miss. Code Ann. § 97-5-39(1), none of the issues raised by defendant father rose to the level of reversible error either standing alone or when considered together as the evidence supported the finding that defendant father was the ringleader of the abominable enterprise and he failed to demonstrate any procedural or substantive errors that warranted reversal; thus, defendant father's convictions and sentences were affirmed. *King v. State*, 857 So. 2d 702, 2003 Miss. LEXIS 450 (Miss. 2003).

Conviction of conspiracy was not supported by evidence which, although raising strong suspicions that defendant and

others were illegally involved in drug related activities, failed to show that they had intended or agreed to sell, barter, transfer, and distribute marijuana. *McCray v. State*, 486 So. 2d 1247, 1986 Miss. LEXIS 2888 (Miss. 1986).

17. Practice and procedure; trial.

Issue was never framed for the jury to determine appellant's guilt or lack thereof as to the charge of conspiracy. Appellant's contention that the crime of conspiracy to commit armed robbery was presented to the jury and subsequently dismissed by the jury in his first trial such that double jeopardy and collateral estoppel would attach was unfounded. *Newell v. State*, 180 So. 3d 701, 2015 Miss. App. LEXIS 236 (Miss. Ct. App. 2015).

Defendants were properly convicted of conspiracy to commit armed robbery because defendant's did not fail to receive a fair and impartial trial due to juror misconduct. *James v. State*, 146 So. 3d 985, 2014 Miss. App. LEXIS 66 (Miss. Ct. App.), cert. denied, 146 So. 3d 981, 2014 Miss. LEXIS 463 (Miss. 2014).

Defendants were properly convicted of conspiracy to commit armed robbery because the form of the verdict constituted an intelligent answer to the issues submitted to the jury and allowed the jury's intent to be understood in a reasonably clear manner. *James v. State*, 146 So. 3d 985, 2014 Miss. App. LEXIS 66 (Miss. Ct. App.), cert. denied, 146 So. 3d 981, 2014 Miss. LEXIS 463 (Miss. 2014).

Trial court had jurisdiction over conspiracy charge, although defendant allegedly agreed with coconspirator to rob victim while they were in Louisiana, where victim was robbed in Mississippi. *Taylor v. State*, 682 So. 2d 359, 1996 Miss. LEXIS 532 (Miss. 1996).

In a prosecution for capital murder and conspiracy to commit capital murder, the trial court committed reversible error in failing to place the initial burden on the State to establish a prima facie case of racial discrimination in the defendant's use of his peremptory challenges, before concluding that the defendant failed to offer a race-neutral reason for challenging one of the jurors, since the defendant was arbitrarily and erroneously denied the use

of one of his peremptory challenges, and the composition of the jury was directly altered as a result. *Colosimo v. Senatobia Motor Inn*, 662 So. 2d 552, 1995 Miss. LEXIS 479 (Miss. 1995).

Since conspiracy and burglary are separate and distinct crimes requiring proof of different elements, a defendant did not have a double jeopardy claim based on the prosecution of these 2 crimes arising from the same incident, despite the fact that the prosecution chose to prosecute the defendant for these crimes at separate trials. *House v. State*, 645 So. 2d 931, 1994 Miss. LEXIS 537 (Miss. 1994).

At trial of charge of conspiracy to distribute cocaine, a series of questions posed by the prosecutor on cross-examination of defendant as to his involvement with selling cocaine did not require the trial court to grant a mistrial on its own motion, where the prosecutor stayed within the latitude allowed for cross-examination and the trial was conducted in conformity with the law. *Temple v. State*, 498 So. 2d 379, 1986 Miss. LEXIS 2834 (Miss. 1986).

In an action to enjoin enforcement of the statute, the court, in lieu of injunctive relief, declared the rights of complainants to the use of public facilities. *Clark v. Thompson*, 206 F. Supp. 539, 1962 U.S. Dist. LEXIS 3769 (S.D. Miss. 1962), *aff'd*, 313 F.2d 637, 1963 U.S. App. LEXIS 5965 (5th Cir. Miss. 1963).

In an action for an injunction restraining defendants from enforcing or executing subsection (1) of Code 1942, § 2046.5, subsection (7) of this section [Code 1942, § 2056] and Code 1942, § 4065.3 against the plaintiffs by preventing them from using public recreational facilities on an integrated and equal basis solely on the ground of race and color, the federal three-judge statutory court would be dissolved and the case left for decision of a single federal district judge, where it appeared that what plaintiffs actually sought was to attack a pattern or practice rather than the constitutional validity of a statute or actions under it. *Clark v. Thompson*, 204 F. Supp. 30, 1962 U.S. Dist. LEXIS 3102 (S.D. Miss. 1962).

18. —Jury instructions.

Because the record provided evidence corroborating an accomplice's testimony,

the trial court was not required to instruct the jury to regard the accomplice's testimony with great caution and suspicion. *James v. State*, 146 So. 3d 985, 2014 Miss. App. LEXIS 66 (Miss. Ct. App.), *cert. denied*, 146 So. 3d 981, 2014 Miss. LEXIS 463 (Miss. 2014).

Trial court properly refused a requested instruction because, reading all the given instructions together, the jury was fairly, fully, and accurately instructed regarding its duty to consider and weigh the credibility of witness testimony. *James v. State*, 146 So. 3d 985, 2014 Miss. App. LEXIS 66 (Miss. Ct. App.), *cert. denied*, 146 So. 3d 981, 2014 Miss. LEXIS 463 (Miss. 2014).

Trial court did not err by refusing a proposed theory-of-the-case instruction because the instruction was redundant. *James v. State*, 146 So. 3d 985, 2014 Miss. App. LEXIS 66 (Miss. Ct. App.), *cert. denied*, 146 So. 3d 981, 2014 Miss. LEXIS 463 (Miss. 2014).

In a prosecution for conspiracy to commit grand larceny involving the stealing of a portable generator, a requested instruction, which stated that before the defendant could be found guilty of conspiracy, the evidence had to show that the defendants "did willfully, unlawfully and feloniously conspire, confederate and agree together and with each other to unlawfully commit grand larceny by stealing a generator . . ." was properly denied since it misstated the law in that it stated that the defendant must have agreed to steal the generator by a more formal agreement than is required. *Rose v. State*, 556 So. 2d 728, 1990 Miss. LEXIS 37 (Miss. 1990).

On trial of felony charge of conspiring to distribute more than one kilogram of marijuana, giving of instructions which would allow the jury to find defendants guilty based on acts in furtherance of the conspiracy without requiring a separate finding that they knowingly became a part of the agreement to commit the crime, while erroneous, did not require reversal, where defendants failed to object, and the deficiency of the instructions was cured by other instructions given. *Gray v. State*, 487 So. 2d 1304, 1986 Miss. LEXIS 2441 (Miss. 1986).

Giving of conspiracy instruction which allows jury to convict alleged conspirator

upon finding that conspirator has conspired only with person legally precluded from coconspirator status, rather than with coconspirator, is reversible error. *James v. State*, 481 So. 2d 805, 1985 Miss. LEXIS 2358 (Miss. 1985).

Where evidence also shows an assault and battery, an instruction permitting a conviction thereon is error. *King v. State*, 123 Miss. 532, 86 So. 339, 1920 Miss. LEXIS 54 (Miss. 1920).

19. Penalties.

Circuit court erred when it found that a truck had been forfeited, when defendant and a codefendant had cocaine in their possession while they were traveling in the truck, because the forfeiture of the truck was an excessive and grossly disproportionate fine for the non-adjudicated offense of conspiracy to possess cocaine, as neither the instrumentality test, nor the proportionality test favored forfeiture. *One (1) 2011 Chevrolet Silverado 1500 v. Panola County Narcotics Task Force*, 169 So. 3d 967, 2014 Miss. App. LEXIS 682 (Miss. Ct. App. 2014), cert. denied, 168 So. 3d 962, 2015 Miss. LEXIS 370 (Miss. 2015).

In a case where defendant father and defendant adopted son were convicted of conspiracy to commit sexual battery, Miss. Code Ann. §§ 97-1-1 and 97-3-95(1)(d), sexual battery, Miss. Code Ann. § 97-3-95(1)(d), and contributing to the delinquency of a minor, Miss. Code Ann. § 97-5-39(1), defendant father was sentenced to five years and a \$ 5,000 fine on the conspiracy count; 30 years and a \$ 10,000 fine on the sexual battery count; and one year and a \$ 1,000 fine on the contributing to the delinquency of a minor charge and the trial court ordered that the prison time be served consecutively; however, nothing in the record or presented by defendant father warranted reversal or reduction of his sentence because his sentence was within the statutory limits and it was a just punishment for the despicable crimes for which he was found guilty by a fair and impartial jury. *King v. State*, 857 So. 2d 702, 2003 Miss. LEXIS 450 (Miss. 2003).

Sentences of 20 years for conspiracy to sell controlled substance and 30 years on

each of two counts of sale of controlled substance, all to run consecutively, did not constitute cruel and unusual punishment, given defendant's extensive juvenile record that began when he was ten years old. *Herring v. State*, 691 So. 2d 948, 1997 Miss. LEXIS 37 (Miss. 1997).

No minimum sentence exists for crime of conspiracy. *Simpson v. State*, 678 So. 2d 712, 1996 Miss. LEXIS 413 (Miss. 1996).

Defendant could not be sentenced to greater penalty than 5 years and/or \$5,000 fine as allowed under general conspiracy statutory provision, and could not be sentenced for conspiracy as first-offender to sell greater than one ounce but less than one kilogram of marijuana, despite defendant's involvement in sale of more than one ounce but less than one kilogram of marijuana, where indictment as to charged conspiracy was silent as to quantity of marijuana involved. *Clubb v. State*, 672 So. 2d 1201, 1996 Miss. LEXIS 143 (Miss. 1996).

Section 41-29-139(a)(1) is merely the provision that defines the prohibitive acts and § 41-29-139(b)(1) is the sentencing provision for subsection (a); the penalty section for a violation of section (a)(1) is in section (b)(1). The discrepancy in the code section is due to the fact that the conspiracy statute section dealing with enhanced sentencing for controlled substances—this section—directly refers to the sentencing provision under § 41-29-139. Thus, a sentence of 20 years imprisonment with 5 years suspended and a fine of \$10,658.50 did not exceed that provided for in this section where the defendant was convicted of conspiracy to possess cocaine with intent to sell, barter, transfer or distribute, since this section provides for a fine not to exceed \$500,000 and/or imprisonment for not more than 20 years where the crime conspired to be committed is a violation of § 41-29-139(b)(1). *Lane v. State*, 562 So. 2d 1235, 1990 Miss. LEXIS 234 (Miss. 1990).

Trial court's imposition of 10 year prison sentence and a \$10,000 fine on a defendant convicted of conspiracy to sell cocaine, who contended that he had had an opportunity to plead guilty to the charge for which he was convicted, and in return receive a recommendation for a 3 year

sentence with no fine, was not a prescribed enhancement of sentence because defendant exercised his right to a jury trial where the record reflected that the trial judge, who was unaware of the guilty plea negotiation, remained circumspect and unbiased. *Temple v. State*, 498 So. 2d 379, 1986 Miss. LEXIS 2834 (Miss. 1986).

20. Sentencing.

In a case where defendant was convicted of several crimes relating to the arson and burglary of a residence, his double jeopardy rights were not violated due to the fact that some of the elements of the crimes overlapped; each of the crimes involved required proof of an additional fact that the other did not. *McCollins v. State*, 952 So. 2d 305, 2007 Miss. App. LEXIS 167 (Miss. Ct. App. 2007).

Trial court did not err by imposing sentences of five years for conspiracy, 25 years for burglary of a dwelling, five years for grand larceny, and 20 years for first degree arson, as these were all the maximum sentences allowed for these crimes. *McCollins v. State*, 952 So. 2d 305, 2007 Miss. App. LEXIS 167 (Miss. Ct. App. 2007).

Appellate court affirmed the denial of an inmate's motion for post-conviction relief on the grounds that her sentences were excessive as the sentences imposed for her conviction for Miss. Code Ann. § 97-1-1 were within the statutory range. *Lee v. State*, 918 So. 2d 87, 2006 Miss. App. LEXIS 23 (Miss. Ct. App. 2006).

Where defendant was convicted for conspiracy to commit grand larceny based on evidence that he and a conspirator attempted to remove tires from a vehicle in a car lot at two o'clock in the morning, the trial court properly sentenced defendant to five years, with three suspended. His sentence was clearly within statutory limits and not disproportionate to the crimes

for which he was convicted. *Brownlee v. State*, 912 So. 2d 1000, 2005 Miss. App. LEXIS 187 (Miss. Ct. App. 2005).

Where appellant pled guilty to the armed robbery of a fast food restaurant, and his accomplice pled guilty to conspiracy to commit armed robbery for driving the "getaway car;" the trial court did not err in sentencing appellant to seven years while his accomplice only received an effective sentence of one year. The men performed different tasks in the crime. *Edmond v. State*, 906 So. 2d 798, 2004 Miss. App. LEXIS 1135 (Miss. Ct. App. 2004).

Maximum sentence allowed by law for conspiracy to manufacture methamphetamine is 20 years in prison and a fine of \$ 500,000. Hence, defendant's sentence of 20 years in prison, with 12 years suspended and five years of post-release supervision, upon his plea of guilty to conspiracy to manufacture methamphetamine, did not exceed the statutory minimum punishment. *Sweat v. State*, 910 So. 2d 12, 2004 Miss. App. LEXIS 1110 (Miss. Ct. App. 2004), *aff'd* in part and *rev'd* in part, 912 So. 2d 458, 2005 Miss. LEXIS 661 (Miss. 2005).

Defendant's sentence after pleading guilty to one count of sale of a controlled substance and one count of conspiracy was proper where his sentence was only one-fifth of the maximum permitted, Miss. Code Ann. §§ 41-29-139(b)(1), 97-1-1(h); further, he failed to object to the sentence imposed upon him by the trial court and was attempting to attack his conspiracy and sale convictions in one post-conviction filing that was not permitted, Miss. Code Ann. § 99-39-9(2), therefore, his claim was not properly presented and was procedurally barred. *McMinn v. State*, 867 So. 2d 268, 2004 Miss. App. LEXIS 187 (Miss. Ct. App. 2004).

RESEARCH REFERENCES

ALR.

Criminal conspiracy between spouses. 46 A.L.R.2d 1275.

Conviction or acquittal of attempt to

commit particular crime as bar to prosecution for conspiracy to commit same crime, or vice versa. 53 A.L.R.2d 622.

When does statute of limitations begin

to run against civil action or criminal prosecution for conspiracy. 62 A.L.R.2d 1369.

Criminal conspiracies as to gambling. 91 A.L.R.2d 1148.

Admissibility of statements of coconspirators made after termination of conspiracy and outside accused's presence. 4 A.L.R.3d 671.

Jurisdiction to prosecute conspirator who was not in state at time of substantive criminal act, for offense committed pursuant to conspiracy. 5 A.L.R.3d 887.

Impossibility of consummation of substantive crime as defense in criminal prosecution for conspiracy or attempt to commit crime. 37 A.L.R.3d 375.

Necessity and sufficiency of independent evidence of conspiracy to allow admission of extrajudicial statements of coconspirators. 46 A.L.R.3d 1148.

Criminal conspiracy between spouses. 74 A.L.R.3d 838.

When statute of limitations begins to run on charge of obstructing justice or of conspiring to do so. 77 A.L.R.3d 725.

Antagonistic defenses as ground for separate trials of codefendants in criminal case. 82 A.L.R.3d 245.

Right of defendants in prosecution for criminal conspiracy to separate trials. 82 A.L.R.3d 366.

Prosecution or conviction of one conspirator as affected by disposition of case against coconspirators. 19 A.L.R.4th 192.

Criminal liability under state laws in connection with application for, or receipt of, public welfare payments. 22 A.L.R.4th 534.

Adverse presumption or inference based on failure to produce or examine codefendant or accomplice who is not on trial—modern criminal cases. 76 A.L.R.4th 812.

Criminality of act of directing to, or recommending, source from which illegal drugs may be purchased. 34 A.L.R.5th 125.

Am. Jur.

16 Am. Jur. 2d, Conspiracy §§ 1, 2, 3, 5.

7 Am. Jur. Pl & Pr Forms (Rev), Conspiracy, Forms 1 et seq. (general); Forms 11 et seq. (particular conspiracies).

8 Am. Jur. Proof of Facts 2d, Withdrawal from or Abandonment of Criminal Enterprise, §§ 6 et seq. (proof of defendant's withdrawal from and abandonment of criminal enterprise).

49 Am. Jur. Proof of Facts 2d 473, Civil Conspiracy to Deny First-Party Insurance Benefits.

50 Am. Jur. Proof of Facts 2d 455, Tortious Interference with Employment Relationship.

20 Am. Jur. Trials, handling the defense in a conspiracy prosecution, §§ 1 et seq.

CJS.

15A C.J.S., Conspiracy §§ 94-96, 98-102, 104.

Practice References.

Paul Marcus, Prosecution and Defense of Criminal Conspiracy Cases (Matthew Bender).

Ronald L. Schoenberg, Criminal Law Deskbook (Matthew Bender).

§ 97-1-3. Accessories before the fact.

Every person who shall be an accessory to any felony, before the fact, shall be deemed and considered a principal, and shall be indicted and punished as such; and this whether the principal have been previously convicted or not.

HISTORY: Codes, Hutchinson's 1848, ch. 64, art. 12, Title 8 (6); 1857, ch. 64, art. 2; 1871, § 2484; 1880, § 2698; 1892, § 950; 1906, § 1026; Hemingway's 1917, § 751; 1930, § 769; 1942, § 1995.

Cross References — Requirements of certain contracts being in writing, see § 15-3-1.

Person acting as agent in effecting sale of liquor, see § 97-31-29.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Misdemeanors.
3. Participation.
4. Defenses.
5. Evidence.
6. Instructions.
7. Conviction.

1. In general.

Whether defendant was classified as an accessory before the fact or an aider and abettor to the gunman was irrelevant where his role was tantamount to that of the principal; therefore, there was no error in the sentence that was given based on his guilty plea for murder. *Walton v. State*, 752 So. 2d 452, 1999 Miss. App. LEXIS 692 (Miss. Ct. App. 1999).

Defendant's role in murder was the same as role of principal, whether he was accessory before the fact or accomplice, aiding and abetting principal. *Pleasant v. State*, 701 So. 2d 799, 1997 Miss. LEXIS 534 (Miss. 1997).

Adequate, credible, and substantial evidence supported defendant's capital murder conviction; there was substantial, credible evidence defendants intended to rob convenience store, even if jury found there was not enough evidence to prove underlying crime of armed robbery, jury was instructed on lesser-included offense of simple murder, and defendant could be convicted as a principal whether characterized as accessory before the fact or accomplice. *Pleasant v. State*, 701 So. 2d 799, 1997 Miss. LEXIS 534 (Miss. 1997).

Accessory to any felony before the fact is a principal and may be convicted as principal in indictment charging him or her as principal. *Hoops v. State*, 681 So. 2d 521, 1996 Miss. LEXIS 433 (Miss. 1996).

The primary distinction between an accessory-before-the-fact and an aider and abettor is the actual or constructive presence of the party. If a person was actually or constructively present at the offense, due to his or her participation he or she is an aider and abettor. If he or she was not present, he or she is an accessory-before-the-fact. *Sayles v. State*, 552 So. 2d 1383, 1989 Miss. LEXIS 472 (Miss. 1989).

One of the critical distinctions between being an accessory before and after the fact is whether the felony is complete at the time assistance is rendered. One is an accessory before the fact when assistance is rendered the principal before the felony is completed in order to help the principal in the commission or completion of the offense; this would include entering into a pre-arranged plan for escape of the principals. An accessory before the fact necessarily participates in the design of the felony while an accessory after the fact is a person assisting one, who has completed the commission of a felony, to avoid being apprehended, arrested, convicted, etc. *Gangl v. State*, 539 So. 2d 132, 1989 Miss. LEXIS 93 (Miss. 1989).

The requirements of this section, were not incorporated into former § 23-9-703 but, instead, former § 23-9-703 created a separate offense of vote fraud. *Van Buren v. State*, 498 So. 2d 1224, 1986 Miss. LEXIS 2858 (Miss. 1986).

A defendant who was not indicted for aiding and abetting the crime of vote fraud but, rather, was indicted for vote fraud for aiding, abetting or assisting or causing a named voter to violate the provisions of former § 23-9-605(2), was indicted as a principal. *Van Buren v. State*, 498 So. 2d 1224, 1986 Miss. LEXIS 2858 (Miss. 1986).

Status as either accessory before fact or principal to crime is distinction without difference. *State v. Peoples*, 481 So. 2d 1069, 1986 Miss. LEXIS 2337 (Miss. 1986).

In a prosecution for sale of marijuana, the trial court properly permitted the state to try the case as a "conspiracy" without stating that word in the indictment, where it was clear from the indictment that all three indictees were indicted as principals in the offense, within the meaning of this section, and where it was clear from the record that there was sufficient evidence to convict all three co-indictees as principals in the crime. *Sanders v. State*, 439 So. 2d 1271, 1983 Miss. LEXIS 2979 (Miss. 1983).

In a prosecution for false pretenses, the trial court properly refused to quash the

indictment, despite defendant's contention that the indictment charged only conspiracy, a crime not excepted from the two year statute of limitations, and that the prosecution was thus barred; conspiracy is a complete offense in itself and does not merge with the underlying crime, and the fact that a conspiracy is committed along with the crime does not change the nature of the offense nor lessen exposure to punishment. Furthermore, the prosecution was not time barred even though defendant was charged with being an accessory only, which is a separate crime not excepted from the statute, since an accessory before the fact to an excepted felony is treated as a principal. *Harrigill v. State*, 381 So. 2d 619, 1980 Miss. LEXIS 1887 (Miss.), cert. denied, 446 U.S. 939, 100 S. Ct. 2159, 64 L. Ed. 2d 792, 1980 U.S. LEXIS 1596 (U.S. 1980).

A man who agreed to purchase goods which others intended to steal, who supplied a tractor to be used during the theft, who was not present during the commission of the crime, but who received stolen goods, could be convicted both as an accessory before the fact and as a receiver of stolen property. *Knowles v. State*, 341 So. 2d 913, 1977 Miss. LEXIS 2283 (Miss. 1977).

Where three teenagers were actively engaged in committing the felony of stealing guns, and where their sole purpose at the time of the accidental shooting of one of them was to finish the job by hiding the guns, the three were jointly and collectively engaged in the commission of a criminal act and all had to bear equal responsibility for what happened, so that the injured one could not recover in damages from the other two, each being a principal to the act. *Parkinson v. Williamson*, 262 So. 2d 777, 1972 Miss. LEXIS 1324 (Miss. 1972).

To convict under this section [Code 1942, § 1995] it is necessary to prove beyond reasonable doubt that the alleged crime has actually been committed and that accused aided and abetted its commission. *Smith v. State*, 237 Miss. 498, 115 So. 2d 318, 1959 Miss. LEXIS 496 (Miss. 1959).

In prosecution for grand larceny of articles which accused alleged to have been

given them by wife of victim so that they could assist her in eloping, whether it was crime for wife to steal from husband held immaterial, since accused if they assisted in theft were principals and not accessories, regardless of whether other person was responsible. *Tatum v. State*, 171 Miss. 336, 157 So. 892, 1934 Miss. LEXIS 263 (Miss. 1934).

What constitutes "aiding and abetting" in commission of crime stated. *Crawford v. State*, 133 Miss. 147, 97 So. 534, 1923 Miss. LEXIS 124 (Miss. 1923).

Party actually committing felony must be proved guilty before evidence of guilt of accessories admissible. *Osborne v. State*, 99 Miss. 410, 55 So. 52, 1910 Miss. LEXIS 33 (Miss. 1910).

One aiding and abetting offense is indictable as principal. *Kittrell v. State*, 89 Miss. 666, 42 So. 609, 1906 Miss. LEXIS 66 (Miss. 1906).

One who aids, assists and encourages a murder is a principal and not an accessory, and his guilt in no wise depends upon the guilt or innocence, the conviction or acquittal of any other alleged participant in the crime. *Dean v. State*, 85 Miss. 40, 37 So. 501, 1904 Miss. LEXIS 133 (Miss. 1904).

2. Misdemeanors.

In misdemeanors, all who aid, incite, participate or abet the commission of such crime, as well as those who perpetrate the crime are guilty as principals and it is not necessary that a person convicted of such misdemeanor be present at the commission of the crime. *State v. Labella*, 232 So. 2d 354, 1970 Miss. LEXIS 1620 (Miss. 1970).

There are no accessories in misdemeanors, but all who aid in and incite their commission are principals. *Johns v. State*, 78 Miss. 663, 29 So. 401, 1900 Miss. LEXIS 153 (Miss. 1900); *State v. Treweilder*, 103 Miss. 859, 60 So. 1015, 1912 Miss. LEXIS 241 (Miss. 1912).

3. Participation.

Defendant's actions in referring the deceased for silicone injections for a buttocks enhancement were inconsistent with putting defendant on the path of conscious and wanton or reckless disregard of the

possibilities of fatal consequences to others as the result of the willful creation of an unreasonable risk, as she did not jointly engage in administering the silicone injections, and thus, defendant was not an accessory before the fact. *Stewart v. State*, 211 So. 3d 724, 2016 Miss. App. LEXIS 344 (Miss. Ct. App. 2016), cert. denied, 209 So. 3d 431, 2017 Miss. LEXIS 48 (Miss. 2017).

If the jury believed all of the testimony offered by the first witness, including defendant's confession to which she testified, then there was sufficient evidence to support a finding that defendant was the principal in the robbery and murder of the victim; if the jury chose to disregard the confession and believe only the testimony of the second witness regarding the bloody clothes and the testimony of the first witness regarding what she overheard about the planning of the crime, then the evidence was sufficient to support an accomplice jury instruction and defendant's conviction for capital murder as a principal under Miss. Code Ann. § 97-1-3. *Johnson v. State*, 956 So. 2d 358, 2007 Miss. App. LEXIS 333 (Miss. Ct. App. 2007).

Where the victim testified that defendant directed the victim's attackers away from the victim's brother-in-law and towards the victim and that after the attack the victim heard, one of the attackers ask defendant for payment, there was sufficient evidence to find that defendant was an accessory before the fact under Miss. Code Ann. § 97-1-3. *Brown v. State*, 864 So. 2d 1009, 2004 Miss. App. LEXIS 55 (Miss. Ct. App. 2004).

Defendant was indicted as a principal on a charge of capital murder where defendant provided the gun and discussed robbing the taxi driver before the fact, and as an indicted principal, defendant faced the same possible punishment as the person who did the actual killing; had defendant gone to trial on the capital murder charge, defendant would have faced the potential imposition of a death penalty. *Bolton v. State*, 831 So. 2d 1184, 2002 Miss. App. LEXIS 693 (Miss. Ct. App. 2002).

Defendant who willingly participated in a bank robbery by driving the robbers to the bank, waiting outside while the robbery

was committed, and serving as the get-away driver was properly sentenced for armed robbery pursuant to defendant's guilty plea and did not have to be sentenced as an accessory. *McCuiston v. State*, 791 So. 2d 315, 2001 Miss. App. LEXIS 291 (Miss. Ct. App. 2001).

One who is an accessory before the fact or one who aids and abets necessarily enters into an agreement that an unlawful act will be done; he participates in the design of the crime. *Malone v. State*, 486 So. 2d 360, 1986 Miss. LEXIS 2419 (Miss. 1986).

Defendant was properly convicted of selling more than one kilogram of marijuana to an undercover agent, even though he did not personally deliver the marijuana to the agent, where the proof showed his participation as an accessory before the fact, thus rendering him subject to indictment and punishment as a principal. *McGowan v. State*, 375 So. 2d 987, 1979 Miss. LEXIS 2415 (Miss. 1979).

Appellant was properly convicted of rape where the evidence showed that while he did not himself commit the sex act, he was armed with a gun and was effectively instrumental in forcing the prosecutrix to submit to the advances of another and thereby aided, assisted and abetted the commission of the rape. *Pilcher v. State*, 296 So. 2d 682, 1974 Miss. LEXIS 1527 (Miss. 1974), cert. denied, 420 U.S. 938, 95 S. Ct. 1149, 43 L. Ed. 2d 415, 1975 U.S. LEXIS 702 (U.S. 1975).

Where the evidence proved a combination or conspiracy entered into by the defendant and others to commit armed robbery, and the victim was thereafter shot to death by a codefendant at a time when all conspirators were present and each was doing his or her assigned part in the conspiracy to rob, the defendant became an accessory to armed robbery before the fact, and under the specific provisions of Code 1942, § 1995 was deemed and considered a principal so that every essential element of the crime of murder listed in Code 1942, § 2215 was proved by the state against the defendant. *Alexander v. State*, 250 So. 2d 629, 1971 Miss. LEXIS 1185 (Miss. 1971).

A defendant who was shown by testimony to have induced another to forge the

name of the payee on a check, was not entitled to acquittal of the forgery charged in the indictment on the theory that the indictment did not inform the defendant that he was being tried as an accessory before the fact of forgery, since, as an accessory before the fact, the defendant was considered a principal under Code 1942, § 1995. *Bell v. State*, 255 So. 2d 325, 1971 Miss. LEXIS 1288 (Miss. 1971).

One who instigates a theft of specific property on his behalf, though not present, is liable as a principal. *James v. State*, 248 Miss. 777, 160 So. 2d 695, 1964 Miss. LEXIS 303 (Miss. 1964).

One who was present and initiated the pointing of a gun at another was a principal. *Hathorn v. State*, 246 Miss. 135, 149 So. 2d 845, 1963 Miss. LEXIS 429 (Miss. 1963).

A father pursued by a patrolman because of driving without lights is properly convicted of negligent manslaughter where he instructed his 16-year-old son to drive as fast as possible and not stop, and the car struck another. *Griffin v. State*, 242 Miss. 376, 135 So. 2d 198, 1961 Miss. LEXIS 572 (Miss. 1961).

One may be convicted as accessory to a burglary at which he was not present, if he was party to a design to commit it. *Kennard v. State*, 242 Miss. 691, 128 So. 2d 572, 1961 Miss. LEXIS 596 (Miss.), cert. denied, 368 U.S. 869, 82 S. Ct. 111, 7 L. Ed. 2d 66, 1961 U.S. LEXIS 791 (U.S. 1961).

Aiding and abetting involves some participation in the criminal act and this may be evidenced by some word, act or deed. *West v. State*, 233 Miss. 730, 103 So. 2d 437, 1958 Miss. LEXIS 434 (Miss. 1958).

Where the accused was present at the taking and participated in the asportation and where he was in the company of his co-indictees practically all the night of the larceny, he was an accessory. *Hollis v. State*, 221 Miss. 677, 74 So. 2d 747, 1954 Miss. LEXIS 577 (Miss. 1954).

Where two or more persons act in concert to accomplish the common purpose of robbery, the act of one in taking the property is the act of all. *Noble v. State*, 221 Miss. 339, 72 So. 2d 687, 1954 Miss. LEXIS 543 (Miss. 1954).

In order to be guilty of robbery, one need not necessarily be present at the commis-

sion of the crime, and persons absent from the scene of the robbery may be liable to prosecution therefore if they were participants *criminis* before or after the commission of robbery. *Noble v. State*, 221 Miss. 339, 72 So. 2d 687, 1954 Miss. LEXIS 543 (Miss. 1954).

Where the indictment charged burglary but the evidence, chiefly circumstantial, indicated that the defendant was at least an accessory, the defendant was liable as principal. *Wages v. State*, 210 Miss. 187, 49 So. 2d 246, 1950 Miss. LEXIS 335 (Miss. 1950).

One who drives his car to seed house door, after midnight, and assists in loading fertilizer in car after two other persons have unlocked door, entered seed house and brought fertilizer to door, is actually present, aiding, abetting, and participating in theft of fertilizer and is principally guilty of larceny and not of receiving stolen property. *Thomas v. State*, 205 Miss. 653, 39 So. 2d 272, 1949 Miss. LEXIS 456 (Miss. 1949).

A taxicab driver who, without knowledge of the larcenous intent of his passengers, drove them to the scene of their burglary and drove them away after being advised of their true completed mission was not an accessory before the fact. *Mullen v. State*, 202 Miss. 795, 32 So. 2d 874, 1947 Miss. LEXIS 341 (Miss. 1947).

Under statutes, assistance rendered principal before felony is completed to avoid arrest therefor makes person rendering assistance an "accessory before and not after the fact." *Crosby v. State*, 179 Miss. 149, 175 So. 180, 1937 Miss. LEXIS 27 (Miss. 1937).

Accessory before fact to robbery is indictable and punishable as principal in county wherein robbery was consummated, though not in such county at time. *Watson v. State*, 166 Miss. 194, 146 So. 122, 1933 Miss. LEXIS 335 (Miss. 1933).

Each person present consenting to and doing any act leading to commission of crime is principal. *Moore v. State*, 91 Miss. 250, 44 So. 817, 1907 Miss. LEXIS 148 (Miss. 1907).

4. Defenses.

A defendant was not immune from prosecution under § 97-3-99 for a sexual bat-

tery on his wife committed by another person, even though he may have been immune from prosecution had he alone committed the battery; § 97-3-99 did not give the defendant immunity since the sexual battery was committed by someone else and the defendant had aided and abetted its commission. *Davis v. State*, 611 So. 2d 906, 1992 Miss. LEXIS 802 (Miss. 1992).

5. Evidence.

Evidence was sufficient to sustain defendant's conviction for aggravated assault because rational jurors could find that defendant acted in concert with his father to commit the assault; though defendant never specifically admitted that he encouraged or asked the father to shoot the victim, the evidence permitted a reasonable inference that he encouraged the father to do so, and the evidence indicated that defendant personally continued the assault and ultimately stabbed the victim to death. *Pointer v. State*, 202 So. 3d 210, 2016 Miss. App. LEXIS 567 (Miss. Ct. App. 2016).

Evidence was sufficient to establish defendant's guilt of conspiracy because the evidence showed that defendant – knowing of the plan to rob the bank – drove the co-defendant's to the bank, waited for them outside, and then served as the getaway driver. *Glenn v. State*, 996 So. 2d 148, 2008 Miss. App. LEXIS 584 (Miss. Ct. App. 2008).

Defendant's claim that the State had failed to prove that he had acted as an aider and abetter was without merit where the law was clear that any person who was present at the commission of a criminal offense and aided, counseled, or encouraged another in the commission of that offense was an aider and a better and was equally guilty with the principal offender; the State presented evidence that defendant was present during the commission of the crime and actively assisted codefendant in the commission of the crime. *Schankin v. State*, 910 So. 2d 1113, 2005 Miss. App. LEXIS 169 (Miss. Ct. App.), cert. denied, 920 So. 2d 1008, 2005 Miss. LEXIS 566 (Miss. 2005).

A murder defendant's actions met the requirements for aiding and abetting, and

therefore her conviction for murder would be affirmed, where she was present when her boyfriend shot the victim, she arranged for the victim to be at the location of the killing, she testified that she suspected trouble when she saw her boyfriend arrive with a gun, she admitted that she did nothing while her boyfriend stood talking with the victim for approximately 30 minutes, and there was testimony that she knew of the plan to kill the victim. *Swinford v. State*, 653 So. 2d 912, 1995 Miss. LEXIS 90 (Miss. 1995).

The evidence was sufficient to support a conviction of accessory before the fact of sale of cocaine where the defendant approached a vehicle that an undercover agent and an informant were driving, and told them that they were late and the cocaine had been “sent back,” but to wait and someone would “take care” of them. It was not necessary for the prosecution to prove that the defendant exercised dominion and control over the cocaine or that he personally profited from its sale. *Turner v. State*, 573 So. 2d 1340, 1990 Miss. LEXIS 832 (Miss. 1990).

The evidence was insufficient to support a conviction for armed robbery as an accessory before the fact where none of the witnesses who testified at trial saw the defendant prior to or during the armed robbery, the first time anyone saw the defendant was approximately 20 minutes after the commission of the armed robbery, and there was no evidence showing that the defendant was aware of his companions' activities prior to the actual commission of the armed robbery and no reasonable inference from other evidence to show any such knowledge by the defendant. *Gangl v. State*, 612 So. 2d 333, 1992 Miss. LEXIS 562 (Miss. 1992).

The evidence was sufficient to support a conviction of the defendant for aiding and abetting his brother in the sale of cocaine, despite the defendant's defense that he had no idea what was happening though he was present during the sale, where the defendant drove his brother to meet a confidential informant and 2 undercover narcotics agents for the purpose of making the sale of cocaine, the defendant then drove his brother to another location where he remained with the informant

and the two agents while his brother went to get the cocaine, and the defendant was present when his brother returned and completed the sale. *Gowdy v. State*, 592 So. 2d 29, 1991 Miss. LEXIS 841 (Miss. 1991).

Jury verdict finding defendant guilty of armed robbery as an accessory before the fact was amply supported by testimony of state's principal witness, the person who actually assaulted and wrestled jewels from the victim, that defendant masterminded the crime, which testimony was corroborated by another witness, and by testimony of the defendant placing himself with the co-defendants before the fact and with the stolen jewels on the evening of the crime. *Malone v. State*, 486 So. 2d 360, 1986 Miss. LEXIS 2419 (Miss. 1986).

Evidence that defendant was aware of possibility that future sale of narcotics would be made is insufficient to render defendant criminally accountable as principal in sale of substance. *Clemons v. State*, 482 So. 2d 1102, 1985 Miss. LEXIS 2356 (Miss. 1985).

Evidence in the record that established that the defendant participated in the advance planning of the robbery of the victim, furnished codefendant the knife used in the murder, and that, after the victim had been killed, he took charge of dividing the "take" and assisted in disposing of the body, was sufficient to support a conviction under this section. *Fairchild v. State*, 459 So. 2d 793, 1984 Miss. LEXIS 1983 (Miss. 1984).

Although defendant may very well have been an accessory after the fact under § 97-1-5, the state never made a jury issue that he was engaged in a conspiracy under § 97-1-1, where he had been trying to extricate his brother and a very good friend when he violated the law by possessing and transporting marijuana. *Kennedy v. State*, 454 So. 2d 495, 1984 Miss. LEXIS 2091 (Miss. 1984).

Evidence that the defendant in a prosecution for robbery of a jewelry store had accompanied the principal when he robbed the store and that, upon the return of an employee to the store, the defendant had stated "there she is", established the defendant's participation as a full-fledged accessory in the crime despite her conten-

tion that she had not exhibited a pistol, made any threats, or participated in tying up the employees. *Sanders v. State*, 403 So. 2d 1288, 1981 Miss. LEXIS 2191 (Miss. 1981).

Within the purview of this section defendant was at least an accessory before the fact to murder and as such was subject to indictment and punishment as a principal where defendant had given two confessions, revealing that he had been drinking alcoholic beverages at the time of the murder, admitting going in the murder victim's house, and giving conflicting statements as to whether anyone else had accompanied him and as to whether or not he had shot the victims. *Lee v. State*, 338 So. 2d 395, 1976 Miss. LEXIS 1623 (Miss. 1976).

In a prosecution for murder growing out of a shootout between police officers and the defendant and others, evidence that the defendant had an opportunity to give himself up but chose not to do so and that he fired upon the officers was sufficient to bring defendant within the purview of this section [Code 1972, § 97-1-3]. *James v. State*, 307 So. 2d 549, 1975 Miss. LEXIS 1823 (Miss.), cert. denied, 423 U.S. 848, 96 S. Ct. 88, 46 L. Ed. 2d 70, 1975 U.S. LEXIS 2560 (U.S. 1975).

In a prosecution for setting fire to a field, where the defendant was tried as a principal on a theory that he was an accessory before the fact, but the only evidence of his participation in the crime consisted in the fact that he was observed sitting with another in an automobile stopped adjacent to a field which two other men were in the act of firing, and when someone gave an order to put out the fire, the two young men returned to defendant's car and he drove away, such evidence, while sufficient for submission of the case to the jury, left the defendant's guilt in such serious doubt that he would be granted a new trial. *Russell v. Ralston Purina Co.*, 234 So. 2d 50, 1970 Miss. LEXIS 1398 (Miss. 1970).

Where it was shown that the defendant was an accessory before the fact, and as such, a principal, evidence as to the act of his companion at the time the victim was shot was admissible against the defendant in a prosecution for intentionally

pointing and aiming a pistol and wounding the victim. *Blackwell v. State*, 231 So. 2d 790, 1970 Miss. LEXIS 1608 (Miss.), cert. denied, 400 U.S. 848, 91 S. Ct. 43, 27 L. Ed. 2d 86, 1970 U.S. LEXIS 1188 (U.S. 1970).

Where an accused admitted that he drove three companions in his automobile to a service station, and then drove the car away after the companions broke into the station and took several cartons of cigarettes and other items, the evidence was sufficient to support his conviction of burglary, since any person acting with others in the commission of a crime and aiding and abetting therein is responsible as a principal for the offense. *Bass v. State*, 231 So. 2d 495, 1970 Miss. LEXIS 1594 (Miss. 1970).

6. Instructions.

Circuit court could have reasonably held that its accessory before the fact instruction was supported by portions of defendant's statement to the police and his trial testimony since the jury could reject any or all parts of a witness's testimony; defendant's own statement provided an adequate evidentiary basis for the instruction, and it would not have been unreasonable to find him guilty of two murders as an accessory before the fact. *Taylor v. State*, — So. 3d —, 2020 Miss. App. LEXIS 176 (Miss. Ct. App. May 12, 2020).

Defendant was not erroneously convicted of aggravated assault because the evidence supported the giving by the trial judge of an accomplice-liability jury instruction, given the conflicting testimony as to whether defendant or another person with defendant shot the victim, and the instruction did not constructively amend the indictment. Moreover, the trial judge did abuse the judge's discretion in additionally giving a cautionary instruction as to accomplice testimony. *Jones v. State*, 238 So. 3d 1235, 2016 Miss. App. LEXIS 408 (Miss. Ct. App. 2016), cert. denied, 237 So. 3d 1269, 2018 Miss. LEXIS 148 (Miss. 2018).

At defendant's trial for capital murder during the commission of a robbery, defendant was not entitled to a lesser-offense instruction of accessory-after-the-fact; the

proposed instruction lacked an evidentiary basis. Defendant said that he became uncomfortable about the incident only later that evening, but remained unaware that any felony had been committed; therefore, he could not be an accessory under Miss. Code Ann. § 97-1-3. *Dampier v. State*, 973 So. 2d 221, 2008 Miss. LEXIS 57 (Miss. 2008).

Three defendants' capital-murder convictions were appropriate because, although a limiting instruction given to the jury regarding confessions by defendants was not sufficient, no prejudice or manifest injustice resulted as to any defendant; each of the defendants gave sufficient evidence of his individual participation in the robbery of a gun store in his separate statements to support a capital-murder charge. *Anderson v. State*, 5 So. 3d 1088, 2007 Miss. App. LEXIS 677 (Miss. Ct. App. 2007), cert. denied, 11 So. 3d 1250, 2009 Miss. LEXIS 171 (Miss. 2009), cert. denied, 11 So. 3d 1250, 2009 Miss. LEXIS 184 (Miss. 2009), cert. denied, 11 So. 3d 1250, 2009 Miss. LEXIS 177 (Miss. 2009).

Language of Miss. Code Ann. § 97-1-3, as well as the holdings of the appellate court and the supreme court interpreting and applying that provision, provide sufficient notice to felony defendants that although they may be indicted as a principal, a jury instruction based on accomplice liability is proper provided that the evidence presented supports the instruction given; thus, defendant could not claim prejudice by a jury instruction that properly instructed the jury in accordance with Miss. Code Ann. § 97-1-3 simply because the indictment did not contain any allegations regarding accomplice liability. *Johnson v. State*, 956 So. 2d 358, 2007 Miss. App. LEXIS 333 (Miss. Ct. App. 2007).

Where defendant was charged as a principal in a drug charge and the evidence showed that defendant had acted as an accessory before the fact, a jury instruction for accessory was properly given under Miss. Code Ann. § 97-1-3, even though defendant was not charged as an accessory. *Pratt v. State*, 870 So. 2d 1241, 2004 Miss. App. LEXIS 273 (Miss. Ct. App. 2004).

Jury instruction stating that "each person present at the time of, or consenting to

and encouraging, aiding or assisting in any material manner in the commission of a crime, or knowingly and wilfully doing any act which is an ingredient in the crime, is . . . a principal" did not deem mere knowledge or unknowing assistance sufficient to find one guilty; phrase "knowingly and wilfully" contemplated that accused acted with knowledge and deliberation, and assistance in commission of crime had to be major. *Hoops v. State*, 681 So. 2d 521, 1996 Miss. LEXIS 433 (Miss. 1996).

In a prosecution for accessory before the fact of sale of cocaine, an instruction was sufficient to advise the jury that, before it could find the defendant guilty as an accessory before the fact, it also had to find the fact, where the instruction stated that the jury was required to find that the defendant arranged for the sale of cocaine "and that this occurred in Lauderdale County, Mississippi"; although the quoted language intended to address the point of venue, it sufficiently informed the jury that, before convicting, it was required to find that the sale had occurred in fact. *Turner v. State*, 573 So. 2d 1340, 1990 Miss. LEXIS 832 (Miss. 1990).

A jury instruction on accessory before the fact was inadequate where it did not instruct the jury to find beyond a reasonable doubt that the crime was actually committed, but only instructed the jury to determine whether the defendant was an accessory before the fact, leaving them to assume that the occurrence of the crime was an established fact. *Wilson v. State*, 592 So. 2d 993, 1991 Miss. LEXIS 962 (Miss. 1991).

An instruction in a murder prosecution, in which the defendant was tried as an accessory before the fact, stating that "even if the defendant was frightened, coerced, or forced, such is not to be considered by you and is no defense in this case" was erroneous. To be convicted as an accessory, the defendant must possess the mens rea for the commission of the crime, and the precise state of mind of the defendant has great significance in determining the degree of his or her guilt; an accomplice may be convicted of accomplice liability only for those crimes as to which he or she personally has the requisite mental

state. The cumulative effect of the instruction was that the defendant was guilty of murder regardless of his mental state; the instruction affirmatively negated the mens rea requirement and should not have been given. *Welch v. State*, 566 So. 2d 680, 1990 Miss. LEXIS 152 (Miss. 1990).

In a prosecution for being an accessory before the fact of armed robbery, use of terms usually associated with "conspiracy" in one of the state's instructions was not fatal, especially where any alleged deficiency in the matter of advising the jury of the concepts of aiding and abetting and specific intent was cured by 2 other instructions, as the reviewing court does not examine jury instructions in isolation but, rather, reads all instructions as a whole to determine whether the jury has been correctly instructed. *Malone v. State*, 486 So. 2d 360, 1986 Miss. LEXIS 2419 (Miss. 1986).

Use of the word "conspiracy" to label certain criminal conduct does not preclude use of the verb "to conspire" and the noun "conspiracy" to connote the sort of participation and involvement in the planning of a crime which is at least in part requisite to being guilty as an accessory before the fact. *Malone v. State*, 486 So. 2d 360, 1986 Miss. LEXIS 2419 (Miss. 1986).

Where there was testimony showing that three persons including the accused, acted in concert in committing a robbery, each was responsible and accountable for the wrongful actions of the other two, including the use of a knife during the armed robbery by one of the codefendants, and the trial court was justified in refusing an unarmed robbery instruction requested by the defendant, who did not himself use a knife during the incident. *Ivey v. State*, 232 So. 2d 368, 1970 Miss. LEXIS 1626 (Miss. 1970).

In a prosecution for intentionally pointing and aiming a pistol and wounding the victim, an instruction was proper which permitted the jury to convict the defendant if they should find that he himself fired the shot that wounded the victim, or if the shot was fired by the defendant's companion at that time, where the defendant was an accessory before the fact and, as such, a principal. *Blackwell v. State*,

231 So. 2d 790, 1970 Miss. LEXIS 1608 (Miss.), cert. denied, 400 U.S. 848, 91 S. Ct. 43, 27 L. Ed. 2d 86, 1970 U.S. LEXIS 1188 (U.S. 1970).

Where the accused was prosecuted under an indictment charging him, jointly with two others, with murder, accused's tendered instruction that since he was charged by the indictment with the killing of the deceased with malice aforethought with a certain gun, unless the state had proved the charge beyond all reasonable doubt, the jury should find the defendant not guilty, was properly refused, since it was not supported by the evidence and was contrary to the provisions of this section Code 1942, § 1995. *West v. State*, 233 Miss. 730, 103 So. 2d 437, 1958 Miss. LEXIS 434 (Miss. 1958).

Where accused was prosecuted under an indictment charging him, jointly with two others, with murder, state's instruction that if one of the others murdered the deceased, and accused, without being forced or coerced, transported the others in his automobile to where they obtained rifles, knowing full well that the others intended to murder deceased, and aided, assisted and encouraged them therein, the accused was guilty as charged, was not erroneous. *West v. State*, 233 Miss. 730, 103 So. 2d 437, 1958 Miss. LEXIS 434 (Miss. 1958).

In a prosecution for grand larceny an instruction to the jury that if the woman and the accused conspired together to steal money and then, pursuant to said conspiracy or agreement, the woman stole the money, then the accused was guilty of grand larceny, was proper. *Shedd v. State*, 228 Miss. 381, 87 So. 2d 898, 1956 Miss. LEXIS 524 (Miss.), cert. denied, 352 U.S. 944, 77 S. Ct. 262, 1 L. Ed. 2d 237, 1956 U.S. LEXIS 60 (U.S. 1956).

In murder prosecution instruction for state that if jury believe from evidence beyond reasonable doubt that defendant did wilfully, unlawfully, feloniously and of his malice aforethought shoot deceased with pistol at time deceased received wounds that caused his death, jury should find defendant guilty even though jury believed that another person was at same time shooting at deceased and jury do not know which person fired shot or shots that

actually killed deceased is not objectionable as assuming a conspiracy when evidence shows that defendant was a principal since he was present, aiding and abetting others and evidence is adequate to show defendant guilty individually. *Merrell v. State*, 39 So. 2d 306 (Miss. 1949); *Porter v. State*, 39 So. 2d 307 (Miss. 1949).

An instruction in a prosecution for unlawful possession of whiskey, which based defendant's responsibility upon the relation of master and servant did not misapply the civil doctrine of respondeat superior, but properly recognized that in criminal cases such relationship may constitute both as principals. *Graham v. State*, 190 Miss. 887, 2 So. 2d 150, 1941 Miss. LEXIS 106 (Miss. 1941).

Refusal of peremptory instruction and of instruction ignoring law authorizing punishment of persons who are accessories to felony was not error, where evidence showed defendant furnished still used in unlawful manufacture of liquor. *Bailey v. State*, 143 Miss. 210, 108 So. 497, 1926 Miss. LEXIS 257 (Miss. 1926).

Defendant not present could only be convicted as accessory before the fact; instruction should define accessory before the fact. *Williams v. State*, 128 Miss. 271, 90 So. 886, 1922 Miss. LEXIS 113 (Miss. 1922).

7. Conviction.

In a prosecution for armed robbery, the defendant was properly convicted as a principal where he had aided and abetted the person who actually robbed the bank in question. *Anderson v. State*, 397 So. 2d 81, 1981 Miss. LEXIS 1988 (Miss. 1981).

Where the defendants falsely represented to seller of paint that they were working for a certain person and wanted paint purchased charged to his account, the defendants by implication falsely represented that they were authorized to have the paint so charged and where after receiving the paint they deposited it as a security for a loan thereby establishing an intent to defraud, this was sufficient to support conviction of obtaining property by false pretenses. *Fortenberry v. State*, 213 Miss. 116, 56 So. 2d 56, 1952 Miss. LEXIS 338 (Miss. 1952).

One who steals property, or who is accessory before fact to grand larceny cannot be convicted of receiving, concealing, or aiding in concealing, the property stolen. *Thomas v. State*, 205 Miss. 653, 39 So. 2d 272, 1949 Miss. LEXIS 456 (Miss. 1949).

Accused indicted as principal may be convicted as accessory before fact. *Goss v.*

State, 205 Miss. 177, 38 So. 2d 700, 1949 Miss. LEXIS 424 (Miss. 1949).

Accessory before the fact may be convicted of higher degree than was party who actually committed the felony, if latter, on trial of former, is shown guilty of higher degree. *Fleming v. State*, 142 Miss. 872, 108 So. 143, 1926 Miss. LEXIS 134 (Miss. 1926).

RESEARCH REFERENCES

ALR.

Who other than actor if liable for manslaughter. 95 A.L.R.2d 175.

Criminality of act of directing to, or recommending, source from which illicit drugs may be purchased. 42 A.L.R.3d 1072.

Offense of aiding and abetting illegal possession of drugs or narcotics. 47 A.L.R.3d 1239.

Acquittal of principal, or his conviction of lesser degree of offense, as affecting prosecution of accessory, or aider and abettor. 9 A.L.R.4th 972.

Adverse presumption or inference based on failure to produce or examine codefendant or accomplice who is not on trial—modern criminal cases. 76 A.L.R.4th 812.

Criminality of act of directing to, or recommending, source from which illegal

drugs may be purchased. 34 A.L.R.5th 125.

Criminal responsibility under 18 USCS § 2(b) of one who lacks capacity to commit an offense but who causes another to do so. 52 A.L.R. Fed. 769.

Am. Jur.

21 Am. Jur. 2d, Criminal Law § 169.

CJS.

22 C.J.S., Criminal Law §§ 176-178.

Law Reviews.

1979 Mississippi Supreme Court Review: Criminal Law and Procedure. 50 Miss. L. J. 763, December, 1979.

Practice References.

Ronald L. Schoenberg, Criminal Law Deskbook (Matthew Bender).

§ 97-1-5. Accessories after the fact; punishment.

(1) Every person who shall be convicted of having concealed, received, or relieved any felon, or having aided or assisted any felon, knowing that the person had committed a felony, with intent to enable the felon to escape or to avoid arrest, trial, conviction or punishment after the commission of the felony, on conviction thereof shall be imprisoned in the custody of the Department of Corrections as follows:

(a) If the felony was a violent crime:

(i) If the maximum punishment was life, death or twenty (20) years or more, for a period not to exceed twenty (20) years; or

(ii) If the maximum punishment for the violent felony was less than twenty (20) years, for a period not to exceed the maximum punishment.

(b) If the felony was a nonviolent crime:

(i) If the maximum punishment for the nonviolent felony was ten (10) years or more, for a period not to exceed ten (10) years; or

(ii) If the maximum punishment for the nonviolent felony was less than ten (10) years, for a period not to exceed the maximum punishment.

(2) For the purposes of this section, “violent crime” means homicide, robbery, manslaughter, sex crimes, burglary of an occupied dwelling, aggravated assault, kidnapping, drive-by shooting, armed robbery, felonious abuse of a vulnerable person, felonies subject to an enhanced penalty, felony child abuse or exploitation, or any violation of Section 97-5-33 relating to exploitation of children, Section 97-5-39(1)(b), 97-5-39(1)(c) or 97-5-39(2) relating to child neglect or abuse, or Section 63-11-30(5) relating to aggravated DUI.

(3) In the prosecution of an offense under this section, it shall not be necessary to aver in the indictment or to prove on the trial that the principal has been convicted or tried.

HISTORY: Codes, Hutchinson’s 1848, ch. 64, art. 12, Title 8 (7); 1857, ch. 64, art. 3; 1871, § 2485; 1880, § 2699; 1892, § 951; 1906, § 1027; Hemingway’s 1917, § 752; 1930, § 770; 1942, § 1996; Laws, 2012, ch. 496, § 1, *eff from and after passage* (approved April 30, 2012).

Cross References — Imposition of standard state assessment in addition to all court imposed fines or other penalties for any felony violation, see § 99-19-73.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Evidence; generally.
3. —Sufficiency.
4. Instructions.

1. In general.

Defendant was properly convicted of attempted accessory after the fact and hindering the prosecution because she knew that her passenger had a gun, heard him say that he planned on killing the police officers who had pulled their car over, and when the passenger shot one of the officers, defendant offered him a means of escape, she later gave a false description of the passenger to law enforcement and maintained that she did know his name or whereabouts. *Calloway v. State*, 281 So. 3d 909, 2019 Miss. App. LEXIS 85 (Miss. Ct. App. 2019).

Because the coconspirator asserted that she had assisted a plea-bargaining defendant involved in this case with covering up the crime, the coconspirator confessed to some elements of acting as an accessory after the fact, but her confession indicated duress, and if true, this asserted a defense to liability; her letters were nothing more than an attempt to exonerate herself from her pending murder charge and place

blame elsewhere, and the fact that she may also have implicated herself in a much lesser crime was of no consequence, her statements were not against her penal interest, and they were not admissible. *Hartfield v. State*, 161 So. 3d 125, 2015 Miss. LEXIS 125 (Miss. 2015).

By defendant’s own admission, corroborated by testimony, defendant was a principal to the crime of murder and thus he could not have been at the same time an accessory after the fact under Miss. Code Ann. § 97-1-5 and defendant was not entitled to an instruction on such. *Williams v. State*, 994 So. 2d 808, 2008 Miss. App. LEXIS 183 (Miss. Ct. App.), cert. denied, 998 So. 2d 1010, 2008 Miss. LEXIS 665 (Miss. 2008).

Attorney’s disbarment was appropriate pursuant to Miss. R. Disc. St. Bar 6 because the attorney had pled guilty to the crime of accessory after the fact in violation of Miss. Code Ann. § 97-1-5 and she had been ordered to voluntarily surrender her license to practice law; all procedural prerequisites had been met and disbarment was required. *Miss. Bar v. Smith-Miller*, 962 So. 2d 545, 2007 Miss. LEXIS 185 (Miss. 2007).

Where there was a conflict between the sentencing order and the commitment order, the sentencing order that stated that

the inmate was to serve three years in prison and two years on supervised release controlled; thus, the five year sentence was valid under Miss. Code Ann. § 97-1-5 for his conviction of accessory after the fact to murder. *Fuller v. State*, 914 So. 2d 1230, 2005 Miss. App. LEXIS 858 (Miss. Ct. App. 2005).

The indictment for accessory-after-the-fact properly charged defendant with the completed crime for which she was convicted, rather than an attempted crime, because the indictment tracked the language of Miss. Code Ann. § 97-1-5 and the use of the language "in an attempt to assist" her son described the mental state required for a conviction of accessory-after-the-fact, which was that the defendant acted with "intent to enable" a felon to escape or avoid arrest, trial, conviction or punishment as provided in § 97-1-5. There was overwhelming evidence that defendant's son had committed a felony, that defendant knew her son was wanted by authorities, and that defendant aided her son in evading justice by harboring him and concealing him from law enforcement. *Young v. State*, 908 So. 2d 819, 2005 Miss. App. LEXIS 445 (Miss. Ct. App. 2005).

One cannot be both a principal in the crime and an accessory after the fact. *Hoops v. State*, 681 So. 2d 521, 1996 Miss. LEXIS 433 (Miss. 1996).

One of the critical distinctions between being an accessory before and after the fact is whether the felony is complete at the time assistance is rendered. One is an accessory before the fact when assistance is rendered the principal before the felony is completed in order to help the principal in the commission or completion of the offense; this would include entering into a pre-arranged plan for escape of the principals. An accessory before the fact necessarily participates in the design of the felony while an accessory after the fact is a person assisting one, who has completed the commission of a felony, to avoid being apprehended, arrested, convicted, etc. *Gangl v. State*, 539 So. 2d 132, 1989 Miss. LEXIS 93 (Miss. 1989).

Under this section, the state must prove (1) that a completed felony has been committed; (2) that the accused concealed,

received, relieved, aided or assisted a felon, knowing that such person had committed a felony; and (3) that such aid or assistance was rendered with intent to enable such felon to escape or to avoid arrest, trial, conviction or punishment after the commission of such felony. *Redevelopment Authority of Kosciusko v. Sewell*, 290 So. 2d 924, 1974 Miss. LEXIS 1719 (Miss. 1974).

When one is accused of aiding a felon after the commission of a felony, such felon should be identified, either by name or in some other manner, so the accused might know with certainty the person he is charged with aiding or assisting, and such identity should be set forth in the indictment and proved. *Redevelopment Authority of Kosciusko v. Sewell*, 290 So. 2d 924, 1974 Miss. LEXIS 1719 (Miss. 1974).

Owner of automobile who loaned his automobile to killer and his brother in county of owner's residence, adjoining county in which killing took place, was not subject to prosecution as an accessory after the fact in county in which killing occurred because killer and his brother, who drove the automobile, thereafter drove through such county on the way to the killer's home, where, although defendant was aware of the crime, he had no connection therewith, and killer's brother, in driving the automobile, was not the agent of the owner. *Washington v. State*, 196 Miss. 293, 17 So. 2d 203, 1944 Miss. LEXIS 189 (Miss. 1944).

A person cannot be both a principal and an accessory after the fact. *Crosby v. State*, 179 Miss. 149, 175 So. 180, 1937 Miss. LEXIS 27 (Miss. 1937).

Assistance rendered principal before felony is completed to avoid arrest therefor makes person rendering assistance an "accessory before and not after the fact." *Crosby v. State*, 179 Miss. 149, 175 So. 180, 1937 Miss. LEXIS 27 (Miss. 1937).

One indicted as a participant in or accessory before the fact to a murder cannot be convicted as an accessory after the fact. *Harper v. State*, 83 Miss. 402, 35 So. 572, 1903 Miss. LEXIS 59 (Miss. 1903).

2. Evidence; generally.

Defendant's 20-year sentence for attempted accessory after the fact did not

create an inference of gross disproportionality under the Eighth Amendment because it clearly fell within the statutory limits and she failed to make a threshold comparison of the crime committed to the sentence imposed. *Calloway v. State*, 281 So. 3d 909, 2019 Miss. App. LEXIS 85 (Miss. Ct. App. 2019).

Defendant pointed out that he had not taken the victim's money, rather, that it was a co-defendant who took it, and that the State's evidence did not introduce him on the scene of the robbery until after it had been completed by his co-defendant. He also argued that the State had failed to prove that the victim had been kidnapped before he was killed, and therefore, the State had failed to prove the corpus delicti of kidnapping; however, considering all of the evidence in the light most favorable to the State, the trial court did not err in denying defendant's motion for judgment notwithstanding the verdict with respect to the accessory to armed robbery and kidnapping charges, as defendant assisted his co-defendant by holding a gun on the victim's friend and prevented that friend from assisting the victim or escaping to obtain assistance before the victim was transferred to another location and then repeatedly shot by his co-defendant. *Parks v. State*, 884 So. 2d 738, 2004 Miss. LEXIS 1165 (Miss. 2004).

Indictment charging making of lewd suggestion by defendant to victim and violent making of attack or assault upon victim properly charges attempted rape under § 97-3-65, rather than assault with intent to rape under § 97-3-71, where indictment accurately tracks § 97-3-65 by omitting mention of "previous chaste character" and affirmatively asserts "carnally know," and where, at trial, at specific request of defendant, defendant is informed that prosecution is under § 97-3-65 and defendant makes no objection to being tried under that statute. *Harden v. State*, 465 So. 2d 321, 1985 Miss. LEXIS 1959 (Miss. 1985).

Although defendant may very well have been an accessory after the fact under this section, the state never made a jury issue that he was engaged in a conspiracy under § 97-1-1, where he had been trying to extricate his brother and a very good

friend when he violated the law by possessing and transporting marijuana. *Kennedy v. State*, 454 So. 2d 495, 1984 Miss. LEXIS 2091 (Miss. 1984).

In a prosecution for conspiracy to sell heroin, the trial court properly overruled defendant's plea in bar based on the two year statute of limitations, where defendant was shown to be a conspirator in a drug-selling ring, and where the proof showed that a co-conspirator, tried jointly with defendant, had illegally sold heroin to a narcotics agent within the two-year span prior to the indictment of defendant; once a defendant is established as being a conspirator, he remains a part of the conspiracy until he has extricated himself therefrom by communicating his abandonment in a manner reasonably expected to reach his co-conspirators. *Norman v. State*, 381 So. 2d 1024, 1980 Miss. LEXIS 1922 (Miss. 1980).

Evidence that defendant was himself a principal in the felonious killing of the woman was not admissible. *Crosby v. State*, 179 Miss. 149, 175 So. 180, 1937 Miss. LEXIS 27 (Miss. 1937).

Evidence that defendant procured pistol with which woman was killed without knowledge or consent of its owner and gave it to murderer, and that defendant, with knowledge that murderer had killed woman, surreptitiously returned pistol to the place from which he had procured it, was competent as bearing on defendant's knowledge that murderer had killed woman with the pistol. *Crosby v. State*, 179 Miss. 149, 175 So. 180, 1937 Miss. LEXIS 27 (Miss. 1937).

Evidence that defendant knew when he gave pistol to murderer that murderer intended to kill woman with pistol was admissible. *Crosby v. State*, 179 Miss. 149, 175 So. 180, 1937 Miss. LEXIS 27 (Miss. 1937).

Admission of defendant's confession that he concealed pistol was not error, in view of evidence as to concealment of pistol. *Crosby v. State*, 179 Miss. 149, 175 So. 180, 1937 Miss. LEXIS 27 (Miss. 1937).

Admission of evidence as to defendant's burning of overalls worn by murderer at time of killing was not error. *Crosby v. State*, 179 Miss. 149, 175 So. 180, 1937 Miss. LEXIS 27 (Miss. 1937).

Proof of murder by alleged principal as original proposition, was not error, notwithstanding defendant's admission of murder by alleged principal. *Crosby v. State*, 179 Miss. 149, 175 So. 180, 1937 Miss. LEXIS 27 (Miss. 1937).

Evidence that defendant at first denied any knowledge of murder when questioned by police shortly thereafter, and that he subsequently admitted that he was present and saw the murder, was not admissible where defendant was charged with the homicide at time of questioning. *Crosby v. State*, 179 Miss. 149, 175 So. 180, 1937 Miss. LEXIS 27 (Miss. 1937).

3. —Sufficiency.

Evidence was sufficient to convict defendant of being an accessory after the fact to the murder of the victim and the conviction was not contrary to the overwhelming weight of the evidence because defendant assisted two individuals to avoid arrest after the commission of a felony, at a time when she well knew that the individuals had committed the crime of murder, by transporting the individuals to locations outside of the county to a safe location with the intent to enable them to avoid arrest and prosecution for the murder of the victim; and an investigator told the jury that defendant gave no aid to the police throughout the entirety of their investigation. *Thompson v. State*, — So. 3d —, 2020 Miss. App. LEXIS 97 (Miss. Ct. App. Mar. 31, 2020), cert. denied, — So. 3d —, 2020 Miss. LEXIS 348 (Miss. 2020).

Defendant's conviction for being an accessory after the fact to her husband's crime of statutory rape by assisting her daughter in obtaining an abortion was appropriate because defendant had concealed, received, relieved, aided, or assisted her husband and those actions were sufficient under Miss. Code Ann. § 97-1-5 to support the conviction. *Sherron v. State*, 959 So. 2d 30, 2006 Miss. App. LEXIS 832 (Miss. Ct. App. 2006), cert. denied, 958 So. 2d 1232, 2007 Miss. LEXIS 375 (Miss. 2007).

Evidence was sufficient to support defendant's conviction for accessory-after-the-fact of the crime of possession of marijuana with intent to distribute pursuant

to Miss. Code Ann. § 97-1-5 where the evidence showed that defendant failed to call police as she had been instructed if her son, who was wanted on a marijuana conviction, returned to her home, and she failed to answer the door when police came back to the house and found defendant's son inside. There was overwhelming evidence that defendant's son had committed a felony, that defendant knew her son was wanted by authorities, and that defendant aided her son in evading justice by harboring him and concealing him from law enforcement. *Young v. State*, 908 So. 2d 819, 2005 Miss. App. LEXIS 445 (Miss. Ct. App. 2005).

Because the evidence showed that defendant accompanied others in retrieving stolen property and disposing of it, there was sufficient evidence to support defendant's conviction of accessory after the fact to burglary. *Martin v. State*, 834 So. 2d 727, 2003 Miss. App. LEXIS 7 (Miss. Ct. App. 2003).

The evidence was sufficient to support a conviction of accessory after the fact of robbery where the defendant was a part of the robbery plans in the beginning, she kept and provided the get-away automobile after the bank was robbed but before the active robbers had completed their flight, and she gave orders to her confederates after all of them were apprehended. *Harrell v. State*, 583 So. 2d 963, 1991 Miss. LEXIS 457 (Miss. 1991).

A jury would have been warranted in finding the defendant guilty as an accessory after the fact to burglary or larceny, but not as a principal to burglary, where the defendant was present at the time of the burglary of a store but neither assisted nor encouraged the perpetrator of the burglary by any word or act to commit the crime. *Smith v. State*, 523 So. 2d 1028, 1988 Miss. LEXIS 190 (Miss. 1988).

Evidence was sufficient to support guilty verdict of accessory after the fact of larceny where defendant assisted in disposition of items of personal property taken in course of burglary. *Buckley v. State*, 511 So. 2d 1354, 1987 Miss. LEXIS 2646 (Miss. 1987).

Facts and circumstances known to accused at time of his arrest while aiding in transportation of stolen tires, were insuf-

ficient to support conclusion that he knew a felony had been committed or that he was assisting the felon (whoever he might have been) dispose of tires. *Redevelopment Authority of Kosciusko v. Sewell*, 290 So. 2d 924, 1974 Miss. LEXIS 1719 (Miss. 1974).

State must prove that the alleged principal feloniously killed the woman and that thereafter the defendant, with actual knowledge thereof, committed specific acts with intent thereby to enable the alleged principal to escape or to avoid arrest, trial, conviction, or punishment. *Crosby v. State*, 179 Miss. 149, 175 So. 180, 1937 Miss. LEXIS 27 (Miss. 1937).

Whether murder by alleged principal should be proved as original proposition in prosecution for statutory offense of being accessory after the fact to a murder, wherein defendant admitted murder by alleged principal, rested in trial court's sound discretion, which would not be interfered with in absence of manifest abuse. *Crosby v. State*, 179 Miss. 149, 175 So. 180, 1937 Miss. LEXIS 27 (Miss. 1937).

4. Instructions.

Circuit court did not err when it refused a proposed accessory after the fact instruction because there was no evidence that defendant acted to help an accomplice avoid being punished for killing the victim as the accomplice testified that defendant shot the victim twice in the back, but defendant chose not to testify. *Leagea v. State*, 138 So. 3d 184, 2013 Miss. App. LEXIS 692 (Miss. Ct. App. 2013), cert. denied, 139 So. 3d 74, 2014 Miss. LEXIS 251 (Miss. 2014).

Defendant juvenile was not entitled to an accessory-after-the-fact instruction since defendant's involvement in the underlying robbery began earlier in the day when the group decided to go "hit a lick" and headed to the gas station where the victim was killed. *Hye v. State*, 162 So. 3d 818, 2013 Miss. App. LEXIS 292 (Miss. Ct. App. 2013), aff'd in part, vacated in part, 162 So. 3d 750, 2015 Miss. LEXIS 69 (Miss. 2015).

Trial judge did not err in denying defendant's request for lesser offense instructions on accessory after the fact and/or

receiving stolen goods, Miss. Code Ann. §§ 97-17-70 and 97-1-5, as these lesser offenses were separate and distinct from those charged, and there was no evidentiary basis to support the requisite knowledge element for either instruction. *Brazzle v. State*, 13 So. 3d 810, 2009 Miss. LEXIS 339 (Miss. 2009).

Trial court did not err by refusing to give defendant's requested accessory-after-the-fact jury instruction because considering the evidence in the light most favorable to defendant, a reasonable jury could not have found defendant guilty as an accessory after the fact. There was no evidence that defendant acted with the intent to enable the man with the crooked eye to escape or avoid arrest, trial, conviction, or punishment for the victim's murder. *Brown v. State*, 19 So. 3d 85, 2008 Miss. App. LEXIS 789 (Miss. Ct. App. 2008), cert. denied, 19 So. 3d 82, 2009 Miss. LEXIS 489 (Miss. 2009).

At defendant's trial for capital murder during the commission of a robbery, defendant was not entitled to a lesser-offense instruction of accessory-after-the-fact under Miss. Code Ann. § 97-1-5. The proposed instruction lacked an evidentiary basis; defendant said that he became uncomfortable about the incident only later that evening, but remained unaware that any felony had been committed. *Dampier v. State*, 973 So. 2d 221, 2008 Miss. LEXIS 57 (Miss. 2008).

In a capital murder case, the trial court did not err in refusing defendant's requested jury instruction concerning accessory after the fact as the evidence clearly demonstrated defendant's involvement prior to the crime, that she was the mastermind of the plot to kill her husband, that she gave incriminating statements to law enforcement that described her conversations with a co-conspirator and others regarding having her husband killed, and her son's statement revealed that defendant told him where his father had hidden the pistol that was used to kill him. *Byrom v. State*, 863 So. 2d 836, 2003 Miss. LEXIS 535 (Miss. 2003), cert. denied, 543 U.S. 826, 125 S. Ct. 71, 160 L. Ed. 2d 40, 2004 U.S. LEXIS 5754 (U.S. 2004).

In a prosecution for capital murder, the trial court properly refused to instruct the

jury regarding accessory after the fact where the defendant's two coperpetrators both testified that the defendant took part in designing the attempted robbery and escape and one of them placed the defendant as the "getaway" driver, and the only contrary evidence was the defendant's own in which he claimed that he was never involved in planning any crime and that he never assisted either coperpetrator afterwards in any way. *Mangum v. State*, 762 So. 2d 337, 2000 Miss. LEXIS 163 (Miss. 2000).

An indispensable element of the crime of concealing, receiving, or relieving a felon, or aiding or assisting a felon, with the intent to enable such felon to escape or to avoid arrest, trial, conviction, or punishment after the commission of a felony, is guilty knowledge on the part of the one charged with the crime. *Matula v. State*, 220 So. 2d 833, 1969 Miss. LEXIS 1480 (Miss. 1969).

From the mere fact that the defendant

traveled with the perpetrator of an attempted burglary, it could not be inferred that the defendant had committed the offense of feloniously concealing, receiving, or relieving a felon, or aiding or assisting him in the attempted burglary with the intent to enable such felon to escape or to avoid indictment, trial, conviction, or punishment. *Matula v. State*, 220 So. 2d 833, 1969 Miss. LEXIS 1480 (Miss. 1969).

In prosecution for statutory offense of being an accessory after the fact to the murder of a woman, instruction that principal in commission of felony cannot thereafter become an accessory after the fact, and that defendant could not be convicted of being an accessory after the fact if he himself murdered woman or assisted another so to do, should have been granted. *Crosby v. State*, 179 Miss. 149, 175 So. 180, 1937 Miss. LEXIS 27 (Miss. 1937).

RESEARCH REFERENCES

ALR.

Offense of aiding and abetting illegal possession of drugs or narcotics. 47 A.L.R.3d 1239.

Acquittal of principal, or his conviction of lesser degree of offense, as affecting prosecution of accessory, or aider and abettor. 9 A.L.R.4th 972.

Adverse presumption or inference based on failure to produce or examine codefendant or accomplice who is not on trial—modern criminal cases. 76 A.L.R.4th 812.

Am. Jur.

21 Am. Jur. 2d, Criminal Law § 170.

CJS.

22 C.J.S., Criminal Law §§ 179-181.

Practice References.

Ronald L. Schoenberg, Criminal Law Deskbook (Matthew Bender).

§ 97-1-6. Directing or causing felony to be committed by person under age of seventeen years.

In addition to any other penalty and provision of law, any person over the age of seventeen (17) who shall direct or cause any person under the age of seventeen (17) to commit any crime which would be a felony if committed by an adult shall be guilty of a felony and upon conviction shall be fined not more than Ten Thousand Dollars (\$10,000.00) or imprisoned for not more than twenty (20) years, or both.

HISTORY: Laws, 1994, ch. 595, § 7, eff from and after July 1, 1994.

JUDICIAL DECISIONS

ANALYSIS

1. Evidence sufficient to sustain conviction.
2. Evidence insufficient to sustain a conviction.

1. Evidence sufficient to sustain conviction.

The evidence was sufficient to support the defendant's conviction under the statute where one of his coperpetrators, who was under 17 years of age, testified that the defendant planned the crime and that he would not have committed the crime if the defendant had not planned it, and where the evidence showed that the coperpetrator actually assisted in the crime. *Mamon v. State*, 724 So. 2d 878, 1998 Miss. LEXIS 602 (Miss. 1998).

2. Evidence insufficient to sustain a conviction.

Miss. Code Ann. § 97-1-6 pertains to persons over the age of seventeen and not persons who are seventeen at the time a crime is committed. Therefore, a conviction for directing or causing a minor to commit a felony was based on insufficient evidence because appellant was only 17 when a crime was committed; moreover, the jury instructions failed to include the necessary language that appellant be over seventeen at the time of the crime. *Armstead v. State*, 80 So. 3d 112, 2011 Miss. App. LEXIS 365 (Miss. Ct. App. 2011), cert. denied, 80 So. 3d 111, 2012 Miss. LEXIS 77 (Miss. 2012).

RESEARCH REFERENCES

ALR.

Validity, Construction, and Application of 18 U.S.C.S. 373, Proscribing Solicita-

tion to Commit Crime of Violence. 49 A.L.R. Fed 2d 333.

§ 97-1-7. Attempt to commit offense; punishment.

(1) Every person who shall design and endeavor to commit an offense, and shall do any overt act toward the commission thereof, but shall fail therein, or shall be prevented from committing the same, on conviction thereof, shall, where no other specific provision is made by law for the punishment of the attempt, be punished by imprisonment and fine for a period and for an amount not greater than is prescribed for the actual commission of the offense so attempted.

(2) Every person who shall design and endeavor to commit an act which, if accomplished, would constitute an offense of murder under Section 97-3-19, but shall fail therein, or shall be prevented from committing the same, shall be guilty of attempted murder and, upon conviction, shall be imprisoned for life in the custody of the Department of Corrections if the punishment is so fixed by the jury in its verdict after a separate sentencing proceeding. If the jury fails to agree on fixing the penalty at imprisonment for life, the court shall fix the penalty at not less than twenty (20) years in the custody of the Department of Corrections.

HISTORY: Codes, Hutchinson's 1848, ch. 64, art. 12, Title 8 (3); 1857, ch. 64, art. 20; 1871, § 2809; 1880, § 2713; 1892, § 973; 1906, § 1049; Hemingway's 1917, § 777; 1930, § 793; 1942, § 2017; Laws, 2013, ch. 510, § 1, eff from and after July 1, 2013.

Cross References — Murder, as provided in subsection (2) of this section, defined as crime of violence, see § 97-3-2.

Mandatory reporting of offense under this section relating to the attempt to commit any of the offenses listed in § 97-5-51(1) when committed by an adult against a minor under the age of sixteen, see § 97-5-51.

Arrests without warrant, see § 99-3-7.

An insane person charged with crime, see § 99-13-3.

Conviction of attempt as constituent of offense charged, see § 99-19-15.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Indictment.
3. Particular offenses.
4. —Burglary.
5. —Embezzlement.
6. —False pretenses.
7. —Homicide.
8. —Sexual offenses.
9. —Evidence.
10. —Miscellaneous.
11. Sentence.
12. Instructions

1. In general.

Defendant was properly convicted of attempted accessory after the fact and hindering the prosecution because she knew that her passenger had a gun, heard him say that he planned on killing the police officers who had pulled their car over, and when the passenger shot one of the officers, defendant offered him a means of escape, she later gave a false description of the passenger to law enforcement and maintained that she did know his name or whereabouts. *Calloway v. State*, 281 So. 3d 909, 2019 Miss. App. LEXIS 85 (Miss. Ct. App. 2019).

Defendant was wrongly convicted of attempted aggravated assault because the doctrine of transferred intent was not applicable as defendant deliberately shot and killed the intended victim, but the unintended victim was unharmed when the bullet landed near the unintended victim. Defendant had no intention to harm the unintended victim, defendant was not aware of the unintended victim's presence, and there was no evidence that the unintended victim was in any fear of harm. *Craig v. State*, 201 So. 3d 1108, 2016 Miss. App. LEXIS 598 (Miss. Ct. App. 2016).

Defendant's right against double-jeopardy was not violated because, while the counts for fondling, under Miss. Code Ann. § 97-5-23(1), and the attempted-sexual-battery, under Miss. Code Ann. § 97-1-7, stemmed from the same encounter, the elements of the crimes were not the same as each count contained an element not contained in the other. Attempted sexual battery did not contain the element of gratification of lust, while fondling did not require the element of penetration. *Moore v. State*, 112 So. 3d 1084, 2013 Miss. App. LEXIS 207 (Miss. Ct. App. 2013).

Defendant was not entitled to instruction on abandonment as a defense to a charge of attempted carjacking where defendant ceased effort to steal a sports utility vehicle only after defendant's efforts to unlock the vehicle's doors were thwarted by a passenger sitting inside the vehicle. *Kizart v. State*, 795 So. 2d 582, 2001 Miss. App. LEXIS 366 (Miss. Ct. App. 2001).

Generally, attempt to commit a crime is an indictable offense, which is separate and distinct from the crime itself. *Eakes v. State*, 665 So. 2d 852, 1995 Miss. LEXIS 555 (Miss. 1995).

In general, this section requires a showing of 3 elements: (1) an attempt to commit a particular crime, (2) a direct ineffectual act done toward its commission, and (3) the failure to consummate its commission. *McGowan v. State*, 541 So. 2d 1027, 1989 Miss. LEXIS 180 (Miss. 1989).

In order to prove abandonment as a defense to the crime of attempt, the defendant must prove that he voluntarily abandoned his intent and did not have his intent frustrated by the resistance of the victim or the intervention of a third party. *Pruitt v. State*, 528 So. 2d 828, 1988 Miss. LEXIS 339 (Miss. 1988).

The 3 elements of an attempt to commit a specific crime are an intent to commit the crime, a direct ineffectual act done towards its commission, and the failure to consummate its commission. *Edwards v. State*, 500 So. 2d 967, 1986 Miss. LEXIS 2775 (Miss. 1986).

An attempt is an offense separate from the completed offense and it is indictable and punishable as such. *McCullum v. State*, 487 So. 2d 1335, 1986 Miss. LEXIS 2457 (Miss. 1986).

An attempt to commit a crime is an indictable offense separate and distinct from the crime itself, and failure to commit the target crime is an essential element of an attempt; accordingly, it was error to prosecute defendant on the charge of attempted armed robbery where there was conclusive proof that the robbery had been consummated. *Mason v. State*, 430 So. 2d 857, 1983 Miss. LEXIS 2612 (Miss. 1983).

Mere acts of preparation do not constitute an attempt; there must be some overt act which goes beyond mere preparation or planning. *Smith v. State*, 279 So. 2d 652, 1973 Miss. LEXIS 1491 (Miss. 1973).

The gravamen of the offense of an attempt to commit a crime is fixed by the statutory requirement that the defendant must do an overt act toward the commission thereof and be prevented from its consummation. *State v. Lindsey*, 202 Miss. 896, 32 So. 2d 876, 1947 Miss. LEXIS 353 (Miss. 1947).

Under the attempt statute no greater punishment may be administered than that prescribed for the actual commission of the offense attempted. *Grillis v. State*, 196 Miss. 576, 17 So. 2d 525, 1944 Miss. LEXIS 237 (Miss. 1944).

Whenever the design of a person to commit crime is clearly shown, slight acts done in furtherance will constitute an attempt. *Dill v. State*, 149 Miss. 167, 115 So. 203, 1928 Miss. LEXIS 15 (Miss. 1928).

In prosecution for attempt to commit offense, state must charge and prove overt act. *Dill v. State*, 149 Miss. 167, 115 So. 203, 1928 Miss. LEXIS 15 (Miss. 1928).

Necessary elements constituting crime are, intent to commit, and overt act. *Miller v. State*, 130 Miss. 730, 95 So. 83, 1922 Miss. LEXIS 255 (Miss. 1922).

The rule that the act attempted must be a possibility has no application where it merely becomes impossible for the crime to be committed. *Stokes v. State*, 92 Miss. 415, 46 So. 627, 1908 Miss. LEXIS 245 (Miss. 1908).

2. Indictment.

Indictment was sufficient as to the attempt charge as defendant failed to acknowledge authorities holding that failure was not required to be alleged in indictments charging attempt, and he proffered no compelling reason to abandon those authorities. *Scott v. State*, — So. 3d —, 2020 Miss. LEXIS 420 (Miss. Nov. 5, 2020).

Defendant's 20-year sentence for attempted accessory after the fact did not create an inference of gross disproportionality under the Eighth Amendment because it clearly fell within the statutory limits and she failed to make a threshold comparison of the crime committed to the sentence imposed. *Calloway v. State*, 281 So. 3d 909, 2019 Miss. App. LEXIS 85 (Miss. Ct. App. 2019).

Amended indictment sufficiently charged the essential elements of attempted murder because the indictment charged that defendant attempted to kill and murder the victim; there was no need for the indictment to also specify that defendant failed or were prevented from completing the act. *Pickett v. State*, 252 So. 3d 40, 2018 Miss. App. LEXIS 54 (Miss. Ct. App.), cert. denied, 250 So. 3d 1271, 2018 Miss. LEXIS 374 (Miss. 2018), cert. denied, — So. 3d —, 2018 Miss. LEXIS 376 (Miss. 2018).

Amendment to the indictment reflected the language used at trial and did not prejudice the defense because the amendment did not change the nature of the charges and thus, did not deprive defendants of a fair opportunity to present their defense; defendants could not claim unfair surprise, as they knew at all times that the victim was not actually shot, only shot at, and that was the basis for the charges of attempted murder. *Pickett v. State*, 252 So. 3d 40, 2018 Miss. App. LEXIS 54 (Miss. Ct. App.), cert. denied, 250 So. 3d 1271, 2018 Miss. LEXIS 374 (Miss. 2018), cert. denied, — So. 3d —, 2018 Miss. LEXIS 376 (Miss. 2018).

Defendant's indictment sufficiently notified him of the charge against him of attempted murder, given that the indictment used the word attempt and contained the language that the crime, if accomplished, would have constituted an offense of murder, which indicated the incompleteness of the attempted crime. *Morton v. State*, 246 So. 3d 895, 2017 Miss. App. LEXIS 649 (Miss. Ct. App. 2017), cert. denied, 246 So. 3d 886, 2018 Miss. LEXIS 295 (Miss. 2018).

Variance between the indictment and the jury instructions did not substantially alter the elements of proof necessary for a conviction, as the jury was charged that to convict defendant of attempted murder, it had to find that he intended to commit murder, attempted to do so, and failed to do so, and thus the jury was instructed on all the elements of proof necessary for a conviction. *Morton v. State*, 246 So. 3d 895, 2017 Miss. App. LEXIS 649 (Miss. Ct. App. 2017), cert. denied, 246 So. 3d 886, 2018 Miss. LEXIS 295 (Miss. 2018).

Indictment was not defective for failing to include the third element of attempted burglary: the failure to consummate its commission. The use of the word "attempt" gave defendant sufficient notice that the State would prove that the crime was not successfully committed. *Spearman v. State*, 2010 Miss. App. LEXIS 107 (Miss. Ct. App. Mar. 2, 2010), rev'd, 58 So. 3d 30, 2011 Miss. App. LEXIS 277 (Miss. Ct. App. 2011).

Indictment for aggravated assault, Miss. Code Ann. § 97-3-7 (Rev. 2006), was not fatally defective because it did not need to specify an overt act of attempt where defendant was not indicted under the general attempt statute, Miss. Code Ann. § 97-1-7 (Rev. 2006). Thus, the previous decision in *Joshua v. State*, 445 So. 2d 221 (Miss. 1984), which held that that the separate elements of attempt had to be set out in a criminal indictment for aggravated assault, was expressly overruled. *Brooks v. State*, 18 So. 3d 833, 2009 Miss. LEXIS 471 (Miss. 2009).

Indictment against defendant described the charge of attempted burglary by citing the burglary statute, providing the details of the alleged attempted burglary, and supplying the details concerning the fail-

ure to complete the burglary; thus, the indictment against defendant stated the essential facts, and fully notified him of the nature and cause of the charges brought against him, and therefore the trial court did not err in denying the motion to quash the indictment. *Brown v. State*, 961 So. 2d 720, 2007 Miss. App. LEXIS 13 (Miss. Ct. App. 2007).

Defendant was originally indicted for attempted breaking and entering, but the indictment was properly amended when the amendment was one of form, not substance, and defendant had notice, and the indictment never made reference to Miss. Code Ann. § 97-1-7; had the original indictment stated "Attempted Burglary, Miss. Code Ann. § 97-1-7" or failed to provide "Burglary of a Dwelling, Miss. Code Ann. § 97-17-23," then unquestionably the amendment would have been one of substance rather than form, and the supreme court would have been compelled to reverse the trial court's conviction and sentence. This indictment, however, was styled and read "Burglary of a Dwelling, Miss. Code Ann. § 97-17-23." *Spears v. State*, 942 So. 2d 772, 2006 Miss. LEXIS 656 (Miss. 2006).

Because the information did not sufficiently charge defendant with armed robbery, as it did not charge the overt act as the display of a weapon by another perpetrator and then the shooting of the victim, defendant's armed robbery conviction, the result of a guilty plea, was reversed; however, because there was a sufficient charge of simple robbery, if not for the word "attempt," the court affirmed a conviction of robbery, and remanded for sentencing on that count. *Neal v. State*, 936 So. 2d 463, 2006 Miss. App. LEXIS 589 (Miss. Ct. App. 2006).

Miss. Code Ann. § 41-29-313 made possession of precursor chemicals unlawful, and Miss. Code Ann. § 97-1-7 (the attempt statute), and Miss. Code Ann. § 41-29-313, when viewed together, gave the elements of the crime of attempted possession of precursor drugs or chemicals. Thus, where defendant was charged with attempted possession of precursor chemicals, his argument that the trial court had erred in allowing him to plead guilty to a nonexistent statute of attempted posses-

sion of precursor chemicals was rejected. *Green v. State*, 880 So. 2d 377, 2004 Miss. App. LEXIS 808 (Miss. Ct. App. 2004).

Indictment had to set out with certainty the specific conduct that the State asserted to be the overt act undertaken by the defendant in order to indict for an attempt; the indictment was rendered void where it did not contain a plain, concise and definite written statement of the essential facts constituting the offense charged because of its failure to set out with any certainty defendant's overt act intended to aid the felon's escape. *White v. State*, 851 So. 2d 400, 2003 Miss. App. LEXIS 671 (Miss. Ct. App. 2003).

Since the principal offenses of welfare fraud as defined in Mississippi Code § 97-19-71 include attempts, an indictment for a principal welfare fraud offense is in no way defective because it employs the word "attempt," and the state is not limited at trial to proof only of the attempt. *McCullum v. State*, 487 So. 2d 1335, 1986 Miss. LEXIS 2457 (Miss. 1986).

Indictment charging attempted child abuse may be amended to reflect code section under which defendant is charged and need not use precise words of statute. *Watson v. State*, 483 So. 2d 1326, 1986 Miss. LEXIS 2366 (Miss. 1986).

Prior to adoption of Uniform Criminal Rules of Circuit Court Practice, an indictment charging that defendant "did unlawfully, wilfully, feloniously and forcibly attempt to rape and ravage. . . a female above the age of 12 years, without the consent and against the will of. . ." was insufficient; the defect was not waived by defendant's failure to demur, and his conviction was reversed. *Maxie v. State*, 330 So. 2d 277, 1976 Miss. LEXIS 1845 (Miss. 1976).

An indictment which charged the defendant with intent to murder, designating the intended victim as well as charging overt acts of arming himself with a rifle and transporting himself to a point where he expected to find the victim, charged an intent to commit an offense, as well as an overt act toward its commission, and was not demurrable. *Ford v. State*, 218 So. 2d 731, 1969 Miss. LEXIS 1616 (Miss. 1969).

In an indictment charging the accused with the crime of attempting to commit

false pretenses or cheats by organizing a group of people who attempted to defraud insurance companies by staging a fake or false wreck with automobiles, a statement that certain named individuals involved in the scheme bought insurance contracts to indemnify themselves from loss arising out of automobile accidents sufficiently described the insurance policies by designation and type and thereby indicated their purport within the meaning of Code 1942, § 2453. *Prisock v. State*, 244 Miss. 408, 141 So. 2d 711, 1962 Miss. LEXIS 463 (Miss. 1962).

Indictment properly charged the offense of an attempt to commit the crime of sodomy. *Taurasi v. State*, 233 Miss. 330, 102 So. 2d 120, 1958 Miss. LEXIS 385 (Miss. 1958).

An indictment for attempted rape is subject to demurrer where the alleged overt act described could have applied equally to other crimes. *State v. Lindsey*, 202 Miss. 896, 32 So. 2d 876, 1947 Miss. LEXIS 353 (Miss. 1947).

Indictment charging attempt to obtain money by false pretenses held to charge member of board of supervisors as well as road contractor with false pretenses. *State v. Fitzgerald*, 151 Miss. 229, 117 So. 517, 1928 Miss. LEXIS 289 (Miss. 1928).

Indictment charging attempt to obtain money by false pretenses by virtue of contract with county held fatally defective because not setting forth contract. *State v. Fitzgerald*, 151 Miss. 229, 117 So. 517, 1928 Miss. LEXIS 289 (Miss. 1928).

Allegation that alleged false account by contractor was prepared, signed and approved and filed with board of supervisors, charged overt act. *State v. Fitzgerald*, 151 Miss. 229, 117 So. 517, 1928 Miss. LEXIS 289 (Miss. 1928).

Chastity of female not element of defense and need not be alleged in prosecution for attempt to rape female of previous chaste character; separate offense from assault to rape female not of previous chaste character. *Watkins v. State*, 134 Miss. 211, 98 So. 537, 1923 Miss. LEXIS 242 (Miss. 1923); *Hicks v. State*, 130 Miss. 411, 94 So. 218, 1922 Miss. LEXIS 211 (Miss. 1922).

Accused entitled to have particulars alleged to constitute overt act of crime

stated in the indictment. *Stapleton v. State*, 130 Miss. 737, 95 So. 86, 1922 Miss. LEXIS 257 (Miss. 1922).

It is sufficient to charge an attempt to commit a crime, coupled with an act towards it, falling short of the thing intended. *State v. Wade*, 102 Miss. 711, 59 So. 880, 1912 Miss. LEXIS 110 (Miss. 1912).

3. Particular offenses.

Where defendant confessed that he attacked the victim when she would not lend him money, and then searched the house for money after the victim was dead, sufficient evidence existed, at a minimum, to support a finding of attempted armed robbery, which under Miss. Code Ann. § 97-3-79, supported a conviction for armed robbery. *Carr v. State*, 880 So. 2d 1079, 2004 Miss. App. LEXIS 849 (Miss. Ct. App. 2004).

Victim's father testified that he had paid between \$ 3,000 and \$ 4,000 for the truck rims; although this was not direct testimony as to the value of the rims, it circumstantially provided a basis for the jury to infer that the rims were worth at least \$ 250; defendant's conviction for attempt to commit grand larceny was therefore appropriate and the trial court did not err in denying defendant's motion for judgment notwithstanding the verdict, or in the alternative, a new trial. *Smith v. State*, 881 So. 2d 908, 2004 Miss. App. LEXIS 401 (Miss. Ct. App. 2004).

Evidence that defendants broke into a hotel room, assaulted one of the occupants with a gun, but aborted their plans after encountering unexpected resistance, was sufficient to establish that they possessed the requisite intent to commit an armed robbery; a victim's watch was found on the floor, and the jury could have found that defendants removed the watch with the intent to take it. *Broomfield v. State*, 878 So. 2d 207, 2004 Miss. App. LEXIS 1182 (Miss. Ct. App.), cert. denied, 878 So. 2d 66, 2004 Miss. LEXIS 935 (Miss. 2004).

Evidence was sufficient to prove beyond a reasonable doubt that defendant committed attempted sexual battery, Miss. Code Ann. § 97-1-7, because the second victim testified that (1) defendant attempted to engage in sexual penetration

with the second victim by trying to insert defendant's penis into the second victim's mouth; (2) defendant was 24 or more months older than the second victim; and (3) the second victim was under the age of 14 years. *Bell v. State*, 835 So. 2d 953, 2003 Miss. App. LEXIS 214 (Miss. Ct. App. 2003).

4. —Burglary.

Evidence was sufficient to convict defendant of attempted burglary of a truck because the owner of the truck provided his eyewitness account, stating that he saw defendant trying to get into his truck; an officer testified that, when he arrived, defendant was walking away from the vehicle; the officer arrested defendant based on the incident report; a copy of the owner's original title was admitted into evidence; and, while defendant stated that he had bought the truck, the owner testified that he had never seen defendant before that day and that his truck was not for sale. *Anderson v. State*, 201 So. 3d 497, 2016 Miss. App. LEXIS 13 (Miss. Ct. App.), cert. denied, 203 So. 3d 1133, 2016 Miss. LEXIS 431 (Miss. 2016).

Evidence was sufficient to support a guilty verdict for attempted burglary because, inter alia: (1) the victim testified that she heard someone removing the screen from her bedroom window and breathing heavily; (2) once the scene was investigated by the victim and the officers, the screen was found removed from the window; and (3) the victim testified to having seen defendant in her backyard shortly after hearing the window screen tampering; thus, the trial court did not err in denying defendant's motion for a directed verdict, his request for a peremptory jury instruction, and his motion for a judgment notwithstanding the verdict. *Brown v. State*, 961 So. 2d 720, 2007 Miss. App. LEXIS 13 (Miss. Ct. App. 2007).

Indictment for attempted burglary must set forth an overt act toward the commission of the offense and where indictment fails to set forth such, indictment is defective. *Durr v. State*, 446 So. 2d 1016, 1984 Miss. LEXIS 1668 (Miss. 1984).

The overt act of the defendant in moving a display stand and placing it in a

position so that he could obtain access to the roof of a drug store was in furtherance of a design and constitutes an attempt to commit burglary under the provisions of this section [Code 1942, § 2017]. *Hendrix v. State*, 206 So. 2d 328, 1968 Miss. LEXIS 1564 (Miss. 1968).

Attempted burglary of a store building is a felony. *McCollum v. State*, 197 So. 2d 252, 1967 Miss. LEXIS 1523 (Miss. 1967).

In prosecution for attempt to commit burglary with intent to steal, drunkenness of accused, while no defense, remained a factor in adjudging whether there was present a definite intent to steal. *Bullock v. State*, 195 Miss. 340, 15 So. 2d 285, 1943 Miss. LEXIS 142 (Miss. 1943).

"Intent" to commit burglary implies purpose only, while "attempt" to do so implies both purpose and actual effort to carry such purpose into effect. *Jones v. State*, 172 Miss. 597, 161 So. 143, 1935 Miss. LEXIS 178 (Miss. 1935).

Conviction of attempt to commit burglary will be sustained, if method employed was calculated to carry out such unlawful purpose, though not most sensible or usual method. *Jones v. State*, 172 Miss. 597, 161 So. 143, 1935 Miss. LEXIS 178 (Miss. 1935).

Intent to commit burglary was essential, indispensable element of crime charged by indictment for attempting to break and enter dwelling house by breaking or forcing window thereof, with intent to take, steal, and carry away personal property therein. *Jones v. State*, 172 Miss. 597, 161 So. 143, 1935 Miss. LEXIS 178 (Miss. 1935).

Mere fact that one charged with attempt to commit burglary rattled window of dwelling "like he was trying to get in" raised no presumption that he intended to commit such crime. *Jones v. State*, 172 Miss. 597, 161 So. 143, 1935 Miss. LEXIS 178 (Miss. 1935).

Design to effect entrance into dwelling unlawfully may be shown by circumstances in trial for attempt to commit burglary. *Jones v. State*, 172 Miss. 597, 161 So. 143, 1935 Miss. LEXIS 178 (Miss. 1935).

An act may be sufficient in and of itself to warrant jury in finding that one

charged with attempt to commit burglary intended to commit such crime. *Jones v. State*, 172 Miss. 597, 161 So. 143, 1935 Miss. LEXIS 178 (Miss. 1935).

Evidence, in trial for attempt to commit burglary, that defendant rattled window of dwelling house "like he was trying to get in" and falsely stated that cook thereat had told him to bring some eggs there, held insufficient to sustain conviction. *Jones v. State*, 172 Miss. 597, 161 So. 143, 1935 Miss. LEXIS 178 (Miss. 1935).

5. —Embezzlement.

The crime of attempted embezzlement is not established where the evidence fails to show an overt act on the part of the defendant to commit the crime charged before he abandoned his alleged purpose. *Kern v. Noble*, 206 So. 2d 200, 1968 Miss. LEXIS 1557 (Miss. 1968).

6. —False pretenses.

Evidence, including the testimony of eight accomplices who testified for the state, sustained the conviction of an attorney for an attempt to commit the crime of false pretenses or cheats by organizing a group of people who attempted to defraud insurance companies by staging a fake or false wreck with automobiles, after having obtained hospitalization insurance on the participants and liability insurance on the offending vehicle. *Prisock v. State*, 244 Miss. 408, 141 So. 2d 711, 1962 Miss. LEXIS 463 (Miss. 1962).

Attempt to commit false pretenses is indictable offense. *State v. Fitzgerald*, 151 Miss. 229, 117 So. 517, 1928 Miss. LEXIS 289 (Miss. 1928).

7. —Homicide.

Evidence supported defendant's convictions for second degree murder and multiple counts of attempted murder because witnesses to the shooting said that defendant was in a vehicle seated on the passenger side of the vehicle behind a codefendant, two of the victims said defendant shot at them while passing their vehicle, and the driver of the vehicle in which defendant was a passenger said in a statement before the driver's death that defendant was instrumental in getting rid of the driver's vehicle after the shooting.

Holland v. State, 290 So. 3d 754, 2020 Miss. App. LEXIS 23 (Miss. Ct. App. 2020).

Trial court did not abuse its discretion in admitting prior-assault evidence as proof of defendant's intent because it found the testimony and exhibits showing his wife's bruises from that prior assault were probative to prove defendant intent, a necessary element of attempted murder; after filtering the evidence, the trial court found it was more probative than prejudicial. Bowman v. State, 283 So. 3d 154, 2019 Miss. LEXIS 359 (Miss. 2019).

Jury was correctly instructed on the elements of attempted-murder because defendants' acts of shooting at the victim with a firearm with the deliberate design to effect his death were acts, which, if accomplished, would constitute first-degree murder; not only did defendants approach the victim with guns drawn, verbally threaten to kill him, and say that they wanted him dead, they fired multiple shots at him as he tried to hide and escape. Pickett v. State, 252 So. 3d 40, 2018 Miss. App. LEXIS 54 (Miss. Ct. App.), cert. denied, 250 So. 3d 1271, 2018 Miss. LEXIS 374 (Miss. 2018), cert. denied, — So. 3d —, 2018 Miss. LEXIS 376 (Miss. 2018).

Attempted-murder statute was intended to punish the crimes committed, and no person of common intelligence would have to guess at its meaning or would differ as to its application, nor does the statute encourage arbitrary and erratic arrests; thus, the statute is not unconstitutionally vague. Pickett v. State, 252 So. 3d 40, 2018 Miss. App. LEXIS 54 (Miss. Ct. App.), cert. denied, 250 So. 3d 1271, 2018 Miss. LEXIS 374 (Miss. 2018), cert. denied, — So. 3d —, 2018 Miss. LEXIS 376 (Miss. 2018).

Attempted-murder statute was not overly broad, as it did not sweep within its ambit other protected rights. Pickett v. State, 252 So. 3d 40, 2018 Miss. App. LEXIS 54 (Miss. Ct. App.), cert. denied, 250 So. 3d 1271, 2018 Miss. LEXIS 374 (Miss. 2018), cert. denied, — So. 3d —, 2018 Miss. LEXIS 376 (Miss. 2018).

Verdicts finding defendants guilty of attempted murder were not against the weight or sufficiency of the evidence be-

cause the victim testified defendants fired multiple rounds at him after he exited a garbage truck and that all shots were directed at him; a witness corroborated the testimony, and investigators recovered thirteen shell casings near the garbage truck and discovered eight bullet holes in the hood, side mirror, windshield, and side window. Pickett v. State, 252 So. 3d 40, 2018 Miss. App. LEXIS 54 (Miss. Ct. App.), cert. denied, 250 So. 3d 1271, 2018 Miss. LEXIS 374 (Miss. 2018), cert. denied, — So. 3d —, 2018 Miss. LEXIS 376 (Miss. 2018).

Evidence was sufficient to convict defendant of the attempted murder of the victim, his wife, as any alleged abandonment by defendant did not bar his conviction because the jury heard testimony that defendant intended to murder the victim, as the victim testified that defendant had told her that he was going to kill her with a machete, and that he took action to carry out the crime, well beyond mere preparation, by repeatedly striking her with the machete; and, even if defendant prevented the victim from succumbing to the wounds he inflicted by calling 911 after he left the home, he completed the crime of attempted murder when he proceeded beyond mere preparation in carrying out his intent to kill the victim. Green v. State, 269 So. 3d 75, 2018 Miss. LEXIS 413 (Miss. 2018).

Evidence was sufficient to support a conviction for attempted murder where (1) the defendant tracked his targets, traveled the substantial distance necessary to furnish himself direct access to the victims, and procured the very weapon and abundant ammunition with which to accomplish his deadly mission, and (2) when the victims confronted him as to his purpose for being in Mississippi, he threatened to use the weapon to kill them. Morris v. State, 745 So. 2d 862, 1999 Miss. App. LEXIS 286 (Miss. Ct. App. 1999).

The difference between attempted murder and aggravated assault is the specific intent requirement, for the former, and the element of deadly weapon use, for the latter. In many fact scenarios, both charges are established by the same evidence. McGowan v. State, 541 So. 2d 1027, 1989 Miss. LEXIS 180 (Miss. 1989).

A defendant who was convicted of aggravated assault and sentenced to 15 years imprisonment was not entitled to a jury instruction on attempted murder which carries a maximum sentence of 10 years imprisonment, even though the evidence would have supported a conviction for either offense, since there was no view of the evidence under which the defendant might have been found guilty of attempted murder and not guilty of aggravated assault. *McGowan v. State*, 541 So. 2d 1027, 1989 Miss. LEXIS 180 (Miss. 1989).

Evidence sustained conviction of attempted murder where defendant had the intent to murder his intended victim, and had committed overt acts toward the consummation of the crime by attempting to forcibly enter the victim's home after arming himself with a deadly weapon, and was prevented from carrying out his intent to murder only because his intended victim shot him first. *Ledet v. State*, 286 So. 2d 817, 1973 Miss. LEXIS 1320 (Miss. 1973).

An instruction to the jury in a prosecution for murder that even if the deceased attempted to have unnatural intercourse with the defendant, but the danger of accomplishment of the crime by the deceased was over and at a time when such danger was not imminent or impending the defendant tied and gagged the deceased, and if the jury finds robbery, then the crime was murder, was proper in presenting defendant's theory of self-defense and the state's theory of felony murder. *Burns v. State*, 228 Miss. 254, 87 So. 2d 681, 1956 Miss. LEXIS 510 (Miss. 1956).

Where it was reported to officers that a man of certain description had attempted to steal an automobile and defendant answered the description and the officers had good ground to believe that a felony had been committed and the defendant was person who committed the crime, and consequently arrested the defendant without warrant and searched him, the evidence obtained incident to the search was admissible in prosecution for murder. *Wheeler v. State*, 219 Miss. 129, 63 So. 2d 517, 1953 Miss. LEXIS 377 (Miss.), cert. denied, 346 U.S. 852, 74 S. Ct. 67, 98 L. Ed. 367, 1953 U.S. LEXIS 1649 (U.S. 1953).

An indictment charging the defendant with an assault "with the intent and in the attempt to kill and murder," and the proof in the record charged an offense with intent to kill and murder under Code 1930, § 787 (Code 1942, § 2011), and not an offense under this section [Code 1942, § 2017]. *Norwood v. State*, 182 Miss. 898, 183 So. 523, 1938 Miss. LEXIS 205 (Miss. 1938).

The distinction between the mere attempt to commit the offense of murder, and the offense with assault with intent to kill and murder, is that in the attempt statute any attempt by overt act to do an act that would, if completed, amount to murder, regardless of the specific intent to kill a specific person, is made out by doing such acts as, if consummated, would amount to murder; such, for instance, as shooting in a public place where there are many people, without specific intent to kill any one of them or to kill anybody; the act being predicated upon recklessness and disregard of social duty, and fatally bent on mischief. *Norwood v. State*, 182 Miss. 898, 183 So. 523, 1938 Miss. LEXIS 205 (Miss. 1938).

Where defendant attempted to procure R to kill a third party, and in furtherance of the purpose took a gun, loaded it, and started with R to the point where the killing was to occur, but was arrested, the act was an "attempt" within this section [Code 1942, § 2017]. *Stokes v. State*, 92 Miss. 415, 46 So. 627, 1908 Miss. LEXIS 245 (Miss. 1908).

8. —Sexual offenses.

Trial court did not err in accepting appellant's guilty plea because the indictment, the prosecutor's statement, and appellant's testimony all established a sufficient factual basis for the crimes of kidnapping, armed robbery, and attempted sexual battery; substantial evidence was presented that appellant committed the crimes to which he pleaded guilty. *Green v. State*, — So. 3d —, 2019 Miss. App. LEXIS 73 (Miss. Ct. App. Feb. 19, 2019), cert. denied, 276 So. 3d 660, 2019 Miss. LEXIS 298 (Miss. 2019), cert. denied, — U.S. —, 140 S. Ct. 876, 205 L. Ed. 2d 494, 2020 U.S. LEXIS 324 (U.S. 2020).

Trial court did not commit plain error when it gave an instruction on attempted rape because the instruction included the intent to commit the offense of rape, stated the overt acts toward the commission of rape, and dictated that defendant was prevented from consummating the crime of rape; thus, the instruction properly recited the law on attempted rape, and it defined attempt. *Scott v. State*, 231 So. 3d 1024, 2016 Miss. App. LEXIS 404 (Miss. Ct. App. 2016), *aff'd*, 231 So. 3d 995, 2017 Miss. LEXIS 440 (Miss. 2017).

Evidence was sufficient to convict defendant of attempted sexual battery pursuant to Miss. Code Ann. § 97-1-7 and Miss. Code Ann. § 97-3-95(1)(a) and (d) because, *inter alia*: (1) there was evidence that defendant intended to penetrate the six-year-old victim's privates with his privates, which satisfied the definition of penetration under Miss. Code Ann. § 97-3-97(a); and (2) at the time of the incident, defendant, who was 18, was more than two years older than the victim. *Bracken v. State*, 939 So. 2d 826, 2006 Miss. App. LEXIS 742 (Miss. Ct. App. 2006).

Indictment was sufficient to put defendant on notice that he was being charged with attempted rape, and the indictment specifically set forth the conduct which the State planned to use as evidence; defendant failed to complete the crime of rape because he was unable to get an erection, and consequently unable to penetrate the victim's vagina, so that the record supported a conviction of attempted rape. *Purnell v. State*, 878 So. 2d 124, 2004 Miss. App. LEXIS 24 (Miss. Ct. App.), *cert. denied*, 878 So. 2d 67, 2004 Miss. LEXIS 938 (Miss. 2004).

Evidence was sufficient to convict defendant of attempted sexual battery of a female minor where the victim testified that defendant asked her to get into a car with him and to lie down in the back of the car, and asked her if "he was going to get him some sex," and when they arrived at a hotel room, defendant announced to other men there that the victim was there to have sex with them. *Quarles v. State*, 863 So. 2d 987, 2004 Miss. App. LEXIS 2 (Miss. Ct. App. 2004).

Evidence was sufficient to prove beyond a reasonable doubt that defendant com-

mitted attempted sexual battery, Miss. Code Ann. § 97-1-7, because the second victim testified that (1) defendant attempted to engage in sexual penetration with the second victim by trying to insert defendant's penis into the second victim's mouth; (2) defendant was 24 or more months older than the second victim; and (3) the second victim was under the age of 14 years. *Bell v. State*, 835 So. 2d 953, 2003 Miss. App. LEXIS 214 (Miss. Ct. App. 2003).

In a prosecution for attempted rape, the court's instruction to the jury on attempt was insufficient where it did not mention the requirement that the defendant be found either to have failed or was prevented from completing the act. *Armstead v. State*, 716 So. 2d 576, 1998 Miss. LEXIS 281 (Miss. 1998).

Instruction on attempted sexual battery that required jury to find, as overt act, defendant's attempt to place his penis into victim's anus, in combination with instruction that charged jury that "in order to prove an attempt to commit sexual penetration, the State must prove that the intended act was prevented from taking place by resistance or other means," fully and correctly charged jury on elements of the crime. *Eakes v. State*, 665 So. 2d 852, 1995 Miss. LEXIS 555 (Miss. 1995).

Conviction for sexual battery and attempted sexual battery was supported by victim's testimony that described anal and digital penetration, attempted anal penetration, and attempted cunnilingus, victim's testimony that defendant had threatened to harm other members of her family if she told anyone about the abuse, corroboration by other witnesses, and evidence that immediately after alleged abuse, victim had been treated for gonorrhea and chlamydia. *Eakes v. State*, 665 So. 2d 852, 1995 Miss. LEXIS 555 (Miss. 1995).

Trial court acted within its discretion by imposing 2 consecutive 20-year sentences for 2 sexual battery convictions and concurrent 20-year sentence for attempted sexual battery conviction. *Eakes v. State*, 665 So. 2d 852, 1995 Miss. LEXIS 555 (Miss. 1995).

The elements required to prove attempted capital rape are: (1) a design and

endeavor to rape one less than 14 years old by one at least 18 years old, (2) an overt act toward the commission of rape, and (3) failure to complete the rape or prevention of completion. *Henderson v. State*, 660 So. 2d 220, 1995 Miss. LEXIS 390 (Miss. 1995).

A trial court committed reversible error in failing to adequately instruct the jury on the elements of attempted capital rape where the instructions did not mention the element of failure to complete the rape or prevention of completion. *Henderson v. State*, 660 So. 2d 220, 1995 Miss. LEXIS 390 (Miss. 1995).

At defendant's trial for attempted rape, admission, over defense's objections, of alleged victim's earring, and of testimony concerning earring, constituted reversible error where earring had not been made available to defense for inspection before trial under motion for discovery. *Thomas v. State*, 488 So. 2d 1343, 1986 Miss. LEXIS 2475 (Miss. 1986).

Attempted sexual battery is a criminal offense by virtue of Mississippi Code § 97-1-7. *Gill v. State*, 485 So. 2d 1047, 1986 Miss. LEXIS 2378 (Miss. 1986).

Person who attempts to perform anal intercourse on another person but is prevented from doing so when other person flees may be convicted of attempted unnatural intercourse. *Haymond v. State*, 478 So. 2d 297, 1985 Miss. LEXIS 2269 (Miss. 1985).

In a prosecution for attempted rape of a female child under the age of 12 years, the trial court erred in conducting an in-chambers interrogation of a 9-year-old girl to determine her competency as a witness where defendants and their attorneys had not been informed of the examination and did not learn of it until the prosecution offered the child as a rebuttal witness and where the court had refused to allow this same child to testify in a similar case the previous week. *Allen v. State*, 384 So. 2d 605, 1980 Miss. LEXIS 2020 (Miss. 1980).

An indictment on the charge of attempted rape, charging that defendant attempted to commit such offense by stalking, chasing and running after the female in question, to the extent of almost exhausting her, in a lonesome and secluded place in the country where no one

else was present, was demurrable for failure sufficiently to fix the overt act in connection with the crime charged, since under such indictment defendant's purpose could have equally been a number of other crimes. *State v. Lindsey*, 202 Miss. 896, 32 So. 2d 876, 1947 Miss. LEXIS 353 (Miss. 1947).

Sentence of accused after indictment, trial, and conviction under the statute (Code 1942, § 2361) providing for punishment of one convicted of an assault with intent to forcibly ravish any female of previous chaste character, was not improper because accused could have been prosecuted and sentenced under this section [Code 1942, § 2017]. *Lee v. State*, 201 Miss. 423, 29 So. 2d 211, 1947 Miss. LEXIS 402 (Miss. 1947), rev'd, 332 U.S. 742, 68 S. Ct. 300, 92 L. Ed. 330, 1948 U.S. LEXIS 2619 (U.S. 1948).

Where an indictment charged the defendant with an assault with intent to ravish a female of previous chaste character, of the age of 14 years, and was drawn under Code 1930, § 1125 (Code 1942, § 2361), it was error for the trial court to treat the indictment as if drawn under Code 1930, § 793, the attempt statute. *John v. State*, 191 Miss. 152, 2 So. 2d 800, 1941 Miss. LEXIS 149 (Miss. 1941).

Refusal of instruction that burden was on state to prove that accused attempted to rape prosecutrix as charged held not error, because covered by instruction given at accused's request. *Barnes v. State*, 164 Miss. 126, 143 So. 475 (Miss. 1932).

In prosecution for attempt to rape, testimony respecting isolated act of sexual intercourse by prosecutrix held properly excluded as irrelevant. *Barnes v. State*, 164 Miss. 126, 143 So. 475 (Miss. 1932).

Permitting witness to testify that soon after alleged attempted rape prosecutrix told witness that accused broke into her house held not reversible error. *Barnes v. State*, 164 Miss. 126, 143 So. 475 (Miss. 1932).

Corroboration of prosecutrix held not required in prosecution for attempt to rape. *Barnes v. State*, 164 Miss. 126, 143 So. 475 (Miss. 1932).

Instructions to convict for attempt to rape if jury believed from evidence beyond

reasonable doubt that defendant committed act specified in instructions held not erroneous as confusing. *Barnes v. State*, 164 Miss. 126, 143 So. 475 (Miss. 1932).

9. — —Evidence.

Trial court did not abuse its discretion in denying defendant's motion for a new trial because the verdict was not contrary to the overwhelming weight of the evidence; the evidence demonstrated that defendant committed the crime of attempted rape because he unlawfully entered the victim's home, dragged her to her bedroom while making sexual comments, tore at her clothing, and only ceased his attempt to rape the victim in order to obtain money from her. *Scott v. State*, 231 So. 3d 1024, 2016 Miss. App. LEXIS 404 (Miss. Ct. App. 2016), *aff'd*, 231 So. 3d 995, 2017 Miss. LEXIS 440 (Miss. 2017).

Evidence was sufficient to provide the elements of attempted rape because defendant dragged the victim to the bedroom, tore her clothing, and said sexually explicit statements, which demonstrated his intent and constituted an overt act toward the act of rape; defendant only ended his attempt to rape the victim when she told him she would give him money to leave her alone. *Scott v. State*, 231 So. 3d 1024, 2016 Miss. App. LEXIS 404 (Miss. Ct. App. 2016), *aff'd*, 231 So. 3d 995, 2017 Miss. LEXIS 440 (Miss. 2017).

Defendant's convictions for attempted rape and statutory rape in violation of Miss. Code Ann. §§ 97-1-7 and 97-3-65(1)(b) were proper based on the victim's testimony and the corroboration of that testimony by defendant's wife, a physician and a psychologist. *Lee v. State*, 910 So. 2d 1123, 2005 Miss. App. LEXIS 216 (Miss. Ct. App. 2005).

Supreme Court of Mississippi overrules *Gibby v. State* and finds that when a defendant makes an overt act and a reasonable person would believe a deadly weapon is present, there is no requirement that the victim has to actually see the deadly weapon in order to convict for attempted armed robbery pursuant to Miss. Code Ann. § 97-3-79. Therefore, a victim is not required to have "definite knowledge" of a deadly weapon in the

sense that the weapon must actually be seen by the victim's own eyes. *Dambrell v. State*, 903 So. 2d 681, 2005 Miss. LEXIS 144 (Miss. 2005).

Court of appeals erred in reversing defendant's conviction for armed robbery where although the cashier did not actually see the butcher knife before defendant fled, clearly, defendant intended to rob the store, had a deadly weapon, threw down the towel and knife that was in his possession and was only thwarted in his attempt to rob the store. The cashier gained possession of the knife once defendant discarded it and thus, it was clear that defendant had a weapon on entering the store. *Dambrell v. State*, 903 So. 2d 681, 2005 Miss. LEXIS 144 (Miss. 2005).

While the Mississippi attempt statute requires that the third element of attempted rape, failure to consummate, result from extraneous causes and not a voluntary cessation, the extraneous cause was met by the struggle over a gun between the defendant and the victim, the shooting of the victim, and the resulting death of the victim. *Powers v. State*, 883 So. 2d 20, 2003 Miss. LEXIS 850 (Miss. 2003), *cert. denied*, 543 U.S. 1155, 125 S. Ct. 1297, 161 L. Ed. 2d 121, 2005 U.S. LEXIS 1584 (U.S. 2005).

Evidence was sufficient to prove beyond a reasonable doubt that defendant committed attempted sexual battery, Miss. Code Ann. § 97-1-7, because the second victim testified that (1) defendant attempted to engage in sexual penetration with the second victim by trying to insert defendant's penis into the second victim's mouth; (2) defendant was 24 or more months older than the second victim; and (3) the second victim was under the age of 14 years. *Bell v. State*, 835 So. 2d 953, 2003 Miss. App. LEXIS 214 (Miss. Ct. App. 2003).

Evidence was sufficient to establish attempted sexual battery where (1) the nine-year-old victim was in a check-out line at a store with his mother when the mother sent him back to the appropriate aisle to get a box of cereal, (2) once the victim got to that aisle, the defendant approached him and asked, using the vernacular, if he could engage in fellatio on the victim, (3) simultaneously with the

verbal request, the defendant pointed to his own genitals, (4) the victim refused, and the encounter ended, and (5) the defendant never touched the victim or made any effort to restrain him. *Ishee v. State*, 2000 Miss. App. LEXIS 412 (Miss. Ct. App. Aug. 29, 2000).

A defendant's grabbing of the victim by the throat, threatening to beat her up if she did not remove her clothes, and announcing his intent to rape her, constituted an "overt act" for attempted rape. *Pruitt v. State*, 528 So. 2d 828, 1988 Miss. LEXIS 339 (Miss. 1988).

In a juvenile delinquency proceeding, evidence that the juvenile had a medium-sized pocketknife, forcibly took the victim behind a woodpile in the backyard, pushed her to the ground, and then voluntarily stopped the assault was insufficient to support a finding of guilty of attempted rape. In *Interest of R.T.*, 520 So. 2d 136, 1988 Miss. LEXIS 124 (Miss. 1988).

Lewd suggestion to victim coupled with physically grabbing victim and attempting to carry her away only to have her break free comes near enough to accomplishment of rape as to constitute crime of attempted rape. *Harden v. State*, 465 So. 2d 321, 1985 Miss. LEXIS 1959 (Miss. 1985).

Undisputed evidence that defendant propositioned victim in lewd manner, exposed himself, seized victim and attempted to drag her away with him, and that lack of success in defendant's attempt to rape victim resulted from victim's resistance, not defendant's abandonment of crime, is sufficient to support conviction for attempted rape. *Harden v. State*, 465 So. 2d 321, 1985 Miss. LEXIS 1959 (Miss. 1985).

In a prosecution for attempted sexual battery in violation of § 97-3-95, evidence was insufficient to sustain a conviction under this section, where the uncontradicted facts indicated that there was no penetration, as defined by § 97-3-97, the prosecution conceded that there was no attempt to penetrate, the defendant had every opportunity to penetrate if he had wished to do so, and his failure was not the product of his victim's admittedly ineffective resistance or the intervention of extraneous causes. *West v. State*, 437 So.

2d 1212, 1983 Miss. LEXIS 2924 (Miss. 1983).

Evidence, including positive identification of the accused by two residents of the dwelling, was sufficient to sustain a conviction of burglariously breaking and entering a dwelling house with the intent to commit rape. *McDole v. State*, 229 Miss. 646, 91 So. 2d 738, 1957 Miss. LEXIS 308 (Miss. 1957).

10. — Miscellaneous.

Evidence was sufficient to support defendant's attempted kidnapping conviction because it showed that defendant entered the victim's bedroom, demanded she leave with him, struck her when she refused, and while she was unconscious defendant stole no items from the room. *Sullivan v. State*, 281 So. 3d 1146, 2019 Miss. App. LEXIS 267 (Miss. Ct. App. 2019).

Evidence supported defendant's conviction for attempting to leave the scene of an accident that resulted in an injury because defendant tried to open the door to a car and get in the car after wrecking a car which defendant had taken in a carjacking. The jury was free to infer that defendant did so with the intent to steal the car and then flee the scene of an auto accident in which another motorist was severely injured, but was frustrated by a locked car door or defendant's own physical condition, not a voluntary abandonment of purpose. *Moffett v. State*, 287 So. 3d 975, 2019 Miss. App. LEXIS 549 (Miss. Ct. App. 2019).

Trial judge's decision that a photograph's content was not too remote in time to be relevant and that the danger of unfair prejudice did not substantially outweigh that probative value was not an abuse of discretion because it was within the trial judge's discretion to determine that the photograph of handcuffs in defendant's car was relevant, even though it was taken more than two months after the alleged attempted kidnapping; the presence of the handcuffs in defendant's car was offered to show that on his trips to "look for women," defendant was not looking for consensual relationships, and the presence of handcuffs made it more probable that defendant grabbed the victim

with the intent to kidnap her. *Tucker v. State*, 64 So. 3d 594, 2011 Miss. App. LEXIS 324 (Miss. Ct. App. 2011).

Defendant's conviction for aggravated assault was appropriate even though there was no direct proof that defendant intended to cause serious bodily injury to the victim because the existence of such intent could have been logically deduced from the victim's testimony that he feared for his own safety, along with other testimony that defendant appeared to have come straight at the victim with his vehicle. *Commodore v. State*, 994 So. 2d 864, 2008 Miss. App. LEXIS 658 (Miss. Ct. App. 2008).

Defendant's conviction for attempted kidnapping in violation of Miss. Code Ann. § 97-3-53 and Miss. Code Ann. § 97-1-7 was proper where the evidence was sufficient to support the conviction. The evidence established that, among other things, defendant chased the victim down the street and grabbed her. *Carter v. State*, 932 So. 2d 850, 2006 Miss. App. LEXIS 77 (Miss. Ct. App.), cert. denied, 933 So. 2d 303, 2006 Miss. LEXIS 496 (Miss. 2006).

Defendants' convictions for armed robbery were proper where, at trial, the defense presented no credible evidence tending to demonstrate the innocence of defendants nor a reasonable explanation for their actions; further, the testimony concerning the manner in which defendants entered the room, their subsequent conduct, the fact that they fled and resisted arrest, and that a reasonably supported inference existed that there was an attempt to take one of the victim's watch all sustained a finding by a reasonable minded jury that defendants committed armed robbery. *Broomfield v. State*, 2003 Miss. App. LEXIS 914 (Miss. Ct. App. Oct. 7, 2003), op. withdrawn, sub. op., 878 So. 2d 207, 2004 Miss. App. LEXIS 1182 (Miss. Ct. App. 2004).

Although defendant received the maximum sentence on both counts of attempted robbery, there was no evidence that improper consideration infected the court's decision, or that the maximum sentences were given in retribution for defendant's physical outbursts at sentencing. *Bolton v. State*, 752 So. 2d 480, 1999

Miss. App. LEXIS 701 (Miss. Ct. App. 1999).

Attempted suicide is unlawful under the statute making criminal attempts unlawful. *Nicholson ex rel. Gollott v. State*, 672 So. 2d 744, 1996 Miss. LEXIS 146 (Miss. 1996).

Defense of accident to homicide charge was inapplicable if defendant, as he alleged, fatally shot victim while attempting to commit suicide, an unlawful act, and thus defendant was not entitled to requested instruction on accident. *Nicholson ex rel. Gollott v. State*, 672 So. 2d 744, 1996 Miss. LEXIS 146 (Miss. 1996).

The crime of attempted robbery is a crime of violence within the meaning of § 99-19-83. *Ashley v. State*, 538 So. 2d 1181, 1989 Miss. LEXIS 24 (Miss. 1989).

Evidence was sufficient to sustain conviction for attempted kidnapping where defendant had taken part in attempted kidnapping after failing to follow through with plan to rob grocery store, despite defendant's contention that he took no part in plan or effort to rob or kidnap grocery store customer. *Jenkins v. State*, 507 So. 2d 89, 1987 Miss. LEXIS 2505 (Miss. 1987).

Notwithstanding that the state failed to prove that a deadly weapon was displayed at the time motel operator was sprayed with mace, defendant's conviction of an attempt to commit armed robbery of the motel operator was supported by evidence showing that defendant, along with others, planned the armed robbery, armed and transported themselves to the motel site, with the defendant and another hidden in the back seat of the automobile used in the commission of the crime, and by shooting at the motel operator to effectuate and escape. *Edwards v. State*, 500 So. 2d 967, 1986 Miss. LEXIS 2775 (Miss. 1986).

Photographs of injuries of child are admissible, in prosecution of parent for attempted child abuse, on issue of whether fall resulting in injuries was accidental or result of parent's deliberate act. *Watson v. State*, 483 So. 2d 1326, 1986 Miss. LEXIS 2366 (Miss. 1986).

Defendant's statement to associate to tell juror who had been summoned to hear defendant's upcoming murder trial "there

might be a reward in the future,” followed by associate’s refusal to convey the offer and actual failure to make such effort was not an overt act as required by Code 1942 § 2017, and conviction of attempting to make and offer a reward or gratuity to a juror, with the intent to influence the juror’s verdict, would be reversed. *Smith v. State*, 279 So. 2d 652, 1973 Miss. LEXIS 1491 (Miss. 1973).

Undisputed showing that the defendant used some force and a great deal of persuasion and maneuvering to get a nine-year-old female child to go with him, and persisted in his efforts to the extent of taking the child about two blocks in one direction from the place from where she had wanted to go, and then, when she had got away from him, he pursued her until she arrived at the door of the place where her mother was, was sufficient to sustain the charge of attempted kidnaping. *McGuire v. State*, 231 Miss. 375, 95 So. 2d 537, 1957 Miss. LEXIS 522 (Miss. 1957).

Upon conviction of restaurant proprietor of attempt to sell diseased flesh of an animal for human consumption, under indictment bringing offense either under Code 1942, § 2336 or § 2338, but specifically referring to neither section, nor charging that defendant was a butcher or that his occupation might be classified as that of a butcher, sentence should be that imposed by § 2338, under the rule that when the facts which constitute a criminal offense may fall under either of two sections, or when there is substantial doubt as to which of the two is to be applied, the case will be referred to the statute which imposes the lesser punishment, having regard for the rule that under the attempt statute no greater punishment may be administered than that prescribed for the actual commission of the offense attempted. *Grillis v. State*, 196 Miss. 576, 17 So. 2d 525, 1944 Miss. LEXIS 237 (Miss. 1944).

Firing into house in nighttime with knowledge that house was occupied and that persons were sleeping therein was done in commission of act evincing a reckless disregard for human life, and with intent to injure some person therein, and town marshal living in house had such probable cause to believe that person fir-

ing gun had committed felony as would warrant marshal in arresting person without warrant. *Lee v. State*, 179 Miss. 122, 174 So. 85, 1937 Miss. LEXIS 14 (Miss. 1937).

Penalty for attempt to escape from county jail limited to year’s imprisonment; every person lawfully imprisoned. *Floyd v. State*, 140 Miss. 884, 105 So. 765, 1925 Miss. LEXIS 319 (Miss. 1925).

Verdict that defendant was preparing to make liquor not sufficient for conviction for attempt. *Wiggington v. State*, 136 Miss. 825, 101 So. 856, 1924 Miss. LEXIS 187 (Miss. 1924).

11. Sentence.

Attempted-murder statute does not violate the Eight Amendment; the difference in sentencing between the attempted-murder statute and the attempted aggravated assault statute does not violate the Eighth Amendment. *Pickett v. State*, 252 So. 3d 40, 2018 Miss. App. LEXIS 54 (Miss. Ct. App.), cert. denied, 250 So. 3d 1271, 2018 Miss. LEXIS 374 (Miss. 2018), cert. denied, — So. 3d —, 2018 Miss. LEXIS 376 (Miss. 2018).

In a case where defendant was sentenced to eight years in prison with five years of post-release supervision after a guilty plea was entered to the crime of attempted burglary of a dwelling, a post-conviction relief motion was properly dismissed without an evidentiary hearing under Miss. Code Ann. § 99-39-11(2) because there was no ineffective assistance of counsel where jurisdiction was included in an indictment, the charges were not contradictory, an attempt charge was appropriate, and appellant inmate’s other self-serving arguments were wholly unsupported by the record. Moreover, a sentence was not illegal since a suspended sentence was not required in addition to post-release supervision, the sentence imposed was within the range permitted, and the inmate was not misinformed regarding his appellate rights. *McKinney v. State*, 7 So. 3d 291, 2008 Miss. App. LEXIS 626 (Miss. Ct. App. 2008).

Appellate court affirmed the denial of an inmate’s motion for post-conviction relief on the grounds that her sentences were excessive as the sentences imposed

for her conviction for Miss. Code Ann. § 97-1-7 were within the statutory range. *Lee v. State*, 918 So. 2d 87, 2006 Miss. App. LEXIS 23 (Miss. Ct. App. 2006).

The defendant was properly sentenced to 30 years' imprisonment for attempted sexual battery, which is a noncapital crime, notwithstanding that the statute permits a maximum 10 years' imprisonment for an attempted capital crime. *Ishee v. State*, 2000 Miss. App. LEXIS 412 (Miss. Ct. App. Aug. 29, 2000).

12. Instructions

Jury instructions accurately followed the requisite elements of attempted murder by charging that defendant had to have (1) intended to murder the victim, (2) attempted to murder the victim, and (3) failed to actually kill the victim. *Morton v. State*, 246 So. 3d 895, 2017 Miss. App. LEXIS 649 (Miss. Ct. App. 2017), cert. denied, 246 So. 3d 886, 2018 Miss. LEXIS 295 (Miss. 2018).

RESEARCH REFERENCES

ALR.

Pregnancy as element of abortion or homicide based thereon. 46 A.L.R.2d 1393.

Conviction or acquittal of attempt to commit particular crime as bar to prosecution for conspiracy to commit same crime, or vice versa. 53 A.L.R.2d 622.

Attempt to commit assault as criminal offense. 79 A.L.R.2d 597.

Attempts to receive stolen property. 85 A.L.R.2d 259.

Attempts to commit offenses of larceny by trick, confidence game, false pretenses, and the like. 6 A.L.R.3d 241.

Impossibility of consummation of substantive crime as defense in criminal prosecution for conspiracy or attempt to commit crime. 37 A.L.R.3d 375.

What constitutes attempted murder. 54 A.L.R.3d 612.

What conduct amounts to an overt act or acts done toward commission of larceny so as to sustain charge of attempt to commit larceny. 76 A.L.R.3d 842.

Construction and application of state statute governing impossibility of consummation as defense to prosecution for attempt to commit crime. 41 A.L.R.4th 588.

Attempt to commit assault as criminal offense. 93 A.L.R.5th 683.

Am. Jur.

21 Am. Jur. 2d, Criminal Law §§ 154 et seq.

8 Am. Jur. Proof of Facts 2d, Withdrawal from or Abandonment of Criminal Enterprise, §§ 6 et seq. (proof of defendant's withdrawal from and abandonment of criminal enterprise).

CJS.

22 C.J.S., Criminal Law §§ 114, 116-123.

Practice References.

Ronald L. Schoenberg, Criminal Law Deskbook (Matthew Bender).

§ 97-1-9. Attempt to commit offense; no conviction if offense completed.

A person shall not be convicted of an assault with intent to commit a crime, or of any other attempt to commit an offense, when it shall appear that the crime intended or the offense attempted was perpetrated by such person at the time of such assault or in pursuance of such attempt.

HISTORY: Codes, 1857, ch. 64, art. 19; 1880, § 2712; 1892, § 974; 1906, § 1050; Hemingway's 1917, § 778; 1930, § 794; 1942, § 2018.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Particular offenses.

1. In general.

Where the State's proof of penetration was insufficient for a sexual battery charge because the victim was severely retarded and unable to communicate by anything other than grunting or squealing sounds, it was not prohibited from charging defendant with attempt, as the State's proof of a completed penetration was not more persuasive than an objective analysis showed it to be. *Thomas v. State*, 824 So. 2d 648, 2002 Miss. App. LEXIS 457 (Miss. Ct. App. 2002).

Statute is inapplicable where it is doubtful that offense attempted was completed by accused, and state may in such case elect to prosecute for the attempt. *Holley v. State*, 175 Miss. 347, 166 So. 924, 1936 Miss. LEXIS 47 (Miss. 1936).

Where crime was actually committed prosecution for an attempt is not proper. *Davis v. State*, 89 Miss. 21, 42 So. 542, 1906 Miss. LEXIS 52 (Miss. 1906).

2. Particular offenses.

Where defendant was indicted for attempting to burglar a dwelling house, the trial court committed reversible error by allowing the State to amend the indictment to change the charge from "attempt to break and enter" to "break and enter." Defendant was clearly prejudiced because the defense that he had actually completed the crime was no longer available to him. *Spears v. State*, 942 So. 2d 812, 2005 Miss. App. LEXIS 735 (Miss. Ct. App. 2005), rev'd, 942 So. 2d 772, 2006 Miss. LEXIS 656 (Miss. 2006).

Where the evidence positively established the completed act of sexual intercourse, it was error to prosecute and convict the appellant of assault with intent to ravish. *Young v. State*, 317 So. 2d 402, 1975 Miss. LEXIS 1752 (Miss. 1975).

Failure to consummate the crime of robbery is an essential element of proof in a prosecution under an indictment charging assault and battery with intent to rob. *Thompson v. State*, 226 Miss. 93, 83 So. 2d 761, 1955 Miss. LEXIS 611 (Miss. 1955).

If there had been doubt whether a crime of robbery was completed the state could have elected to prosecute for assault and battery with intent to rob, but this section [Code 1942, § 2018] does not cover a case wherein it is doubtful that the offense attempted was actually completed by the accused. *Thompson v. State*, 226 Miss. 93, 83 So. 2d 761, 1955 Miss. LEXIS 611 (Miss. 1955).

Where defendant had been indicted, tried and convicted of a crime of assault and battery with intent to rob and the proof showed that the defendant actually completed the robbery, conviction would be reversed and the defendant held for further grand jury action. *Thompson v. State*, 226 Miss. 93, 83 So. 2d 761, 1955 Miss. LEXIS 611 (Miss. 1955).

Conviction for attempted robbery of defendant indicted on charge of attempted burglary would be reversed, where proof introduced by state showed that offense was completed, since prosecution for attempt is improper under statute where crime is actually committed. *Williams v. State*, 178 Miss. 899, 174 So. 47, 1937 Miss. LEXIS 240 (Miss. 1937).

Where deceased was killed by shot fired by third party after defendant had fractured deceased's skull and there was no evidence that fracture would have caused death, defendant could be prosecuted for assault with intent to kill. *Holley v. State*, 175 Miss. 347, 166 So. 924, 1936 Miss. LEXIS 47 (Miss. 1936).

This section [Code 1942, § 2018] applied to crime of forgery, it being held there could be no conviction for forgery under the facts of the case. *Wilson v. State*, 85 Miss. 687, 38 So. 46, 1904 Miss. LEXIS 185 (Miss. 1904).

RESEARCH REFERENCES

ALR.

Construction and application of state statute governing impossibility of consummation as defense to prosecution for attempt to commit crime. 41 A.L.R.4th 588.

Am. Jur.

21 Am. Jur. 2d, Criminal Law §§ 154 et seq.

CJS.

22 C.J.S., Criminal Law §§ 148, 150-158.

Practice References.

Ronald L. Schoenberg, Criminal Law Deskbook (Matthew Bender).

CHAPTER 3.

CRIMES AGAINST THE PERSON

Sec.	
97-3-1.	Abduction for purposes of marriage.
97-3-2.	Crimes of violence defined.
97-3-3.	Abortion; causing abortion or miscarriage.
97-3-4.	Failed abortion; unlawful for physician to intentionally allow or cause living child to die; care of living child mandated; penalties.
97-3-5.	Abortion; advertisement, sale or gift of drugs or instruments.
97-3-7.	Simple assault; aggravated assault; simple domestic violence; simple domestic violence third; aggravated domestic violence; aggravated domestic violence third.
97-3-9 and 97-3-11.	Repealed.
97-3-13.	False confinement; sending sane person to psychiatric hospital or institution.
97-3-15.	Homicide; justifiable homicide; use of defensive force; duty to retreat.
97-3-17.	Homicide; excusable homicide.
97-3-19.	Homicide; murder defined; first-degree murder; second-degree murder; capital murder; lesser-included offenses.
97-3-21.	Homicide; penalty for first- or second-degree murder or capital murder.
97-3-23.	Homicide; death following duels fought out of state.
97-3-25.	Homicide; killing of child under 18 years of age by perpetrator over 21 years of age; penalties for manslaughter and child homicide.
97-3-27.	Homicide; killing while committing felony.
97-3-29.	Homicide; killing while committing a misdemeanor.
97-3-31.	Homicide; killing unnecessarily, while resisting effort of slain to commit felony or do unlawful act.
97-3-33.	Killing trespasser involuntarily.
97-3-35.	Homicide; killing without malice in the heat of passion.
97-3-37.	Homicide; killing of an unborn child; "human being" includes unborn child at every stage of gestation from conception until live birth for purposes of offenses of assault and homicide; "unborn child" defined; intentional injury to pregnant woman; penalties; provisions of section not applicable to legal medical procedures, including abortion.
97-3-39.	Homicide; drunken doctor, etc., unintentionally causing death.
97-3-41.	Homicide; overloading boat.
97-3-43.	Homicide; ignorant or negligent management of steamboat or railroad engine.
97-3-45.	Homicide; owner of dangerous animal.
97-3-47.	Homicide; all other killings.
97-3-49.	Suicide; aiding.
97-3-51.	Interstate removal of child under age fourteen by noncustodial parent or relative.
97-3-52.	Prohibition against selling, buying, offering to sell and offering to buy child or unborn child; penalties.
97-3-53.	Kidnapping; punishment.
97-3-54.	Human Trafficking Act; short title.
97-3-54.1.	Human Trafficking Act; prohibited conduct; penalty.
97-3-54.2.	Human Trafficking Act; destruction, concealment, or confiscation of passport or other immigration document for purpose of preventing person's freedom of movement or ability to travel; penalties.
97-3-54.3.	Human Trafficking Act; aiding, abetting, or conspiring to violate human trafficking provisions.

CRIMES

- Sec.
97-3-54.4. Human Trafficking Act; definitions.
97-3-54.5. Human Trafficking Act; use of undercover operative in detection of offense permitted.
97-3-54.6. Human Trafficking Act; injunctive and other relief for victims of trafficking; confidentiality.
97-3-54.7. Human Trafficking Act; forfeiture of assets and disposition of proceeds.
97-3-54.8. Relief for Victims of Human Trafficking Fund.
97-3-54.9. Statewide Human Trafficking Coordinator; duties.
97-3-54.10. Victims of Human Trafficking and Commercial Sexual Exploitation Fund; authorization to establish program to fund certain victim service providers for victims of human trafficking or commercial sexual exploitation.
97-3-54.11. Victims of Human Trafficking and Commercial Sexual Exploitation Fund; creation, funding, distribution; convening of committee to develop strategic plan to coordinate state's response to victims; member terms.
97-3-54.12. Victims of Human Trafficking and Commercial Sexual Exploitation Fund; requirements shelters must meet to qualify for funds; local contributions.
97-3-54.13. Victims of Human Trafficking and Commercial Sexual Exploitation Fund; confidentiality of information identifying victims; disclosure of physical location of shelter to public or private agency.
97-3-55. Libel; penalty.
97-3-57. Libel; truth as defense.
97-3-59. Mayhem.
97-3-61. Poisoning with intent to kill or injure.
97-3-63. Poisoning with intent to kill; where death does not ensue.
97-3-65. Statutory rape; enhanced penalty for forcible sexual intercourse or statutory rape by administering certain substances; criminal sexual assault protection order.
97-3-67. Repealed.
97-3-68. Rape; procedure for introducing evidence of sexual conduct of complaining witness; "complaining witness" defined.
97-3-69. Rape; "chaste character" presumed; uncorroborated testimony of victim insufficient.
97-3-70. Repealed.
97-3-71. Rape; assault with intent to ravish.
97-3-73. Robbery; definition.
97-3-75. Robbery; penalty.
97-3-77. Robbery; threat to injure person or relative at another time.
97-3-79. Robbery; use of deadly weapon.
97-3-81. Robbery; threatening letter demanding money, property.
97-3-82. Extortion; definitions; offense and penalties.
97-3-83. Robbery; bonds, bills, notes, etc., cotton receipts and railroad tickets.
97-3-85. Threats and intimidation; by letter or notice.
97-3-87. Threats and intimidation; whitecapping.
97-3-89. Timber, trees and saw logs; tampering with to injure or harass the owner prohibited.
97-3-91. Timber, trees and saw logs; penalty for tampering when injury occurs.
97-3-93. Timber, trees and saw logs; penalty for tampering when death results.
97-3-95. Sexual battery.
97-3-97. Sexual battery; definitions.
97-3-99. Sexual battery; defense.
97-3-101. Sexual battery; penalty; criminal sexual assault protection order.
97-3-103. Sexual battery; relationship with other criminal statutes.

- Sec.
 97-3-104. Crime of sexual activity between certain individuals and offenders incarcerated in correctional facilities or on correctional supervision; sanctions.
 97-3-105. Hazing; initiation into organization.
 97-3-107. Stalking; aggravated stalking; penalties; definitions.
 97-3-109. Drive-by shooting; drive-by bombing.
 97-3-110. Seizure and forfeiture of firearms unlawfully possessed by juveniles and of motor vehicles used in drive-by shootings or bombings.
 97-3-111. Forfeiture of vehicles used in drive-by shootings or bombings.
 97-3-113. Mississippi Carjacking Act; short title.
 97-3-115. Mississippi Carjacking Act; definitions.
 97-3-117. Mississippi Carjacking Act; what constitutes offense of carjacking; attempted carjacking; armed carjacking; penalties.

§ 97-3-1. Abduction for purposes of marriage.

Every person who shall take any person over the age of fourteen (14) years unlawfully, against his or her will, and by force, menace, fraud, deceit, stratagem or duress, compel or induce him or her to marry such person or to marry any other person, or to be defiled, and shall be thereof duly convicted, shall be punished by imprisonment in the penitentiary not less than five (5) years and not more than fifteen (15) years.

HISTORY: Codes, Hutchinson's 1848, ch. 64, art. 12, Title 3 (24); 1857, ch. 64, art. 1; 1871, § 2483; 1880, § 2697; 1892, § 949; 1906, § 1025; Hemingway's 1917, § 750; 1930, § 768; 1942, § 1994; Laws, 1980, ch. 356, eff from and after passage (approved April 23, 1980).

Cross References — Statute of frauds as applicable to marriage contracts, see § 15-3-1.

Penal offenses which are crimes against municipalities, see § 21-13-19.

Kidnapping, see §§ 97-3-51, 97-3-53.

Statutory rape, see §§ 97-3-65 et seq.

Seduction of female child, see §§ 97-3-65, 97-3-95, 97-3-101, 97-5-23, and 97-29-55.

Enticing children for prostitution or marriage, see § 97-5-5.

Enticing children for employment, see § 97-5-7.

JUDICIAL DECISIONS

1. In general.

Evidence that defendants who unlawfully took female over age 14, against her will, to another city, so that one of defendants, or some other person, might have sexual intercourse with her, did not intend to bring such sexual intercourse about by force, menace, fraud, deceit, stratagem, or duress, did not warrant conviction of defendants for unlawfully forcing female

over age of 14 to be defiled against her will. *Tyler v. State*, 178 Miss. 340, 173 So. 413, 1937 Miss. LEXIS 219 (Miss. 1937).

To constitute abduction the female must have been taken unlawfully against her will and by force, fraud, deceit, stratagem or duress have been compelled or induced to be defiled. *Lampton v. State*, 11 So. 656 (Miss. 1892).

RESEARCH REFERENCES

ALR.

Kidnapping by fraud or false pretenses.
95 A.L.R.2d 450.

10 Am. Jur. Pl & Pr Forms (Rev), False Imprisonment, Form 1.1 (complaint, petition, or declaration-false imprisonment imposed by private individual-sexual assault).

Am. Jur.

1 Am. Jur. 2d, Abduction and Kidnaping §§ 1, 2.

45 Am. Jur. Proof of Facts 2d 631, Age of Person.

§ 97-3-2. Crimes of violence defined.

(1) The following shall be classified as crimes of violence:

(a) Driving under the influence as provided in Sections 63-11-30(5) and 63-11-30(12)(d);

(b) Murder and attempted murder as provided in Sections 97-1-7(2), 97-3-19, 97-3-23 and 97-3-25;

(c) Aggravated assault as provided in Sections 97-3-7(2)(a) and (b) and 97-3-7(4)(a);

(d) Manslaughter as provided in Sections 97-3-27, 97-3-29, 97-3-31, 97-3-33, 97-3-35, 97-3-39, 97-3-41, 97-3-43, 97-3-45 and 97-3-47;

(e) Killing of an unborn child as provided in Sections 97-3-37(2)(a) and 97-3-37(2)(b);

(f) Kidnapping as provided in Section 97-3-53;

(g) Human trafficking as provided in Section 97-3-54.1;

(h) Poisoning as provided in Section 97-3-61;

(i) Rape as provided in Sections 97-3-65 and 97-3-71;

(j) Robbery as provided in Sections 97-3-73 and 97-3-79;

(k) Sexual battery as provided in Section 97-3-95;

(l) Drive-by shooting or bombing as provided in Section 97-3-109;

(m) Carjacking as provided in Section 97-3-117;

(n) Felonious neglect, abuse or battery of a child as provided in Section 97-5-39;

(o) Burglary of a dwelling as provided in Sections 97-17-23 and 97-17-37;

(p) Use of explosives or weapons of mass destruction as provided in Section 97-37-25;

(q) Statutory rape as provided in Section 97-3-65(1), but this classification is rebuttable on hearing by a judge;

(r) Exploitation of a child as provided in Section 97-5-33;

(s) Gratification of lust as provided in Section 97-5-23; and

(t) Shooting into a dwelling as provided in Section 97-37-29.

(2) In any felony offense with a maximum sentence of no less than five (5) years, upon conviction, the judge may find and place in the sentencing order, on the record in open court, that the offense, while not listed in subsection (1) of this section, shall be classified as a crime of violence if the facts show that the defendant used physical force, or made a credible attempt or threat of physical force against another person as part of the criminal act. No person

convicted of a crime of violence listed in this section is eligible for parole or for early release from the custody of the Department of Corrections until the person has served at least fifty percent (50%) of the sentence imposed by the court.

HISTORY: Laws, 2014, ch. 457, § 39, eff from and after July 1, 2014.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Ex post facto.
3. Constitutionality.

1. In general.

Trial court did not err by finding defendant's burglary was a crime of violence because that did not violate defendant's constitutional rights to due process, trial by an impartial jury, or a jury finding guilt on all elements of the offense beyond a reasonable doubt; the statute is an enhancement that deals solely with parole eligibility and early release. *Bowman v. State*, 283 So. 3d 154, 2019 Miss. LEXIS 359 (Miss. 2019).

Because burglary of a dwelling house was an enumerated crime of violence, defendant could not serve half of his ten-year sentence before being eligible for parole as the trial court believed, but instead, defendant would have to serve the entirety of his ten-year sentence; the trial court was under the erroneous impression that 50 percent parole eligibility applied to all of the statute, including the crimes enumerated in subsection (1). *Bowman v. State*, 283 So. 3d 154, 2019 Miss. LEXIS 359 (Miss. 2019).

Defendant was properly sentenced as a violent habitual offender because, before defendant committed defendant's latest crime, defendant's prior conviction for burglary of a dwelling was classified as a crime of violence. *Miller v. State*, 225 So. 3d 12, 2017 Miss. App. LEXIS 246 (Miss. Ct. App. 2017).

Circuit court properly sentenced defendant to twenty years with five years suspended, followed by five years of post-release supervision, because it did not exceed the statutory maximum for aggravated assault, and the sentence was not

grossly disproportionate to defendant's crime. *Darnell v. State*, 202 So. 3d 281, 2016 Miss. App. LEXIS 565 (Miss. Ct. App. 2016).

2. Ex post facto.

Defendant's habitual-offender sentence was proper because (1) defendant's sentence for a prior burglary committed before burglary was determined to be a crime of violence was not enhanced, as only defendant's sentence for a current crime was increased, and (2) sufficient testimony established defendant had previously served more than one year in prison. *Moffite v. State*, — So. 3d —, 2019 Miss. App. LEXIS 581 (Miss. Ct. App. Dec. 3, 2019), cert. denied, — So. 3d —, 2020 Miss. LEXIS 423 (Miss. 2020).

Defendant's enhanced sentence as a violent habitual offender based, in part, on a statute classifying defendant's prior burglary of a dwelling conviction as a violent crime that was enacted after defendant committed that crime, was not an ex post facto violation because the sentence was imposed for defendant's latest crime, which was aggravated due to being repetitive. *Miller v. State*, 225 So. 3d 12, 2017 Miss. App. LEXIS 246 (Miss. Ct. App. 2017).

3. Constitutionality.

Circuit judge erred in classifying defendant's offense as a "crime of violence" because the judge's finding that defendant used, attempted to use, or threatened to use physical force increased the minimum sentence that he had to serve and indisputably altered the prescribed range of sentences to which he was exposed, it eliminated defendant's eligibility for parole and made him ineligible for any type of early release until he had served at least half of his sentence, aggravated the

punishment based on judicial fact-finding and Miss. Code Ann. § 97-3-2(2) violated defendant's rights under the Sixth and Fourteenth Amendments to the extent that it permitted the circuit judge to find

that an unlisted felony was a "crime of violence." *Fogleman v. State*, 276 So. 3d 1213, 2018 Miss. App. LEXIS 460 (Miss. Ct. App. 2018), rev'd, 283 So. 3d 685, 2019 Miss. LEXIS 303 (Miss. 2019).

§ 97-3-3. Abortion; causing abortion or miscarriage.

(1) Any person wilfully and knowingly causing, by means of any instrument, medicine, drug or other means whatever, any woman pregnant with child to abort or miscarry, or attempts to procure or produce an abortion or miscarriage shall be guilty of a felony unless the same were done by a duly licensed, practicing physician:

(a) Where necessary for the preservation of the mother's life;

(b) Where pregnancy was caused by rape.

Said person shall, upon conviction, be imprisoned in the State Penitentiary not less than one (1) year nor more than ten (10) years; provided, however, if the death of the mother results therefrom, the person procuring, causing or attempting to procure or cause the illegal abortion or miscarriage shall be guilty of murder.

(2) No act prohibited in subsection (1) of this section shall be considered exempt under the provisions of paragraph (a) thereof unless performed upon the prior advice in writing, of two (2) reputable licensed physicians.

(3) The license of any physician or nurse shall be automatically revoked upon conviction under the provisions of this section.

(4) Nothing in this section shall be construed as conflicting with Section 41-41-73.

HISTORY: Codes, 1942, § 2223; Laws, 1952, ch. 260, §§ 1-3; Laws, 1966, ch. 358, § 1; Laws, 1997, ch. 350, § 3, eff from and after July 1, 1997.

Joint Legislative Committee Note — Pursuant to Section 1-1-109, the Joint Legislative Committee on Compilation, Revision and Publication of Legislation corrected an error in an internal reference in (2) by substituting "paragraph (a)" for "subparagraph (a)." The Joint Committee ratified the correction at its October 19, 2020, meeting.

Editor's Notes — Laws of 1997, ch. 350, § 4, provides as follows:

"SECTION 4. If any provision, word, phrase or clause of this act or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect the provisions, words, phrases, clauses or applications of this act that can be given effect without the invalid provision, word, phrase, clause or application and to this end, the provisions, words, phrases and clauses of this act are declared to be severable."

Cross References — Penalty for murder, see § 97-3-21.

JUDICIAL DECISIONS

ANALYSIS

I. UNDER CURRENT LAW.

1. Validity.
2. Construction and application.
- 3.-10. [Reserved for future use.]

II. UNDER FORMER LAW.

11. In general.

I. UNDER CURRENT LAW.

1. Validity.

State's interest in protecting medical standards within its borders was sufficient to support criminal prosecution of non-physicians who perform abortions. *Spears v. Circuit Court, Ninth Judicial Dist.*, 517 F.2d 360, 1975 U.S. App. LEXIS 13189 (5th Cir. Miss. 1975).

Section 1 of this act, as construed by the Mississippi Supreme Court in *Spears v. State*, 278 So. 2d 443, is not unconstitutionally overbroad, vague, or indefinite. *Spears v. Ellis*, 386 F. Supp. 653, 1974 U.S. Dist. LEXIS 7449 (S.D. Miss. 1974), *aff'd*, 423 U.S. 802, 96 S. Ct. 9, 46 L. Ed. 2d 23, 1975 U.S. LEXIS 2208 (U.S. 1975).

Section (1) of Code 1942, § 2223 is constitutional with the exception of subsections (a) and (b). *Spears v. State*, 278 So. 2d 443, 1973 Miss. LEXIS 1444 (Miss. 1973).

Code 1942, § 2223 as amended by Ch. 260, Laws of 1952, making the death of the mother resulting from an illegal abortion a murder is not violative of § 61 of the Mississippi Constitution for omitting to insert the provisions of Code 1942, §§ 2221, 2220, 2215 at length in the amendatory act, for the statute enacted by Ch. 260, Laws of 1952 is complete within itself, required no mention of the manslaughter statutes under which previous prosecution was maintained for the death of a mother as a result of an abortion, and such sections were amended by implication. *McCaskill v. State*, 227 So. 2d 847, 1969 Miss. LEXIS 1374 (Miss. 1969).

2. Construction and application.

The state may not restrict the decision of a pregnant woman and her physician

regarding abortion during the first stage of pregnancy. *Planned Parenthood v. Danforth*, 428 U.S. 52, 96 S. Ct. 2831, 49 L. Ed. 2d 788, 1976 U.S. LEXIS 13 (U.S. 1976).

The art of midwifery does not include the performance of abortions. *Spears v. Circuit Court, Ninth Judicial Dist.*, 517 F.2d 360, 1975 U.S. App. LEXIS 13189 (5th Cir. Miss. 1975).

A state may not require that abortions, prior to the end of the first trimester, be performed only in hospitals. *Doe v. Bolton*, 410 U.S. 179, 93 S. Ct. 739, 35 L. Ed. 2d 201, 1973 U.S. LEXIS 112 (U.S. 1973).

Prior to the end of the first trimester of pregnancy, an attending physician, in consultation with his patient, is free to determine, without regulation by the state, that in his medical judgment, the patient's pregnancy should be terminated, and if such a decision is reached, the physician's judgment may be effectuated by an abortion free of interference by the state. *Roe v. Wade*, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147, 1973 U.S. LEXIS 159 (U.S. 1973), overruled in part, *Planned Parenthood v. Casey*, 505 U.S. 833, 112 S. Ct. 2791, 120 L. Ed. 2d 674, 1992 U.S. LEXIS 4751 (U.S. 1992).

From and after the end of the first trimester of pregnancy, a state may regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health. *Roe v. Wade*, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147, 1973 U.S. LEXIS 159 (U.S. 1973), overruled in part, *Planned Parenthood v. Casey*, 505 U.S. 833, 112 S. Ct. 2791, 120 L. Ed. 2d 674, 1992 U.S. LEXIS 4751 (U.S. 1992).

State regulation protective of fetal life after viability has both logical and biological justifications, and if a state is interested in protecting fetal life after viability, it may proscribe abortion during that period except when it is necessary to preserve the life or health of the mother. *Roe v. Wade*, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147, 1973 U.S. LEXIS 159 (U.S. 1973), overruled in part, *Planned Parenthood v. Casey*, 505 U.S. 833, 112 S. Ct. 2791, 120 L. Ed. 2d 674, 1992 U.S. LEXIS 4751 (U.S. 1992).

Where conviction was based on § (1) of Code 1942, § 223 which prohibits all abortions unless performed by a duly licensed, practicing physician, an abortion performed by a nonphysician was a violation of this section. *Spears v. State*, 278 So. 2d 443, 1973 Miss. LEXIS 1444 (Miss. 1973).

In a prosecution for attempted criminal abortion, where the female on whom the abortion was allegedly attempted was a hostile witness for the state, the state was entitled to prove that the witness had made prior inconsistent statements for the purpose of impeaching or discrediting her testimony, but such extra-judicial statements were not competent as substantial evidence of the facts to which they related. *Hall v. State*, 250 Miss. 253, 165 So. 2d 345, 1964 Miss. LEXIS 461 (Miss. 1964).

Where, in a prosecution for attempted criminal abortion, the accused was the only witness who testified on his behalf as to the facts and circumstances of the alleged crime, it was reversible error for the trial court to give an instruction which, in effect, authorized the jury to throw aside the accused's testimony as being unworthy of belief because of the strong temptation on his part to swear falsely. *Hall v. State*, 250 Miss. 253, 165 So. 2d 345, 1964 Miss. LEXIS 461 (Miss. 1964).

In a prosecution for attempted criminal abortion, the trial judge erred in giving an instruction which might have given the jury the impression that, in making up their verdict, they were not to take into consideration the burden of proof and the presumption of innocence. *Hall v. State*, 250 Miss. 253, 165 So. 2d 345, 1964 Miss. LEXIS 461 (Miss. 1964).

An indictment which charges all elements of the crime, including an averment that the abortion was not necessary for the preservation of the life of the mother, is not insufficient in omitting to add "upon the prior advice, in writing, of two reputable licensed physicians." *Phillips v. State*, 239 Miss. 399, 123 So. 2d 449, 1960 Miss. LEXIS 298 (Miss. 1960).

A defendant may not object to the admission of a confession of an abortion because of a deletion therefrom of admissions of the performance of other abortions. *Phillips v. State*, 239 Miss. 399, 123 So. 2d 449, 1960 Miss. LEXIS 298 (Miss. 1960).

In a prosecution under this section [Code 1942, § 2223] defendant has no right to cross-examine the prosecutrix as to the paternity of the child. *Phillips v. State*, 239 Miss. 399, 123 So. 2d 449, 1960 Miss. LEXIS 298 (Miss. 1960).

3.-10. [Reserved for future use.]

II. UNDER FORMER LAW.

11. In general.

Accused's guilt was for the jury in manslaughter prosecution for death of woman who died as a result of injuries inflicted by someone in attempting to produce an abortion, notwithstanding that injuries were inflicted in an inexcusably crude manner and the accused apparently was a physician or surgeon who had been practicing his profession for more than thirty-five years. *Johnson v. State*, 23 So. 2d 499 (Miss. 1945).

Indictment did not charge offense where it did not charge destruction was not advised by physician. *Ladnier v. State*, 155 Miss. 348, 124 So. 432, 1929 Miss. LEXIS 299 (Miss. 1929).

Where accused performed an operation on a pregnant woman to procure a miscarriage, and the woman died in consequence thereof, he was guilty of manslaughter. *State v. Proctor*, 102 Miss. 792, 59 So. 890, 1912 Miss. LEXIS 123 (Miss. 1912).

An infant in the mother's womb was not a human being at common law and hence the use by a pregnant woman of substances or instruments to kill such a child is not within this section. [Code 1942, § 2223]. *State v. Prude*, 76 Miss. 543, 24 So. 871, 1898 Miss. LEXIS 104 (Miss. 1898).

RESEARCH REFERENCES

ALR.

Admissibility, in prosecution based on abortion, of evidence of commission of

similar crimes by accused. 15 A.L.R.2d 1080.

Necessity, to warrant conviction of abor-

tion, that fetus be living at time of commission of acts. 16 A.L.R.2d 949.

Pregnancy as element of abortion or homicide based thereon. 46 A.L.R.2d 1393.

Right of action for injury to or death of woman who consented to illegal abortion. 36 A.L.R.3d 630.

Right of minor to have abortion performed without parental consent. 42 A.L.R.3d 1406.

Woman's right to have abortion without consent of, or against objections of, child's father. 62 A.L.R.3d 1097.

Medical malpractice in performance of legal abortion. 69 A.L.R.4th 875.

Am. Jur.

1 Am. Jur. 2d, Abortion and Birth Control §§ 1, 116, 117.

40 Am. Jur. 2d, Homicide §§ 8, 9.

1 Am. Jur. Pl & Pr Forms, Rev, Abortion, Form 3.1.

2 Am. Jur. Trials, Investigating Particular Crimes § 64 (abortion).

41 Am. Jur. Proof of Facts 2d 1, Trauma in Pregnancy.

49 Am. Jur. Proof of Facts 2d 125, Teratogenic Drugs.

Lawyers' Edition.

Validity, under Federal Constitution, of abortion laws. 28 L. Ed. 2d 1053.

Practice References.

Ronald L. Schoenberg, Criminal Law Deskbook (Matthew Bender).

§ 97-3-4. Failed abortion; unlawful for physician to intentionally allow or cause living child to die; care of living child mandated; penalties.

(1) It shall be unlawful for any physician performing an abortion that results in the delivery of a living child to intentionally allow or cause the child to die.

(2) If the child is viable, such child shall be immediately provided appropriate medical care and comfort care necessary to sustain life. If the child is not viable, such child shall be provided comfort care. The provision of this section shall include, but not be limited to, a child born with physical or mental handicapping conditions which, in the opinion of the parent, the physician or other persons, diminishes the quality of the child's life, a child born alive during the course of an attempted abortion and a child not wanted by the parent.

(3) As used in this section the term "child" includes every infant member of the species homo sapiens who is born alive at any stage of development.

(4) Any person who violates this section shall be guilty of a felony and, upon conviction, be imprisoned for not less than one (1) year nor more than ten (10) years in the State Penitentiary and fined not more than Fifty Thousand Dollars (\$50,000.00) but not less than Twenty-five Thousand Dollars (\$25,000.00).

HISTORY: Laws, 2004, ch. 436, § 1, eff from and after July 1, 2004.

§ 97-3-5. Abortion; advertisement, sale or gift of drugs or instruments.

A person who sells, lends, gives away, or in any manner exhibits, or offers to sell, lend, or give away, or has in his possession with intent to sell, lend, or

give away, or advertises or offers for sale, loan or distribution any instrument or article, or any drug or medicine, for causing unlawful abortion; or who writes or prints, or causes to be written or printed, a card, circular, pamphlet, advertisement, or notice of any kind, or gives information orally, stating when, where, how, of whom, or by what means such article or medicine can be purchased or obtained, or who manufactures any such article or medicine, is guilty of a misdemeanor, and, on conviction, shall be punished by fine not less than twenty-five dollars (\$25.00) nor more than two hundred dollars (\$200.00), and by imprisonment in the county jail not exceeding three (3) months.

HISTORY: Codes, 1892, § 1217; 1906, § 1293; Hemingway's 1917, § 1026; 1930, § 1057; 1942, § 2289; Laws, 1970, ch. 344, § 1, eff from and after passage (approved March 4, 1970).

Cross References — Imposition of standard state assessment in addition to all court imposed fines or other penalties for any misdemeanor violation, see § 99-19-73.

JUDICIAL DECISIONS

1. In general.

Health and Human Service regulations limiting ability of Federal Title X fund recipients to engage to abortion related activities were permissible construction of Title X, did not impose viewpoint-discriminatory conditions on government subsidy so as to violate First Amendment free speech rights of either private health care organizations that received Title X funds, their staffs, or their patients, and did not violate women's rights under due process clause of Fifth Amendment. *Rust v. Sullivan*, 500 U.S. 173, 111 S. Ct. 1759, 114 L. Ed. 2d 233, 1991 U.S. LEXIS 2908 (U.S. 1991).

A state statute making it a misdemeanor, by sale or circulation of any publication, to encourage or prompt the procuring of an abortion, unconstitutionally infringes upon the First Amendment rights of free speech and press of a newspaper editor who is prosecuted under that statute for publishing an advertisement of an out-of-state organization which offers services relating to obtaining legal abortions in the state where the organization is located. *Bigelow v. Virginia*, 421 U.S. 809, 95 S. Ct. 2222, 44 L. Ed. 2d 600, 1975 U.S. LEXIS 73 (U.S. 1975).

RESEARCH REFERENCES

Am. Jur.

10 Am. Jur. Trials, Obscenity Litigation §§ 1 et seq.

CJS.

67 C.J.S., Obscenity §§ 13-15, 28.

§ 97-3-7. Simple assault; aggravated assault; simple domestic violence; simple domestic violence third; aggravated domestic violence; aggravated domestic violence third.

(1)(a) A person is guilty of simple assault if he or she (i) attempts to cause or purposely, knowingly or recklessly causes bodily injury to another; (ii) negligently causes bodily injury to another with a deadly weapon or other means likely to produce death or serious bodily harm; or (iii) attempts by

physical menace to put another in fear of imminent serious bodily harm; and, upon conviction, he or she shall be punished by a fine of not more than Five Hundred Dollars (\$500.00) or by imprisonment in the county jail for not more than six (6) months, or both.

(b) However, a person convicted of simple assault upon any of the persons listed in subsection (14) of this section under the circumstances enumerated in subsection (14) shall be punished by a fine of not more than One Thousand Dollars (\$1,000.00) or by imprisonment for not more than five (5) years, or both.

(2)(a) A person is guilty of aggravated assault if he or she (i) attempts to cause serious bodily injury to another, or causes such injury purposely, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life; (ii) attempts to cause or purposely or knowingly causes bodily injury to another with a deadly weapon or other means likely to produce death or serious bodily harm; or (iii) causes any injury to a child who is in the process of boarding or exiting a school bus in the course of a violation of Section 63-3-615; and, upon conviction, he or she shall be punished by imprisonment in the county jail for not more than one (1) year or sentenced to the custody of the Department of Corrections for not more than twenty (20) years.

(b) However, a person convicted of aggravated assault upon any of the persons listed in subsection (14) of this section under the circumstances enumerated in subsection (14) shall be punished by a fine of not more than Five Thousand Dollars (\$5,000.00) or by imprisonment for not more than thirty (30) years, or both.

(3)(a) When the offense is committed against a current or former spouse of the defendant or a child of that person, a person living as a spouse or who formerly lived as a spouse with the defendant or a child of that person, a parent, grandparent, child, grandchild or someone similarly situated to the defendant, a person who has a current or former dating relationship with the defendant, or a person with whom the defendant has had a biological or legally adopted child, a person is guilty of simple domestic violence who:

(i) Attempts to cause or purposely, knowingly or recklessly causes bodily injury to another;

(ii) Negligently causes bodily injury to another with a deadly weapon or other means likely to produce death or serious bodily harm; or

(iii) Attempts by physical menace to put another in fear of imminent serious bodily harm.

Upon conviction, the defendant shall be punished by a fine of not more than Five Hundred Dollars (\$500.00) or by imprisonment in the county jail for not more than six (6) months, or both.

(b) **Simple domestic violence: third.** A person is guilty of the felony of simple domestic violence third who commits simple domestic violence as defined in this subsection (3) and who, at the time of the commission of the offense in question, has two (2) prior convictions, whether against the same or another victim, within seven (7) years, for any combination of simple

domestic violence under this subsection (3) or aggravated domestic violence as defined in subsection (4) of this section or substantially similar offenses under the law of another state, of the United States, or of a federally recognized Native American tribe. Upon conviction, the defendant shall be sentenced to a term of imprisonment not less than five (5) nor more than ten (10) years.

(4)(a) When the offense is committed against a current or former spouse of the defendant or a child of that person, a person living as a spouse or who formerly lived as a spouse with the defendant or a child of that person, a parent, grandparent, child, grandchild or someone similarly situated to the defendant, a person who has a current or former dating relationship with the defendant, or a person with whom the defendant has had a biological or legally adopted child, a person is guilty of aggravated domestic violence who:

(i) Attempts to cause serious bodily injury to another, or causes such an injury purposely, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life;

(ii) Attempts to cause or purposely or knowingly causes bodily injury to another with a deadly weapon or other means likely to produce death or serious bodily harm; or

(iii) Strangles, or attempts to strangle another.

Upon conviction, the defendant shall be punished by imprisonment in the custody of the Department of Corrections for not less than two (2) nor more than twenty (20) years.

(b) **Aggravated domestic violence; third.** A person is guilty of aggravated domestic violence third who, at the time of the commission of that offense, commits aggravated domestic violence as defined in this subsection (4) and who has two (2) prior convictions within the past seven (7) years, whether against the same or another victim, for any combination of aggravated domestic violence under this subsection (4) or simple domestic violence third as defined in subsection (3) of this section, or substantially similar offenses under the laws of another state, of the United States, or of a federally recognized Native American tribe. Upon conviction for aggravated domestic violence third, the defendant shall be sentenced to a term of imprisonment of not less than ten (10) nor more than twenty (20) years.

(5) **Sentencing for fourth or subsequent domestic violence offense.** Any person who commits an offense defined in subsection (3) or (4) of this section, and who, at the time of the commission of that offense, has at least three (3) previous convictions, whether against the same or different victims, for any combination of offenses defined in subsections (3) and (4) of this section or substantially similar offenses under the law of another state, of the United States, or of a federally recognized Native American tribe, shall, upon conviction, be sentenced to imprisonment for not less than fifteen (15) years nor more than twenty (20) years.

(6) In sentencing under subsections (3), (4) and (5) of this section, the court shall consider as an aggravating factor whether the crime was committed in the physical presence or hearing of a child under sixteen (16) years of age

who was, at the time of the offense, living within either the residence of the victim, the residence of the perpetrator, or the residence where the offense occurred.

(7) Reasonable discipline of a child, such as spanking, is not an offense under subsections (3) and (4) of this section.

(8) A person convicted under subsection (4) or (5) of this section shall not be eligible for parole under the provisions of Section 47-7-3(1)(c) until he or she shall have served one (1) year of his or her sentence.

(9) For the purposes of this section:

(a) "Strangle" means to restrict the flow of oxygen or blood by intentionally applying pressure on the neck, throat or chest of another person by any means or to intentionally block the nose or mouth of another person by any means.

(b) "Dating relationship" means a social relationship as defined in Section 93-21-3.

(10) Every conviction under subsection (3), (4) or (5) of this section may require as a condition of any suspended sentence that the defendant participate in counseling or treatment to bring about the cessation of domestic abuse. The defendant may be required to pay all or part of the cost of the counseling or treatment, in the discretion of the court.

(11)(a) Upon conviction under subsection (3), (4) or (5) of this section, the court shall be empowered to issue a criminal protection order prohibiting the defendant from any contact with the victim. The court may include in a criminal protection order any other condition available under Section 93-21-15. The duration of a criminal protection order shall be based upon the seriousness of the facts before the court, the probability of future violations, and the continued safety of the victim or another person. However, municipal and justice courts may issue criminal protection orders for a maximum period of time not to exceed one (1) year. Circuit and county courts may issue a criminal protection order for any period of time deemed necessary. Upon issuance of a criminal protection order, the clerk of the issuing court shall enter the order in the Mississippi Protection Order Registry within twenty-four (24) hours of issuance with no exceptions for weekends or holidays, pursuant to Section 93-21-25.

(b) A criminal protection order shall not be issued against the defendant if the victim of the offense, or the victim's lawful representative where the victim is a minor or incompetent person, objects to its issuance, except in circumstances where the court, in its discretion, finds that a criminal protection order is necessary for the safety and well-being of a victim who is a minor child or incompetent adult.

(c) Criminal protection orders shall be issued on the standardized form developed by the Office of the Attorney General and a copy provided to both the victim and the defendant.

(d) It shall be a misdemeanor to knowingly violate any condition of a criminal protection order. Upon conviction for a violation, the defendant shall be punished by a fine of not more than Five Hundred Dollars (\$500.00)

or by imprisonment in the county jail for not more than six (6) months, or both.

(12) When investigating allegations of a violation of subsection (3), (4), (5) or (11) of this section, whether or not an arrest results, law enforcement officers shall utilize the form prescribed for such purposes by the Office of the Attorney General in consultation with the sheriff's and police chief's associations. However, failure of law enforcement to utilize the uniform offense report shall not be a defense to a crime charged under this section. The uniform offense report shall not be required if, upon investigation, the offense does not involve persons in the relationships specified in subsections (3) and (4) of this section.

(13) In any conviction under subsection (3), (4), (5) or (11) of this section, the sentencing order shall include the designation "domestic violence." The court clerk shall enter the disposition of the matter into the corresponding uniform offense report.

(14) Assault upon any of the following listed persons is an aggravating circumstance for charging under subsections (1)(b) and (2)(b) of this section:

(a) When acting within the scope of his or her duty, office or employment at the time of the assault: a statewide elected official; law enforcement officer; fireman; emergency medical personnel; health care provider; employees of a health care provider or health care facility; social worker, family protection specialist or family protection worker employed by the Department of Human Services or another agency; Division of Youth Services personnel; any county or municipal jail officer; superintendent, principal, teacher or other instructional personnel, school attendance officer or school bus driver; any member of the Mississippi National Guard or United States Armed Forces; a judge of a circuit, chancery, county, justice, municipal or youth court or a judge of the Court of Appeals or a justice of the Supreme Court; district attorney or legal assistant to a district attorney; county prosecutor or municipal prosecutor; court reporter employed by a court, court administrator, clerk or deputy clerk of the court; public defender; or utility worker;

(b) A legislator while the Legislature is in regular or extraordinary session or while otherwise acting within the scope of his or her duty, office or employment; or

(c) A person who is sixty-five (65) years of age or older or a person who is a vulnerable person, as defined in Section 43-47-5.

HISTORY: Codes, 1857, ch. 64, art. 18; 1871, § 2497; 1880, § 2711; 1892, § 967; 1906, § 1043; Hemingway's 1917, § 771; 1930, § 787; 1942, § 2011; Laws, 1974, ch. 458, § 1; Laws, 1992, ch. 431, § 2; Laws, 1993, ch. 580, § 1; Laws, 1998, ch. 425, § 1; Laws, 1998, ch. 525, § 1; Laws, 1999, ch. 552, § 2; Laws, 2000, ch. 552, § 1; Laws, 2001, ch. 566, § 1; Laws, 2002, ch. 353, § 1; Laws, 2004, ch. 489, § 9; Laws, 2006, ch. 589, § 1; Laws, 2006, ch. 600, § 11; Laws, 2007, ch. 589, § 10; Laws, 2008, ch. 391, § 2; Laws, 2008, ch. 553, § 1; Laws, 2009, ch. 433, § 3; Laws, 2010, ch. 536, § 1; Laws, 2011, ch. 481, § 3; Laws, 2012, ch. 514, § 8; Laws, 2013, ch. 565, § 1; Laws, 2014, ch. 463, § 1; Laws, 2015, ch. 332, § 3; Laws, 2015, ch. 397, § 1; Laws, 2016, ch. 346, § 1, eff from and after July 1, 2016; Laws, 2019, ch. 341, § 1, eff from and after July 1, 2019.

Joint Legislative Committee Note — Section 1 of ch. 425, Laws, 1998, effective July 1, 1998 (approved March 23, 1998), amended this section. Section 1 of ch. 525, Laws, 1998, effective July 1, 1998 (approved April 6, 1998), also amended this section. As set out above, this section reflects the language of Section 1 of ch. 525, Laws, 1998, pursuant to Section 1-3-79 which provides that whenever the same section of law is amended by different bills during the same legislative session, and the effective dates of the amendments are the same, the amendment with the latest approval date shall supersede all other amendments to the same section approved on an earlier date.

Section 1 of ch. 589, Laws, 2006, effective from and after July 1, 2006 (approved April 21, 2006), amended this section. Section 11 of ch. 600, Laws, 2006, effective from and after July 1, 2006 (approved April 24, 2006), also amended this section. As set out above, this section reflects the language of Section 1 of ch. 589, Laws, 2006, which contains language that specifically provides that it supercedes § 97-3-7 as amended by Laws, 2006, ch. 600.

Section 2 of ch. 391, Laws of 2008, effective July 1, 2008 (approved March 31, 2008), amended this section. Section 1 of ch. 553, Laws of 2008, effective July 1, 2008 (approved May 10, 2008), also amended this section. As set out above, this section reflects the language of Section 1 of ch. 553, Laws of 2008, which contains language that specifically provides that it supersedes § 97-3-7 as amended by Laws of 2008, ch. 391.

Pursuant to Section 1-1-109, the Joint Legislative Committee on Compilation, Revision and Publication of Legislation corrected several typographical errors in subsection (12) by substituting “subsection (3), (4), (5) or (11) of this section” for “subsection (3), (4) (5) or 11 of this section.” The Joint Committee ratified the correction at its July 24, 2014, meeting.

Section 3 of Chapter 332, Laws of 2015, effective from and after July 1, 2015, (approved March 13, 2015), amended this section. Section 1 of Chapter 397, Laws of 2015, effective from and after July 1, 2015 (approved March 23, 2015), also amended this section. As set out above, this section reflects the language of both amendments pursuant to Section 1-1-109, which gives the Joint Legislative Committee on Compilation, Revision and Publication of Legislation authority to integrate amendments so that all versions of the same code section enacted within the same legislative session may become effective. The Joint Committee on Compilation, Revision and Publication of Legislation ratified the integration of these amendments as consistent with the legislative intent at the August 17, 2015, meeting of the Committee.

Editor’s Notes — Laws of 1974, ch. 458, § 3, which chapter amended this section, provides as follows:

“SECTION 3. Nothing in this act shall be construed to defeat or affect in any manner whatsoever the prosecution of any person, association, firm or corporation for the violation of any statute repealed or amended hereby which violation occurred prior to the effective date of this act.”

Amendment Notes — The 2019 amendment substituted “sentenced to the custody of the Department of Corrections for not more than” for “in the Penitentiary for not more than” in (2)(a); and in (14)(a), substituted “health care provider” for “health personnel” and inserted “employees of a health care provider or health care facility”; and made gender neutral changes throughout.

Cross References — Employees of department of corrections having status of law-enforcement officers under this section, see § 47-5-54.

Effect of conviction of assault with intent to kill as disqualification for holding office in labor union, etc., see § 71-1-49.

Mississippi Protection Order Registry, see § 93-21-25.

Aggravated assault, as provided in this section, defined as crime of violence, see § 97-3-2.

Homicide, see § 97-3-15 et seq.

Mayhem, see § 97-3-59.

Applicability of the Racketeer Influenced and Corrupt Organization Act to this

section, see § 97-43-1 et seq.

Arrest of person without warrant for violation of this section, see § 99-3-7.

Insulting words being admissible in assault trials, see § 99-17-19.

Imposition of standard state assessment in addition to all court imposed fines or other penalties for any felony violation, see § 99-19-73.

Additional monetary assessment for violation of this section when committed against a minor to be deposited in Mississippi Children's Trust Fund, see § 99-19-75.

Enhancement of offenses listed in 99-19-401(2) if the instrumentality used in the commission of the 99-19-401(2) offense was initially obtained in the course of the commission of the crime(s) provided for in this section, see § 99-19-401.

JUDICIAL DECISIONS

ANALYSIS

1. In general; definitions and distinctions.
2. Intent; generally.
3. —Sufficiency of.
4. Deadly weapon.
5. Serious bodily harm.
6. Indictment or affidavit; generally.
7. —Sufficiency of.
8. Defenses; generally.
9. — Insanity.
10. — Self-defense.
11. —Civil suit as bar to prosecution.
12. Double jeopardy.
13. Evidence; generally.
14. — Admissibility.
15. — — Nature of injuries.
16. — — Other offenses or conduct.
17. — —Self-defense.
18. — Sufficiency.
19. — Charge or conviction supportable.
20. — —Charge or conviction unsupportable.
21. —Variance between indictment and proof.
22. Instructions; generally.
23. —Intent.
24. —Deadly weapon.
25. —Self-defense.
26. — Lesser offense.
27. —Defendant as witness.
28. Conviction of lesser crime.
29. Sentence.
30. — Excessive fine.
31. Domestic violence aggravated assault.
32. Miscellaneous.
33. Plea.

1. In general; definitions and distinctions.

Where an altercation begins with a

simple assault but as a matter of law escalates in a continuous sequence of events to an aggravated assault, the simple assault is subsumed into the aggravated assault. *Downs v. State*, 962 So. 2d 1255, 2007 Miss. LEXIS 444 (Miss. 2007).

Under Mississippi law, domestic violence, as defined in Miss. Code Ann. § 97-3-7(3), is not a lesser-included offense of kidnapping, a violation of Miss. Code Ann. § 97-3-53, because the two are independent crimes with distinct elements; the elements of domestic violence are not among the elements of kidnapping. *Busby v. State*, 956 So. 2d 1112, 2007 Miss. App. LEXIS 352 (Miss. Ct. App. 2007).

Defendant, who was convicted of kidnapping, a violation of Miss. Code Ann. § 97-3-53, was not entitled to a jury instruction on domestic violence under Miss. Code Ann. § 97-3-7(3) as a lesser included offense because the two were independent crimes with distinct elements. *Busby v. State*, 956 So. 2d 1112, 2007 Miss. App. LEXIS 352 (Miss. Ct. App. 2007).

Denial of the inmate's petition for post-conviction relief was proper where it was not necessary under Miss. Code Ann. § 97-3-7(2)(b) that the victim suffer "serious" bodily injury. Mere bodily injury was sufficient as long it was caused with other means likely to produce death or serious bodily harm. *Miller v. State*, 919 So. 2d 1067, 2005 Miss. App. LEXIS 457 (Miss. Ct. App. 2005).

In a juvenile delinquency case, the petition did not give the trial judge the option of an attempt charge in a simple assault case, and the record was devoid of any questions or answers regarding injury

caused at the hands of appellant juvenile when he touched the minor victim's private area; thus, the State failed to prove all the elements of simple assault as charged in the petition, specifically, proof of bodily injury, and appellant was improperly adjudicated a delinquent. In the Interest of C.A., 872 So. 2d 705, 2004 Miss. App. LEXIS 405 (Miss. Ct. App. 2004).

Where a decedent pointed a loaded gun at officers in violation of Miss. Code Ann. § 97-3-7, refused to lower the gun, backed into his house, and initiated fire at the officers, an officer reasonably believed that his life and the lives of other officers at the scene were in imminent danger; hence, there was no violation of the decedent's Fourth Amendment rights when the officer followed the decedent into the latter's home, where the officer returned fire and mortally injured the decedent. *Elkins v. McKenzie*, 865 So. 2d 1065, 2003 Miss. LEXIS 582 (Miss. 2003).

Finding that a juvenile was a delinquent child after he was convicted of simple assault was proper where it was foreseeable that pushing a person down a hill and over a ledge could cause serious injuries; he acted recklessly and there was sufficient evidence for the trial judge, acting as the jury, to conclude that he was guilty of simple assault, Miss. Code Ann. § 97-3-7(1). In *re G. L. H.*, 843 So. 2d 109, 2003 Miss. App. LEXIS 335 (Miss. Ct. App. 2003).

Manslaughter indictment sufficiently alleged that defendant was engaged in the perpetration of a felony, namely aggravated assault pursuant to Miss. Code Ann. § 97-3-7(2), that had to be proved in order to show that defendant's participation in the crime of killing another human being without malice was manslaughter, as the indictment tracked the language of the aggravated assault statute and identified the person upon whom defendant committed the aggravated assault, the person who was killed while defendant committed that felony, and the date and place of the crimes committed. *Stevens v. State*, 2001 Miss. LEXIS 301 (Miss. Oct. 31, 2001).

Defendant's conviction for assault of a police officer was affirmed because sub-

stantial evidence showed that the victim suffered injury, and the jury rejected the contention that defendant was resisting an unlawful arrest. *Johnson v. State*, 754 So. 2d 576, 2000 Miss. App. LEXIS 12 (Miss. Ct. App. 2000).

Police officer's action in turning onto road despite fact that view of oncoming traffic was blocked by row of hedges, while negligent, did not turn collision with motorist into crime of assault, so as to relieve motorist of having to comply with notice requirements in Tort Claims Act in subsequent personal injury claim against city and officer. *City of Jackson v. Lumpkin*, 697 So. 2d 1179 (Miss. 1997), overruled in part, *Carr v. Town of Shubutu*, 733 So. 2d 261 (Miss. 1999), overruled to the extent that these cases characterize the notice requirements set out in § 11-46-11 as jurisdictional requirements, *Stuart v. Univ. of Miss. Med. Ctr.*, — So. 3d —, 2009 Miss. LEXIS 396 (Miss. Aug. 20, 2009). *Carr v. Town of Shubuta*, 733 So. 2d 261, 1999 Miss. LEXIS 72 (Miss. 1999), overruled in part, *Stuart v. Univ. of Miss. Med. Ctr.*, 21 So. 3d 544, 2009 Miss. LEXIS 396 (Miss. 2009).

In aggravated assault prosecution arising from defendant's stabbing of two victims, evidence was insufficient to warrant lesser included offense instruction on simple assault; multiple stab wounds suffered by victims were serious and life threatening, and there was no evidence that defendant was merely negligent in handling knife. *Jackson v. State*, 684 So. 2d 1213, 1996 Miss. LEXIS 7 (Miss. 1996), cert. denied, 520 U.S. 1215, 117 S. Ct. 1703, 137 L. Ed. 2d 828, 1997 U.S. LEXIS 2937 (U.S. 1997).

The mere pointing of a firearm does not constitute attempt under the aggravated assault statute, this section. *Gibson v. State*, 660 So. 2d 1268, 1995 Miss. LEXIS 365 (Miss. 1995).

In a prosecution for aggravated assault, the State was not required to prove that the defendant acted "under circumstances manifesting extreme indifference to the value of human life" where the indictment charged only that the defendant "did unlawfully, feloniously, purposely and knowingly cause serious bodily injury" to the victim. *Hall v. State*, 644 So. 2d 1223, 1994 Miss. LEXIS 513 (Miss. 1994).

Subsection (1) of this section is not unconstitutionally vague on the ground that it does not define "bodily injury"; although there are no degrees of bodily injury stated in the statute, a minor injury is a "bodily injury" even though it may not be a traumatic injury. *Reining v. State*, 606 So. 2d 1098, 1992 Miss. LEXIS 542 (Miss. 1992).

Subsection (2) of this section is not unconstitutionally vague on the ground that it does not define the term "serious bodily harm," particularly when applied in a case involving brutal injuries; in more ambiguous cases, prosecutors and trial courts should refer to the definition of "serious bodily injury" set out in § 210.0 of the Model Penal Code. *Fleming v. State*, 604 So. 2d 280, 1992 Miss. LEXIS 382 (Miss. 1992).

It is not necessary under § 97-3-7(2)(b) for the State to prove that the victim suffered "serious" bodily injury; mere "bodily injury" is sufficient so long as it was caused with "other means likely to produce death or serious bodily harm." *Jackson v. State*, 594 So. 2d 20, 1992 Miss. LEXIS 46 (Miss. 1992).

While a juvenile's intentional touching and squeezing of a pregnant woman's derriere, without permission, amounted to a physical offense, this conduct did not constitute simple assault under § 97-3-7(1)(c) where there was no proof of fear of imminent serious bodily harm. Thus, the juvenile's adjudication of delinquency would be reversed based on the failure to prove an essential element of the crime of simple assault. *S.B. v. State*, 566 So. 2d 1276, 1990 Miss. LEXIS 553 (Miss. 1990).

The difference between attempted murder and aggravated assault is the specific intent requirement, for the former, and the element of deadly weapon use, for the latter. In many fact scenarios, both charges are established by the same evidence. *McGowan v. State*, 541 So. 2d 1027, 1989 Miss. LEXIS 180 (Miss. 1989).

A fireman who was engaged in rescuing individuals from a wrecked automobile outside of the city and county in which he was employed was nevertheless a "fireman" within the meaning of this section, which sets forth the punishment for simple assault upon a fireman acting

within the scope of his duty, since the fireman was authorized under § 21-25-5 to act outside his city boundary in "aiding in the rescue of persons" and was not limited to county lines. *Cagle v. State*, 536 So. 2d 3, 1988 Miss. LEXIS 431 (Miss. 1988).

Person who shoots 4 or 5 bullets at second person, hitting third person with 3 bullets, has committed aggravated assault with respect to third person notwithstanding lack of intent to shoot that person. *Davis v. State*, 476 So. 2d 608, 1985 Miss. LEXIS 2248 (Miss. 1985).

Prosecution for aggravated assault on police officer is not barred by prior prosecution for aggravated assault on another police officer arising out of same incident. *Lee v. State*, 469 So. 2d 1225, 1985 Miss. LEXIS 1900 (Miss. 1985).

A defendant who assaulted three police officers, on the same day and as a part of the same occurrence, was properly subjected to three separate charges of assault, in violation of subsection (1) of this section, and properly sentenced to three consecutive terms, pursuant to § 99-19-21, for the three resulting convictions. *Ball v. State*, 437 So. 2d 423, 1983 Miss. LEXIS 2862 (Miss. 1983).

Defendant's act of pointing a loaded pistol at another came within statutory crime of aggravated assault where it manifested an extreme indifference to the value of human life. *Nelson v. State*, 361 So. 2d 343, 1978 Miss. LEXIS 2366 (Miss. 1978).

Lands within the area designated as a reservation for the Choctaw Indians residing in central Mississippi were on the basis of the history of the relations between the Mississippi Choctaws and the United States, "Indian country," as defined in 18 USCS § 1151 and as used in the Major Crimes Act of 1885 (18 USCS § 1153); these federal statutes operate to vest exclusive jurisdiction in the federal courts and to preclude the exercise of state criminal jurisdiction over certain offenses committed on these lands, including aggravated assault, even though (1) the Choctaws in Mississippi were merely a remnant of a larger group of Indians, long ago removed from Mississippi, (2) federal supervision over them had not been con-

tinuous, and (3) the Treaty at Dancing Rabbit Creek (7 Stat 333) extended state citizenship to Choctaws remaining in Mississippi. *United States v. John*, 437 U.S. 634, 98 S. Ct. 2541, 57 L. Ed. 2d 489, 1978 U.S. LEXIS 124 (U.S. 1978).

Under this section [Code 1042, § 2013] in order to find that the defendant did unlawfully and feloniously injure the victim, it is not necessary that the state show that the defendant intentionally or willfully discharged the firearm or intentionally or willfully injured the person whom he assaulted. *Barnes v. State*, 249 So. 2d 383, 1971 Miss. LEXIS 1160 (Miss. 1971).

Many cases of assault and battery, such as a fist fight, are not covered by statute and depend on the common law. *Butler v. State*, 212 So. 2d 573, 1968 Miss. LEXIS 1289 (Miss. 1968).

Where the accused, pursuant to a plan to kill a bus driver, attached dynamite to a bus in such a manner that it exploded upon the ignition being turned on, and the intended victim was horribly maimed thereby, the offense came within the purview of Code 1942, § 2143, rather than this section [Code 1942, § 2011]. *Rogers v. State*, 228 Miss. 873, 89 So. 2d 860, 1956 Miss. LEXIS 576 (Miss. 1956).

The means or force must at least be capable of producing death. *Blaine v. State*, 196 Miss. 603, 17 So. 2d 549, 1944 Miss. LEXIS 240 (Miss. 1944).

Battery with hands and feet may be a means or force "likely to produce death" within the purview of this section [Code 1942, § 2011], depending on the circumstances of each case. *Blaine v. State*, 196 Miss. 603, 17 So. 2d 549, 1944 Miss. LEXIS 240 (Miss. 1944).

The word "likely" in the statute borrows meaning from both possibility and probability and stands midway between their respective connotations, and, as so defined, the responsibility for adjudging likelihood, in all cases save those speaking absurdity, remains with the jury, which may be left free to give due weight to the parties, the place, the means used, and the degree of force employed. *Blaine v. State*, 196 Miss. 603, 17 So. 2d 549, 1944 Miss. LEXIS 240 (Miss. 1944).

"Assault" defined. *Blankenship v. State*, 130 Miss. 725, 95 So. 81, 1922 Miss. LEXIS 254 (Miss. 1922).

Words "point" and "aim" are synonymous and charge but one offense. *Coleman v. State*, 94 Miss. 860, 48 So. 181, 1909 Miss. LEXIS 338 (Miss. 1909).

Distinction is drawn between assault with intent to kill and murder and assault and battery with same intent. *Montgomery v. State*, 85 Miss. 330, 37 So. 835, 1904 Miss. LEXIS 158 (Miss. 1904), overruled, *Flowers v. State*, 101 Miss. 108, 57 So. 226, 1911 Miss. LEXIS 94 (Miss. 1911).

2. Intent; generally.

Defendant kicked the officer, dislocating the officer's jaw, and although no direct evidence was presented that defendant intended to injure the officer, a juror could reasonably infer the intent from the evidence, and the appellate court could not reverse the verdict because of insufficient evidence. *Brown v. State*, 852 So. 2d 607, 2003 Miss. App. LEXIS 10 (Miss. Ct. App. 2003).

Subsection (b) is written in the disjunctive, rather than the conjunctive, with regard to a defendant's intent, as it requires a showing that the defendant caused serious bodily injury "purposely, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life." *Stegall v. State*, 765 So. 2d 606, 2000 Miss. App. LEXIS 394 (Miss. Ct. App. 2000).

The indictment of the defendant and instructions to the jury given in his trial erroneously turned on an improper interpretation of the elements of attempted aggravated assault where they both used language pertaining to reckless, rather than intentional, conduct. *Morris v. State*, 748 So. 2d 143, 1999 Miss. LEXIS 310 (Miss. 1999).

Indictment and jury instructions adequately covered issue of intent with respect to charge of aggravated assault by alleging that defendant caused injury "willfully." *Moore v. State*, 676 So. 2d 244, 1996 Miss. LEXIS 328 (Miss. 1996).

One does not have to possess ill will toward, or even know the identity of, a specific individual in order possess the requisite intent to commit an aggravated assault on that person. *Blanks v. State*, 542 So. 2d 222, 1989 Miss. LEXIS 165 (Miss. 1989).

Person who shoots 4 or 5 bullets at second person, hitting third person with 3 bullets, has committed aggravated assault with respect to third person notwithstanding lack of intent to shoot that person. *Davis v. State*, 476 So. 2d 608, 1985 Miss. LEXIS 2248 (Miss. 1985).

Recklessness or negligence contemplated by this section for conviction of simple assault is in act itself and does not refer to subjective intent of defendant who acts in reckless or negligent belief that he is acting in self defense. *Nobles v. State*, 464 So. 2d 1151, 1985 Miss. LEXIS 1919 (Miss. 1985).

It is necessary for the state to prove intent on the part of the defendant to kill and murder the person named in the indictment. *Barnette v. State*, 252 Miss. 652, 173 So. 2d 904, 1965 Miss. LEXIS 1136 (Miss. 1965).

The rule of criminal law that where one crime is intended and by mistake another committed the unlawful intent to do one act is transposed to the other does not apply to the statutory crime of assault and battery with intent to kill. *Barnette v. State*, 252 Miss. 652, 173 So. 2d 904, 1965 Miss. LEXIS 1136 (Miss. 1965).

The intent of the accused is an essential ingredient of the charge of assault and battery with unlawful and felonious intent, with malice aforethought, to kill and murder. *Hydrick v. State*, 246 Miss. 448, 150 So. 2d 423, 1963 Miss. LEXIS 463 (Miss. 1963).

The intent must exist at the time the injury was inflicted. *Lindley v. State*, 234 Miss. 423, 106 So. 2d 684, 1958 Miss. LEXIS 512 (Miss. 1958).

A felonious intent is necessary to support the charge of assault with intent to kill and murder. *Washington v. State*, 222 Miss. 782, 77 So. 2d 260, 1955 Miss. LEXIS 663 (Miss. 1955).

The trial court properly limited the jury to a consideration of defendant's guilt of simple assault and battery in a prosecution under this section, where the element of intent was absent. *Markham v. State*, 209 Miss. 135, 46 So. 2d 88, 1950 Miss. LEXIS 370 (Miss. 1950).

Test of defendant's guilt under this section is whether or not the accused intends to kill and murder at time he fires shot or

otherwise inflicts wound, and if such intent then exists he is not to be exonerated of felonious charge by what he does or fails to do thereafter. *Cearry v. State*, 204 Miss. 299, 37 So. 2d 316, 1948 Miss. LEXIS 366 (Miss. 1948).

Under this section [Code 1942, § 2011] both the nature of the means used and the quality of the purpose are essential elements of the crime charged; the weapon must be deadly, or the means likely to produce death, and the intent must be murder. *Daniels v. State*, 196 Miss. 328, 17 So. 2d 793, 1944 Miss. LEXIS 196 (Miss. 1944).

It is intent with which an assault is committed that raises it from misdemeanor to a felony. *Toler v. State*, 143 Miss. 96, 108 So. 443, 1926 Miss. LEXIS 246 (Miss. 1926).

3. —Sufficiency of.

Defendant was wrongly convicted of attempted aggravated assault because the doctrine of transferred intent was not applicable as defendant deliberately shot and killed the intended victim, but the unintended victim was unharmed when the bullet landed near the unintended victim. Defendant had no intention to harm the unintended victim, defendant was not aware of the unintended victim's presence, and there was no evidence that the unintended victim was in any fear of harm. *Craig v. State*, 201 So. 3d 1108, 2016 Miss. App. LEXIS 598 (Miss. Ct. App. 2016).

Circuit court did not abuse its discretion in denying defendant's motion for a new trial where a jury could have reasonably found from the evidence and testimony at trial that defendant intended or was attempting to cause two officers seriously bodily injury by resisting arrest, lunging on the bed, and reaching for a knife, and that the tasing was an extraneous event that prevent defendant from carrying out the intended aggravated assault on the officers. *Hunter v. State*, 196 So. 3d 998, 2015 Miss. App. LEXIS 602 (Miss. Ct. App. 2015), cert. denied, 202 So. 3d 611, 2016 Miss. LEXIS 309 (Miss. 2016).

Defendant's conviction for burglary of a dwelling, in violation of Miss. Code Ann. § 97-17-23(1), was supported by the evi-

dence because defendant crashed through a glass window and advanced briskly upon one victim with hands raised, in what was described as a threatening gesture; hence, the evidence was sufficient to infer that defendant intended to commit an assault under Miss. Code Ann. § 97-3-7(1). *Walker v. State*, 21 So. 3d 663, 2009 Miss. App. LEXIS 182 (Miss. Ct. App.), cert. denied, 20 So. 3d 680, 2009 Miss. LEXIS 578 (Miss. 2009).

Defendant's conviction for simple assault upon a law enforcement officer pursuant to Miss. Code Ann. § 97-3-7(1)(a) was appropriate because an officer's testimony that defendant, while resisting arrest, swung the handcuffs at him, supported the inference that she did so purposely and knowingly. There was no evidence concerning the distances involved that would have cast doubt upon the veracity of the officers' testimonies that defendant swung the handcuffs at the first officer, who ducked, which permitted the handcuffs to strike the other officer in the face. *Hitt v. State*, 988 So. 2d 939, 2008 Miss. App. LEXIS 473 (Miss. Ct. App. 2008).

Where defendant, in the process of being arrested for suspicion of driving while under the influence of intoxicants, swung at an officer with a closed fist and landed a "glancing blow," but the officer did not testify as to undergoing any injury or feeling pain, the Murrell standard was controlling and required new trial. *Reynolds v. State*, 818 So. 2d 1287, 2002 Miss. App. LEXIS 337 (Miss. Ct. App. 2002).

Evidence was insufficient to support a charge of attempt to rape where there was nothing in the record that would distinguish the intent of the defendant to rape his victim from any other particular intent where, during the entire assault, both the defendant and the victim were fully clothed and there was no evidence that the defendant removed or attempted to remove any of victim's clothes, nor was there evidence that the defendant fondled or caressed his victim or attempted to do so; the evidence merely depicted a somewhat aimless attack wherein the defendant grabbed his victim, pushed her to the floor and held her there. *Aikerson v. State*, 295 So. 2d 778, 1974 Miss. LEXIS 1524 (Miss. 1974).

Argument that defendant did not intend to kill arresting officer because he shot only once, and, although he had the officer's loaded revolver, he left without killing the officer, and therefore this showed conclusively that he did not intend to kill the officer, was not well taken, inasmuch as the issue as to what the defendant intended at the time he fired the shot was a jury issue. *Torrence v. State*, 283 So. 2d 595, 1973 Miss. LEXIS 1232 (Miss. 1973).

The evidence in a prosecution for assault and battery with intent to kill and murder, sufficiently created a jury question as to intent to kill, on the part of a defendant who struck the victim with a stick with such force as to knock the victim to the pavement, and who returned later and struck the victim again while he was unconscious. *Thompson v. State*, 258 So. 2d 448, 1972 Miss. LEXIS 1509 (Miss. 1972).

Conviction of assault with intent to kill is not warranted by a showing merely of intent to do great bodily harm. *Lindley v. State*, 234 Miss. 423, 106 So. 2d 684, 1958 Miss. LEXIS 512 (Miss. 1958).

The requisite intent is not present where intent to kill is conditioned on happening of an event which may within reason fail to take place, as in the case of a threat to kill if a debt is not paid. *Lindley v. State*, 234 Miss. 423, 106 So. 2d 684, 1958 Miss. LEXIS 512 (Miss. 1958).

Evidence that four law enforcement officers under the authority of a search warrant for intoxicating liquor went to the accused's home on a dark night, and upon finding no one at home, gained entrance through a window, and remained therein from 10 o'clock until midnight, without showing any lights, and the accused, who had been advised that someone was in his home, with a companion shot out the windows of the home with a shot gun fired at a distance of 60 feet, using No. 8, or birdshot, was insufficient to support a finding that accused's intent and purpose was to kill and murder. *Smith v. State*, 233 Miss. 503, 102 So. 2d 699, 1958 Miss. LEXIS 409 (Miss. 1958).

Intent is main ingredient of offense under this section, and where facts show that intent to kill was conditioned upon

happening of some other event, which may, within reason, fail to take place, real intent to kill and murder does not come into existence. *Craddock v. State*, 204 Miss. 606, 37 So. 2d 778, 1948 Miss. LEXIS 393 (Miss. 1948).

An intent to murder, the gist of this offense, was not shown where the deceased was shot by his own pistol which he had given to the defendant who apparently for effect drew the pistol during a crap game and it was discharged when one of the participants struck the defendant's arm. *Edgar v. State*, 202 Miss. 505, 32 So. 2d 441, 1947 Miss. LEXIS 307 (Miss. 1947).

In assault committed by throwing a pair of pliers from a distance of ten feet, striking prosecuting witness upon the upper lip, the evidence, in view of the circumstances, including the parties, the occasion and the means used, was insufficient to support a finding beyond a reasonable doubt that accused's purpose was to kill and murder. *Daniels v. State*, 196 Miss. 328, 17 So. 2d 793, 1944 Miss. LEXIS 196 (Miss. 1944).

The statute charging the crime with specific intent to kill and murder a specified person is made out only by proof sufficient to find that the specific intent to kill existed—the specific intent to kill being the gist of the offense, or that which raises it from a mere misdemeanor to a felony. Intent to kill a specified person, accompanied by an overt act constituting an assault, is also, in a sense, an attempt to commit the crime; but there must be an intent accompanied by an overt act, to make out the offense under this section [Code 1942, § 2011]. *Norwood v. State*, 182 Miss. 898, 183 So. 523, 1938 Miss. LEXIS 205 (Miss. 1938).

Intent to murder may not be inferred from leveling of gun, and the fact that defendant did not shoot, there being nothing to prevent, tends to negative existence of such intent. *Toler v. State*, 143 Miss. 96, 108 So. 443, 1926 Miss. LEXIS 246 (Miss. 1926).

Intent to kill conditioned on happening of event insufficient, though condition unlawful. *Stroud v. State*, 131 Miss. 875, 95 So. 738, 1923 Miss. LEXIS 222 (Miss. 1923).

Evidence of conditional threat to kill held insufficient to establish intent. *Stroud v. State*, 131 Miss. 875, 95 So. 738, 1923 Miss. LEXIS 222 (Miss. 1923).

The intent must be actual, not conditional. *Hairston v. State*, 54 Miss. 689, 1877 Miss. LEXIS 82 (Miss. 1877).

4. Deadly weapon.

In an aggravated assault case, a trial court did not err by denying motions for a directed verdict or a judgment notwithstanding the verdict because the State was not required to provide defendant's deoxyribonucleic acid or fingerprints on a knife in order to present sufficient evidence to support his conviction. Further, a police detective testified that he found a knife on the floor, and a doctor testified that the lacerations on the victim's face were consistent with knife wounds. *Ferguson v. State*, 137 So. 3d 240, 2014 Miss. LEXIS 84 (Miss. 2014).

Assault conviction was affirmed where defendant's use of hands and fists to strike the victim constituted a means likely to produce serious bodily harm, which was sufficient under Miss. Code Ann. § 97-3-7(2)(b). *Parks v. State*, 930 So. 2d 383, 2006 Miss. LEXIS 283 (Miss. 2006).

Defendant's challenge to his conviction for aggravated assault under Miss. Code Ann. § 97-3-7 on the grounds that the butt of his gun was not a dangerous weapon was without merit because it was within the province of the jury to determine whether or not the use of the gun as a bludgeoning instrument made it a deadly weapon. *Beyers v. State*, 930 So. 2d 456, 2006 Miss. App. LEXIS 397 (Miss. Ct. App. 2006).

Where defendant argued that the State failed to prove that the baseball bat used in the attack of the victim was a deadly weapon sufficient to support a conviction of aggravated assault pursuant to Miss. Code Ann. § 97-3-7, the claim failed; the bat caused a compound fracture of the victim's leg, which indicated that the bat certainly could have done more damage even to the point of causing the victim's death. *Brown v. State*, 864 So. 2d 1009, 2004 Miss. App. LEXIS 55 (Miss. Ct. App. 2004).

Evidence was sufficient to support defendant's conviction for aggravated as-

sault—he inflicted the injuries to the victim with a deadly weapon. *Harris v. State*, 892 So. 2d 830, 2004 Miss. App. LEXIS 978 (Miss. Ct. App. 2004).

Under the statute, it was unnecessary for the State to prove the victim suffered serious bodily injury, mere bodily injury was sufficient so long as it was caused with other means likely to produce serious bodily harm. *Vance v. State*, 803 So. 2d 1265, 2002 Miss. App. LEXIS 14 (Miss. Ct. App. 2002).

A bottle may be found to be a deadly weapon. *Gayle v. State*, 743 So. 2d 392, 1999 Miss. App. LEXIS 197 (Miss. Ct. App. 1999).

Evidence was sufficient to allow a jury to find that the defendant's use of his fist was a means likely to produce death or serious bodily harm where (1) the force of the defendant's first blow knocked the victim out of his recliner and onto the fireplace hearth, and (2) the defendant was 19 years old at the time of the crime and struck a much older man in his own home. *Harrison v. State*, 724 So. 2d 978, 1998 Miss. App. LEXIS 1052 (Miss. Ct. App. 1998).

While an assault under subsection (2)(b) of this section ordinarily involves the use of a weapon, a violent and aggravated assault committed with one's fists may constitute a crime under subsection (2)(b) of this section; it is not necessary under subsection (2)(b) of this section that the use of hands and fists constitute the use of a "deadly weapon," but, rather, it is enough if their use constitutes a "means likely to produce [either] death or serious bodily harm." *Jackson v. State*, 594 So. 2d 20, 1992 Miss. LEXIS 46 (Miss. 1992).

Whether closed fists constitute a "means likely to produce serious bodily harm" under subsection (2)(b) of this section involves a question of fact to be decided by the jury in light of the evidence; the responsibility for determining likelihood remains with the jury which may be left free to give due weight to the characteristics of the parties, the place, the manner in which hands and fists were used, and the degree of force employed. *Jackson v. State*, 594 So. 2d 20, 1992 Miss. LEXIS 46 (Miss. 1992).

The use of a .357 Magnum as a blunt instrument was sufficient to support an

aggravated assault charge since the use of the gun as a blunt instrument could have been found by the jury to constitute use of a weapon which could cause bodily injury to another within the meaning of this section. *Griffin v. State*, 540 So. 2d 17, 1989 Miss. LEXIS 144 (Miss. 1989).

A reasonable person could determine that a pistol which misfired 3 times was a deadly weapon where there was no proof that the pistol was incapable of firing and the pistol was not available for inspection at trial. The fact that the pistol misfired 3 times does not preclude its capability to fire on the fourth attempt. *Davis v. State*, 530 So. 2d 694, 1988 Miss. LEXIS 400 (Miss. 1988).

A conviction for aggravated assault upon a state highway patrolman would be affirmed where, although the defendant testified that the gun he had used was a blank starter pistol, the prosecution testimony and inferences to be drawn therefrom were that the gun, which was never found, looked like a real pistol, sounded like a pistol when fired, and had been used in a threatening manner, just as a deadly weapon would be used in similar circumstances, and where at no time prior to trial did the defendant state to any police officer that the weapon used had been a starter pistol. *Jackson v. State*, 404 So. 2d 543, 1981 Miss. LEXIS 2221 (Miss. 1981).

A defendant was properly convicted of aggravated assault upon a law enforcement officer despite the fact that the gun used in the assault was not loaded. *Wilson v. State*, 395 So. 2d 957, 1981 Miss. LEXIS 1945 (Miss. 1981).

While the use of feet and fists ordinarily would not constitute the use of a deadly weapon, they can constitute a deadly weapon if used with means of force likely to produce death. *Pulliam v. State*, 298 So. 2d 711, 1974 Miss. LEXIS 1571 (Miss. 1974).

The question as to whether or not the instrument used is a deadly weapon the force used as likely to produce death are questions of fact for determination of the jury. *Shanklin v. State*, 290 So. 2d 625, 1974 Miss. LEXIS 1714 (Miss. 1974).

Testimony introduced by the state was ample and from which jury properly determined that the iron pipe used by the

defendant was a deadly weapon, and that the force and manner in which it was used proved the intent of the defendant to kill and murder his victim. *Shanklin v. State*, 290 So. 2d 625, 1974 Miss. LEXIS 1714 (Miss. 1974).

Where a defendant held a gun that was incapable of being fired and made no attempt to use the gun as a club to strike the sheriff, and did not strike the sheriff with his hands or feet, he could not properly be convicted of assault and battery with intent to kill the sheriff. *Corley v. State*, 264 So. 2d 384, 1972 Miss. LEXIS 1354 (Miss. 1972).

In itself, a “shoe clad foot” is not a deadly weapon in the conventional sense, but whether in a given case it is a means or force likely to produce death, within the meaning of the section [Code 1942, § 2011], is a matter for the jury’s determination in the light of evidence as to how and in what manner it was employed. *Johnson v. State*, 230 So. 2d 810, 1970 Miss. LEXIS 1572 (Miss. 1970).

One may not be convicted of assault with intent to kill because he advanced with a shotgun which was so jammed that it could not be fired. *Woodall v. State*, 234 Miss. 759, 107 So. 2d 598, 1958 Miss. LEXIS 548 (Miss. 1958).

Since a handsaw is not enumerated as a deadly weapon in this section [Code 1942, § 2011], it was a question for the jury to determine whether a handsaw used in an assault upon another was a deadly weapon. *Cobb v. State*, 233 Miss. 54, 101 So. 2d 110, 1958 Miss. LEXIS 356 (Miss. 1958).

What is a deadly weapon is a question of fact for the jury. *Batteast v. State*, 215 Miss. 337, 60 So. 2d 814, 1952 Miss. LEXIS 570 (Miss. 1952).

Assailant is guilty only of an assault and battery, and not assault and battery with intent to kill and murder, when he deliberately uses a weapon, which is ordinarily capable of producing death, in such fashion as would not ordinarily be calculated to produce such result. *Griffin v. State*, 196 Miss. 528, 18 So. 2d 437, 1944 Miss. LEXIS 226 (Miss. 1944).

Assailant who deliberately struck victim on temple with closed pocket-knife, although he had ample opportunity to

open the knife and to use it in a manner to kill, is guilty only of assault and battery, and not assault and battery with intent to kill and murder. *Griffin v. State*, 196 Miss. 528, 18 So. 2d 437, 1944 Miss. LEXIS 226 (Miss. 1944).

Under this section [Code 1942, § 2011] both the nature of the means used and the quality of the purpose are essential elements of the crime charged; the weapon must be deadly, or the means likely to produce death, and the intent must be murder. *Daniels v. State*, 196 Miss. 328, 17 So. 2d 793, 1944 Miss. LEXIS 196 (Miss. 1944).

In assault committed by throwing a pair of pliers from a distance of ten feet, striking prosecuting witness upon the upper lip, the evidence, in view of the circumstances, including the parties, the occasion and the means used, was insufficient to support a finding beyond a reasonable doubt that accused’s purpose was to kill and murder. *Daniels v. State*, 196 Miss. 328, 17 So. 2d 793, 1944 Miss. LEXIS 196 (Miss. 1944).

5. Serious bodily harm.

Defendant’s appellate claim that insufficient evidence proved aggravated assault for failure to show serious bodily injury failed because (1) defendant did not raise the objection at trial, and (2) the victim’s broken ribs were sufficient. *Griffin v. State*, 269 So. 3d 337, 2018 Miss. App. LEXIS 187 (Miss. Ct. App. 2018), cert. denied, 260 So. 3d 796, 2019 Miss. LEXIS 6 (Miss. 2019).

In connection with defendant’s conviction of aggravated assault, any error in the modification of the instruction defining serious bodily injury was harmless; no juror could have characterized the victim’s injuries as less than serious, since they included broken bones and loss of consciousness. *Johnson v. State*, 252 So. 3d 597, 2017 Miss. App. LEXIS 647 (Miss. Ct. App. 2017), cert. denied, 250 So. 3d 1268, 2018 Miss. LEXIS 341 (Miss. 2018).

Jury could have reasonably determined that defendant’s use of teeth was sufficient to cause serious bodily harm, as the injury sustained when defendant bit off a piece of the victim’s ear was a “sharp trauma.” *Shaw v. State*, 139 So. 3d 79,

2013 Miss. App. LEXIS 662 (Miss. Ct. App. 2013).

6. Indictment or affidavit; generally.

In an indictment alleging defendant committed aggravated domestic assault, the trial judge erred by allowing the amendment to the indictment to remove the word “serious” as related to bodily injury because the belated amendment unfairly surprised defendant by materially altering the allegations after evidence was closed and altered a defense under the original indictment. *Bell v. State*, 287 So. 3d 944, 2019 Miss. App. LEXIS 316 (Miss. Ct. App. 2019), cert. denied, — So. 3d —, 2020 Miss. LEXIS 135 (Miss. 2020).

Defendant’s claim that his aggravated assault indictments were defective because they did not specify “serious” bodily injury failed, where both indictments stated that defendant caused bodily injury with a deadly weapon (specifically, a pistol). *Terrell Patrick Corvette Hopper v. State*, 220 So. 3d 224, 2017 Miss. App. LEXIS 176 (Miss. Ct. App. 2017), cert. denied, — So. 3d —, 2018 Miss. LEXIS 28 (Miss. 2018), cert. denied, — So. 3d —, 2018 Miss. LEXIS 29 (Miss. 2018), cert. denied, — So. 3d —, 2018 Miss. LEXIS 32 (Miss. 2018).

Argument that there was a change to the material elements of the indictment by a substantive amendment from aggravated assault to attempted aggravated assault was rejected because defendant was on notice that he could have been convicted of attempt; by virtue of this statute, defendant was clearly and fully informed that causing or attempting to cause bodily injury to another, either with a deadly weapon or by some other means likely to produce death or serious injury, constituted the crime of aggravated assault. *Holmes v. State*, 201 So. 3d 491, 2015 Miss. App. LEXIS 668 (Miss. Ct. App. 2015).

Trial court did not err in amending an indictment, months before defendant’s trial commenced, because the State of Mississippi sought to amend the indictment to correct a scrivener’s error as it was clear from the indictment’s title and its statutory citation that the intended charge was domestic aggravated assault,

rather than aggravated assault as originally stated in the indictment. Moreover, the indictment was amended as to form, rather than the substance of the offense charged. *Hoskins v. State*, 186 So. 3d 898, 2015 Miss. App. LEXIS 424 (Miss. Ct. App. 2015), cert. denied, 186 So. 3d 854, 2016 Miss. LEXIS 120 (Miss. 2016).

Circuit court erred by allowing the prosecution to proceed on an indictment that specifically charged defendant with aggravated assault under subsection (2)(a) because the indictment did not accuse defendant of causing serious bodily injury to the victim but only “bodily injury”; because the prosecution specifically indicted defendant under subsection (2)(a), it was obligated to prove that he caused serious bodily injury purposely, knowingly, or recklessly. *Snowden v. State*, 131 So. 3d 1251, 2014 Miss. App. LEXIS 59 (Miss. Ct. App. 2014).

Where an indictment charged appellant with violating former Miss Code Ann. § 97-3-7(2)(b), but the intent language in the indictment was that of former § 97-3-7(2)(a), that the trial court allowed the State to amend the indictment did not entitle appellant to post-conviction relief because 1) he was given fair notice of the crimes with which he was charged; 2) he did not object to the amendments; 3) they were of form and not substance; 4) they did not prejudice him; and 5) his valid guilty plea waived any defects of form in the indictment. *Montalto v. State*, 119 So. 3d 1087, 2013 Miss. App. LEXIS 227 (Miss. Ct. App.), cert. dismissed, 127 So. 3d 1115, 2013 Miss. LEXIS 635 (Miss. 2013).

Defendant’s conviction for aggravated assault in violation of Miss. Code Ann. § 97-3-7 was proper where his actions plainly, clearly, and obviously would have qualified as aggravated assault under § 97-3-7(2)(a) or (b) because he used a deadly weapon and caused serious bodily injury through recklessness. While the indictment used phraseology from § 97-3-7(2)(a) and (b), that blending should not have been classified necessarily as a “defect.” *Johnson v. State*, 910 So. 2d 1174, 2005 Miss. App. LEXIS 404 (Miss. Ct. App. 2005).

Indictment properly stated the elements of the crime of aggravated assault,

even though they were not in the order defendant would have preferred. The indictment in question read that “defendant. .. as part of a common plan or scheme or as part of the same transactions or occurrence did knowingly or purposely, attempt to cause bodily injury to a police officer with a deadly weapon, an automobile. *Stanley v. State*, 904 So. 2d 1127, 2004 Miss. App. LEXIS 973 (Miss. Ct. App. 2004).

When the grand jury returned an indictment under Miss. Code Ann. § 97-3-7(2)(b), requiring purposeful and willful and knowing actions, this stated the charge upon which defendant could be tried; when the proposed amendment was offered to allow the jury to convict under Miss. Code Ann. § 97-3-7(2)(a) to include recklessly causing serious bodily injury under circumstances manifesting extreme indifference to the value of human life, there was a change of substance, prejudicing defendant, and requiring a reversal, and remand, for a new trial. *McLarty v. State*, 842 So. 2d 590, 2003 Miss. App. LEXIS 295 (Miss. Ct. App. 2003).

Attempted assault falls within the meaning of assault, and in the context of defendant’s variance argument between the indictment and the proof, whether defendant’s indictment read “assault” or “attempted assault” made no difference as it was the same crime; moreover, the indictment cited Miss. Code Ann. § 97-3-7(1), the applicable statute. *Brown v. State*, 852 So. 2d 607, 2003 Miss. App. LEXIS 10 (Miss. Ct. App. 2003).

Where the defendant was indicted for aggravated assault under subsection (2) of this section, but neither paragraph (a) nor (b) was specified, the statutory language was wholly included by reference in the indictment and the indictment was not narrowly drawn to preclude the state from arguing a pool stick was used as a deadly weapon. *Rushing v. State*, 1999 Miss. App. LEXIS 350 (Miss. Ct. App. June 22, 1999).

An indictment properly charged the defendant with simple assault under this section, even though the indictment contained the word “feloniously” which does not appear in the statute. *Reining v. State*, 606 So. 2d 1098, 1992 Miss. LEXIS 542 (Miss. 1992).

In a prosecution for aggravated assault under this section, the defendant’s conviction would be reversed where the grand jury returned the indictment under subsection (2)(b) of this section, which requires purposeful, willful and knowing actions, on the morning of the trial the State moved to amend the indictment to allow the jury to convict under subsection (2)(a) of this section, which requires only that the defendant recklessly cause serious bodily injury under circumstances manifesting extreme indifference to the value of human life, and, though there was no order allowing the amendment, the jury instructions clearly reflected the new element which was not contained in the original indictment and it was apparently that part of the instruction upon which the jury returned its verdict. The proposed amendment was a change of substance, rather than form, and therefore the court had no power to amend the indictment without the concurrence of the grand jury. *Quick v. State*, 569 So. 2d 1197, 1990 Miss. LEXIS 662 (Miss. 1990).

A multiple-count indictment, charging murder and aggravated assault, was permissible where both the murder and the aggravated assault arose from a single fusillade, the defendant presented the same self-defense defense to the 2 charges, almost all of the evidence admissible against the defendant on the murder count was also admissible against him on the assault count and visa-versa, and no legally cognizable prejudice could be said to have resulted from the consolidation at trial of the 2 charges. *Blanks v. State*, 542 So. 2d 222, 1989 Miss. LEXIS 165 (Miss. 1989).

A court committed reversible error in permitting the State to amend an indictment charging aggravated assault at the close of the State’s case, at a time when the defendant had indicated his desire to file a motion for a directed verdict, from the charge “by shooting the [victim] in the head” to that of “a pistol, a means likely to produce serious bodily harm.” Had the court not permitted the amendment of the indictment, the defendant would have been entitled to a directed verdict of not guilty on the aggravated assault charge of shooting the victim in the head with the

pistol since the evidence was uncontradicted that the gun accidentally fired and that the victim was not wounded by the firing of the weapon. *Griffin v. State*, 540 So. 2d 17, 1989 Miss. LEXIS 144 (Miss. 1989).

Indictment labeled “aggravated assault” which charges that defendant caused “serious bodily injury” and that defendant beat victim in manner likely to cause “serious bodily injury” and which includes correct section number (subsection (2)(a) of this section) for aggravated assault sufficiently affords defendant and defendant’s attorney notice in fact that defendant is being prosecuted for aggravated assault. *Harbin v. State*, 478 So. 2d 796, 1985 Miss. LEXIS 2261 (Miss. 1985).

Though an indictment for simple assault contained some language from the portion of the statute defining aggravated assault, the indictment was not duplicitous where the language was not sufficient to charge any offense under the aggravated assault provisions and thus only one offense was charged. *Toliver v. State*, 337 So. 2d 1274, 1976 Miss. LEXIS 1616 (Miss. 1976).

In a prosecution for resisting arrest, an indictment charging that the defendant assaulted a deputy sheriff, resisted the execution of legal process upon himself by the deputy sheriff, and shot the deputy sheriff while the latter was attempting to arrest the defendant, did not charge separate and distinct offenses; each action described in the indictment was but a part of a single episode. *Maroone v. State*, 317 So. 2d 25, 1975 Miss. LEXIS 1722 (Miss. 1975).

An indictment is not defective because it does not state definitely the time at which the offense was committed. *Washington v. State*, 222 Miss. 782, 77 So. 2d 260, 1955 Miss. LEXIS 663 (Miss. 1955).

An indictment which stated that the defendant committed assault and battery upon a minor child of the age of nine years, with force and means likely to have produced death by beating and striking her with a cowhide belt and with a large switch or stick, and by pulling her hair out by the roots, and by burning her leg with cigarette lighter, and by holding her by her feet and by striking her head against

the floor and wall, and by mashing or snapping her head with his feet, was not demurrable upon the ground that the several acts of violence alleged constituted separate and distinct offenses. *McNally v. State*, 213 Miss. 356, 56 So. 2d 834, 1952 Miss. LEXIS 374 (Miss. 1952).

Where name of victim is used in indictment, it is unnecessary to allege that he is a human being. *Hughes v. State*, 207 Miss. 594, 42 So. 2d 805, 1949 Miss. LEXIS 372 (Miss. 1949).

Permitting amendment of indictment charging assault with intent to murder, to charge assault and battery with intent to murder, held not reversible error. *Sauer v. State*, 166 Miss. 507, 144 So. 225, 1932 Miss. LEXIS 307 (Miss. 1932).

Indictment charging assault with deadly weapon with intent to kill and murder must allege felonious intent. *State v. May*, 147 Miss. 79, 112 So. 866, 1927 Miss. LEXIS 314 (Miss. 1927).

Indictment in the language of Code 1906, § 1359 cannot be sustained under Code 1892, § 967, relative to assault, etc. *Barton v. State*, 94 Miss. 375, 47 So. 521, 1908 Miss. LEXIS 12 (Miss. 1908).

Indictment held not objectionable as duplicitous in charging assault and battery in attempt to kill. *Jimerson v. State*, 93 Miss. 685, 46 So. 948, 1908 Miss. LEXIS 115 (Miss. 1908).

7. —Sufficiency of.

Vacating of defendant’s sentence and remand for resentencing was appropriate because defendant was improperly sentenced under a subsection not properly charged in the indictment. Defendant was not on notice that defendant would be convicted and sentenced for simple assault on emergency medical personnel, an aggravating circumstance, but was on notice that defendant was being tried for simple assault on medical personnel. *Hawkins v. State*, 255 So. 3d 1264, 2018 Miss. LEXIS 431 (Miss. 2018).

Indictments for aggravated assault were not defective because defendant was alleged to have used a deadly weapon, a pistol, in each of defendant’s aggravated assaults. That was sufficient as the indictment was not required to have alternatively alleged “or other means likely to

produce death or serious bodily injury.” *McDonald v. State*, 204 So. 3d 780, 2016 Miss. App. LEXIS 583 (Miss. Ct. App.), cert. denied, 205 So. 3d 1085, 2016 Miss. LEXIS 498 (Miss. 2016).

Subsections (1)(a)(i), (ii), and (iii) are not mutually exclusive, and the State is not required to distinguish the subsections in every indictment so long as the indictment is sufficient to inform the defendant of the claims against him or her; if an indictment is not rendered insufficient where it intermingles terms from both the simple and aggravated assault sections, we decline to find that an indictment is insufficient where it intermingles terms from subsections under simple assault only. *State v. Hawkins*, 145 So. 3d 636, 2014 Miss. LEXIS 406 (Miss. 2014).

While the language used in the indictment could have been cleaner, the State was not required to distinguish the subsection under which it brought the charges because subsections (1)(a)(i), (ii), and (iii) were not mutually exclusive; although the indictment mixes the concept of willfulness, or intent, with negligence, the indictment clearly charged defendant with simple assault of a vulnerable person and specified the exact conduct charged. *State v. Hawkins*, 145 So. 3d 636, 2014 Miss. LEXIS 406 (Miss. 2014).

Word “willfully” in the indictment was surplusage because the recitation of the relevant facts showed that defendant’s conduct was negligent; comparing the indictment to the statute, defendant could have determined that the charge was based on her negligence, and she should have been able to prepare her defense adequately. *State v. Hawkins*, 145 So. 3d 636, 2014 Miss. LEXIS 406 (Miss. 2014).

Indictment was sufficient to fully notify defendant of the nature and cause of the accusation against her because it included the essential facts constituting the offense charged, as it described what actions defendant took that led to the victim’s injuries, and the indictment clearly stated that defendant was charged with simple assault of a vulnerable person. *State v. Hawkins*, 145 So. 3d 636, 2014 Miss. LEXIS 406 (Miss. 2014).

In a case involving assault of a law enforcement officer, an argument that the

indictment was defective based on a failure to state that the officer was acting within the scope of his duty, office, or employment was rejected; both the heading and the body of the indictment provided that defendant was being charged with aggravated assault on a law enforcement officer and that the maximum prison term for the crime was thirty years. Moreover, the language of the indictment tracked the statutory language, and a reading of the indictment as a whole gave defendant fair notice of the charge against him so he could prepare an adequate defense and avoid unfair surprise or the threat of double jeopardy. *Townsend v. State*, 188 So. 3d 616, 2016 Miss. App. LEXIS 208 (Miss. Ct. App. 2016).

Trial court did not err by denying defendant’s motion for postconviction relief because the fact that indictment set forth Miss. Code Ann. § 93-3-7 for count I instead of the statute for aggravated assault upon a law enforcement officer, this section, did not support defendant’s claim that he believed he was pleading guilty to a noncriminal offense under § 93-3-7, as his plea petition showed that he acknowledged under oath that he was pleading guilty to aggravated assault. In addition, the trial court correctly informed defendant of the authorized statutory scheme for aggravated assault upon a law enforcement officer. *Williams v. State*, 152 So. 3d 349, 2014 Miss. App. LEXIS 324 (Miss. Ct. App.), cert. dismissed, 145 So. 3d 674, 2014 Miss. LEXIS 458 (Miss. 2014), cert. dismissed, 151 So. 3d 1017, 2014 Miss. LEXIS 520 (Miss. 2014).

Defendant’s indictments for culpable-negligence manslaughter and aggravated assault were not deficient because the indictments contained the essential elements of the crimes and fairly informed defendant of the charges to allow defendant to prepare a defense. *Hardy v. State*, 137 So. 3d 289, 2014 Miss. LEXIS 227 (Miss. 2014).

In a 28 U.S.C.S. § 2254 proceeding which a pro se state inmate argued that his indictment was defective because it did not contain the word serious as required by Miss. Code Ann. § 97-3-7(2)(a), that claim was examined and rejected by the Mississippi Court of Appeals, and pro-

vided no basis for habeas relief. *White v. Epps*, 2010 U.S. Dist. LEXIS 33009 (S.D. Miss. Apr. 2, 2010).

Defendant's argument that his convictions for aggravated assault on law enforcement officers should be reversed and remanded or that he should be resentenced on the lesser charge of simple assault on law enforcement officers was without merit. The heading of defendant's indictment stated that he was being charged with aggravated assault on a law enforcement officer and the counts stated that statute under which he was charged; thus, it was clear from the indictment that he injured the two police officers with a deadly weapon. *Mayers v. State*, 42 So. 3d 33, 2010 Miss. App. LEXIS 88 (Miss. Ct. App.), cert. denied, 42 So. 3d 24, 2010 Miss. LEXIS 437 (Miss. 2010).

Indictment for aggravated assault, Miss. Code Ann. § 97-3-7 (Rev. 2006), was not fatally defective because it did not need to specify an overt act of attempt where defendant was not indicted under the general attempt statute, Miss. Code Ann. § 97-1-7 (Rev. 2006). Thus, the previous decision in *Joshua v. State*, 445 So. 2d 221 (Miss. 1984), which held that the separate elements of attempt had to be set out in a criminal indictment for aggravated assault, was expressly overruled. *Brooks v. State*, 18 So. 3d 833, 2009 Miss. LEXIS 471 (Miss. 2009).

Where the evidence showed that appellant used a deadly weapon to strike his current spouse and to shoot the other victim, the State showed intent to cause bodily injury with a deadly weapon. The indictment charging him with aggravated assault under Miss. Code Ann. § 97-3-7(2)(b) and aggravated domestic violence under Miss. Code Ann. § 97-3-7(4) was not defective; defendant pleaded guilty to both counts. *McComb v. State*, 986 So. 2d 1087, 2008 Miss. App. LEXIS 410 (Miss. Ct. App. 2008), cert. dismissed, 36 So. 3d 455, 2010 Miss. LEXIS 285 (Miss. 2010).

Aggravated assault indictment was not defective for failing to allege serious bodily injury because the injury in question was inflicted with a deadly weapon. *Crawford v. State*, 972 So. 2d 44, 2008 Miss. App. LEXIS 5 (Miss. Ct. App. 2008).

Motion for post-conviction relief was denied based on an amended indictment in

an aggravated assault case because the failure to include the phrase "thereby manifesting extreme indifference to the value of human life" was not erroneous since this was not an element of the crime; moreover, all of the requirements for indictments under Miss. Unif. Cir. & Cty. R. 7.06 were met. *Nichols v. State*, 955 So. 2d 962, 2007 Miss. App. LEXIS 279 (Miss. Ct. App. 2007).

Indictment against defendant was sufficient as it clearly set out the essential elements of aggravated assault and specifically referred to simple assault as a lesser crime; there was no requirement that the State prove intent to cause serious bodily injury when defendant was charged pursuant to Miss. Code Ann. § 97-3-7(2)(b), and the State put forth sufficient evidence that defendant purposefully or knowingly caused bodily injury to the victim with a deadly weapon. *Russell v. State*, 924 So. 2d 604, 2006 Miss. App. LEXIS 167 (Miss. Ct. App. 2006).

Indictment alleged that defendant attempted to cause bodily injury to the victim by firing a gun at her, without any legal justification. The indictment tracked the statutory language, and was sufficient to charge defendant with the crime of aggravated assault. *Brewer v. State*, 920 So. 2d 546, 2006 Miss. App. LEXIS 79 (Miss. Ct. App. 2006).

Defendant's indictment charged defendant with aggravated assault under Miss. Code Ann. § 97-3-7(2)(b); no serious injury was required for a § 97-3-7(2)(b) charge, such that the indictment issued against defendant was sufficient. *Mason v. State*, 867 So. 2d 1058, 2004 Miss. App. LEXIS 213 (Miss. Ct. App. 2004).

Indictment for aggravated assault properly charged one of the means in which to commit the crime; the failure of the indictment to charge other means was appropriate. *Sanderson v. State*, 881 So. 2d 878, 2004 Miss. App. LEXIS 35 (Miss. Ct. App.), aff'd in part and rev'd in part, 883 So. 2d 558, 2004 Miss. LEXIS 1199 (Miss. 2004).

State did not fail to prove that defendant's action in striking one of the police officers attempting to restrain and subdue him was willful and intentional as

charged in the indictment; there was nothing in the record to suggest that defendant's conclusion that he struck the officer as the result of an involuntary reaction to being sprayed with mace was the only reasonable interpretation of evidence that jurors could possibly have drawn. *Griffin v. State*, 872 So. 2d 90, 2004 Miss. App. LEXIS 373 (Miss. Ct. App. 2004).

State did not err in failing to include recklessness language in the indictment because Miss. Code Ann. § 97-3-7(2)(a) is written in the disjunctive (either an accused acted purposely and knowingly or he acted recklessly with indifference to the value of human life); by failing to include the recklessness language in the indictment, the State did not err but was limiting itself to proving that defendant had acted purposefully as opposed to recklessly. *Parisie v. State*, 848 So. 2d 880, 2002 Miss. App. LEXIS 873 (Miss. Ct. App. 2002).

An indictment for aggravated assault was sufficient where it included the seven required elements and provided adequate notice of the offenses charged. *Holmes v. State*, 754 So. 2d 529, 1999 Miss. App. LEXIS 679 (Miss. Ct. App. 1999).

An indictment for aggravated assault was insufficient where it asserted that the defendant willfully, unlawfully, knowingly, feloniously, and purposely caused or attempted to cause bodily injury to another with his fist by striking her in violation of subsection (2) of this section; the fact that the state was granted leave to amend the indictment to insert the word "serious" before the phrase "bodily injury" was insufficient to cure the indictment. *Hawthorne v. State*, 751 So. 2d 1090, 1999 Miss. App. LEXIS 457 (Miss. Ct. App. 1999).

Indictment which tracks language of aggravated assault statute (this section) is legally sufficient notwithstanding failure to allege overt acts evidencing intent and action required for offense. *Ward v. State*, 479 So. 2d 713, 1985 Miss. LEXIS 2302 (Miss. 1985).

An indictment charging defendant with aggravated assault, apparently in violation of subsection (2) of this section, was substantially defective in that it did not

set out any alleged overt act whatsoever regarding defendant's alleged attempt to cause bodily harm to a patrolman, and, thus, his failure to file a demurrer under the provisions of § 99-7-21 did not prevent him from challenging the indictment. *Joshua v. State*, 445 So. 2d 221, 1984 Miss. LEXIS 1582 (Miss. 1984), overruled, *Brooks v. State*, 18 So. 3d 833, 2009 Miss. LEXIS 471 (Miss. 2009).

An indictment charging defendant unlawfully, wilfully, and feloniously caused serious bodily injuries by driving a vehicle recklessly under the circumstances manifesting extreme indifference to the value of human life sufficiently stated an offense under subsection (2) of this section. *Gray v. State*, 427 So. 2d 1363, 1983 Miss. LEXIS 2351 (Miss. 1983).

In a prosecution for aggravated assault upon a police officer, the indictment was sufficient where it stated facts clearly showing aggravated rather than simple assault and indicated in unambiguous language that the victim was a police officer acting within the course of his employment. *Norman v. State*, 385 So. 2d 1298, 1980 Miss. LEXIS 2008 (Miss. 1980).

The trial court properly sentenced defendant for a felony following conviction for aggravated assault, notwithstanding the discretion given the court by this section for imprisonment in the county jail or penitentiary; the indictment charging defendant with having knowingly and purposely caused bodily injury to another "with a deadly weapon" clearly categorized the assault as an aggravated assault rather than a simple assault, even though the indictment did not use the word "feloniously". *Mississippi State Tax Com. v. Reynolds*, 351 So. 2d 326, 1977 Miss. LEXIS 1927 (Miss. 1977).

Under an indictment alleging aggravated assault upon a police officer acting "within the scope of his duty", the evidence was sufficient to prove scope of duty, where defendant assaulted a person whom he recognized as a law enforcement officer engaged in assisting the arresting officer in placing defendant into custody, notwithstanding the fact that the initial arrest was without probable cause. *Watkins v. State*, 350 So. 2d 1384, 1977 Miss. LEXIS 2254 (Miss. 1977).

Indictment charging shooting at another with intent to kill and murder and alleging that shooting was done unlawfully, with malice aforethought, feloniously and wilfully with intent to kill and murder, is sufficient to charge that shooting was done with felonious intent to kill and murder and properly charges an offense of assault and battery with intent to kill and murder. *Bone v. State*, 207 Miss. 20, 41 So. 2d 347, 1949 Miss. LEXIS 314 (Miss. 1949).

An indictment charging an assault with a deadly weapon "with the intent and in the attempt to kill and murder" charged an offense with the intent to kill and murder under this section [Code 1942, § 2011] and not an offense under Code 1930, § 793 (Code 1942, § 2017). *Norwood v. State*, 182 Miss. 898, 183 So. 523, 1938 Miss. LEXIS 205 (Miss. 1938).

Indictment charging wilful, unlawful, felonious, and malicious assault and battery upon one in crowd with felonious intent to kill held to sufficiently charge assault and battery with intent to murder, as against contention that it did not charge intent "to kill and murder" some human situated in building, but merely charged intent "to kill." *White v. State*, 169 Miss. 332, 153 So. 387, 1934 Miss. LEXIS 63 (Miss. 1934).

Where record indicated defendant was aware he was being prosecuted under statute making robbery, or attempt at robbery, capital offense under certain conditions, indictment, though awkwardly worded, was sufficient. *Hall v. State*, 166 Miss. 331, 148 So. 793, 1933 Miss. LEXIS 399 (Miss. 1933).

Affidavit charging accused with striking officer in resisting arrest held to sufficiently charge assault and battery. *Martin v. Laurel*, 106 Miss. 357, 63 So. 670, 1913 Miss. LEXIS 141 (Miss. 1913).

Indictment for attempted rape held to charge an assault with intent to commit felony, constituting a misdemeanor at common law. *Moore v. State*, 102 Miss. 148, 59 So. 3, 1912 Miss. LEXIS 39 (Miss. 1912).

An indictment charging that defendant assaulted and beat C with "leather bridle reins" while armed with a pistol, with intent to intimidate C and prevent him

from defending himself while not good under Code 1906, § 1044, is good as one for common assault and battery. *State v. Spigener*, 96 Miss. 597, 50 So. 977, 1910 Miss. LEXIS 149 (Miss. 1910).

Held indictment should charge that accused shot into wagon wherein was D and other persons, with felonious intent of killing one or more of them, not caring which and in fact shot D. *Gentry v. State*, 92 Miss. 141, 45 So. 721, 1907 Miss. LEXIS 26 (Miss. 1907).

Indictment is sufficient if it avers that the assault was committed with a deadly weapon. *Canterberry v. State*, 90 Miss. 279, 43 So. 678, 1907 Miss. LEXIS 88 (Miss. 1907).

8. Defenses; generally.

In defendant's trial on a charge of misdemeanor domestic violence, pursuant to Miss. Code Ann. § 97-3-7(3), her defense of necessity failed because defendant did not bite the victim, her husband, to avoid harm, but instead, defendant bit him to free herself to leave the home; there was no evidence to suggest that defendant felt she was in imminent danger of death or serious bodily harm to others. *Anderson v. State*, 102 So. 3d 304, 2012 Miss. App. LEXIS 510 (Miss. Ct. App. 2012), cert. dismissed, 105 So. 3d 326, 2013 Miss. LEXIS 37 (Miss. 2013).

Action in the heat of passion is not a defense to aggravated assault. *Brown v. State*, 749 So. 2d 204, 1999 Miss. App. LEXIS 497 (Miss. Ct. App. 1999).

Consent of the victim is irrelevant in a trial for simple assault. *Durr v. State*, 722 So. 2d 134, 1998 Miss. LEXIS 439 (Miss. 1998).

A defendant waived and forfeited his right to assert the statute of limitations under § 99-1-5 as a defense to a charge of aggravated assault when he failed to assert it in the lower court and thereafter entered a voluntary and counseled plea of guilty to the charge. *Conerly v. State*, 607 So. 2d 1153, 1992 Miss. LEXIS 585 (Miss. 1992).

Even if an instruction to the effect that if the jury should find that the accused was intoxicated at the time of the difficulty it must be satisfied beyond a reasonable doubt that such intoxication did not

incapacitate him from forming a deliberate design to kill the victim should be given where the evidence justifies it, it was properly refused where the accused's testimony established that he was not drunk at the time of committing an assault and battery with intent to kill. *Wixon v. State*, 229 Miss. 430, 90 So. 2d 859, 1956 Miss. LEXIS 622 (Miss. 1956).

State's instruction that voluntary drunkenness was no excuse or justification for the commission of a crime in that one could not take advantage of a situation in which he had placed himself voluntarily by being drunk or drinking, and if the jury believed beyond a reasonable doubt that defendant, with felonious intent and malice aforethought to kill, shot and wounded the victim, it should find defendant guilty even though they might believe that defendant had been drunk or drinking at the time, was not misleading as assuming that a crime had been committed, nor was it misleading in any other particular. *Wixon v. State*, 229 Miss. 430, 90 So. 2d 859, 1956 Miss. LEXIS 622 (Miss. 1956).

The shooting at a twelve-year-old boy by a sheriff and his posse who were seeking generally to take into custody persons whom they believed to have been present when a felony was committed justified the boy's brother in returning the fire. *Craft v. State*, 202 Miss. 43, 30 So. 2d 414, 1947 Miss. LEXIS 239 (Miss. 1947).

Husband cannot inflict corporal punishment on wife. *Gross v. State*, 135 Miss. 624, 100 So. 177, 1924 Miss. LEXIS 50 (Miss. 1924).

9. — Insanity.

Even though counsel was deficient in failing to pursue an insanity defense in an aggravated assault case, defendant was not prejudiced thereby because the M'Naghten test was not satisfied; defendant understood the consequences of his actions. Defendant stated that he shot his stepfather for "messing with his mother's mind." *Epps v. State*, 984 So. 2d 1042, 2008 Miss. App. LEXIS 111 (Miss. Ct. App. 2008).

10. — Self-defense.

When defendant was charged with aggravated assault, defendant did not show

defendant acted in self-defense because defendant did not explain why defendant (1) feared for defendant's life, (2) pursued the victim, or (3) fired a shot after a fight ended. *Tutwiler v. State*, 197 So. 3d 418, 2015 Miss. App. LEXIS 650 (Miss. Ct. App. 2015), cert. denied, 202 So. 3d 613, 2016 Miss. LEXIS 352 (Miss. 2016).

In defendant's trial on a charge of misdemeanor domestic violence, pursuant to Miss. Code Ann. § 97-3-7(3), her claim of self-defense failed because there was no evidence to suggest that defendant feared the victim, her husband, would hurt her or cause her some great bodily harm; defendant's actions were made to escape the victim's restraint and leave the home and the evidence supported a conclusion that defendant presented a threat of danger and great bodily harm to herself and others. *Anderson v. State*, 102 So. 3d 304, 2012 Miss. App. LEXIS 510 (Miss. Ct. App. 2012), cert. dismissed, 105 So. 3d 326, 2013 Miss. LEXIS 37 (Miss. 2013).

Defendant's convictions for aggravated assault in violation of Miss. Code Ann. § 97-3-7(2) were improper because the evidence indicated that defendant was acting in necessary self-defense when the projectiles from his firearm struck the bystanders. Defendant had no unlawful intent to cause bodily injury to the bystanders with a deadly weapon and he did not act recklessly under circumstances manifesting extreme indifference to the value of human life; at that moment in the conflict, defendant was attempting to preserve his own life. *Rogers v. State*, 994 So. 2d 792, 2008 Miss. App. LEXIS 170 (Miss. Ct. App.), cert. denied, 998 So. 2d 1010, 2008 Miss. LEXIS 668 (Miss. 2008).

State was not required to prove that defendant was not acting with self defense in order to prove a conviction for aggravated assault under Miss. Code Ann. § 97-3-7(2)(b). *Beyers v. State*, 930 So. 2d 456, 2006 Miss. App. LEXIS 397 (Miss. Ct. App. 2006).

To make an assault justifiable on the grounds of self-defense, danger to the defendant must be either actual, present and urgent, or the defendant must have reasonable grounds to apprehend a design on the part of the victim to kill, or to do him or her some great bodily harm, and

there must be imminent danger of such design being accomplished. On the other hand, if a person provokes a difficulty, arming himself or herself in advance, and intending, if necessary, to use the weapon and overcome his or her adversary, that person becomes the aggressor and is deprived of the right of self-defense. *Anderson v. State*, 571 So. 2d 961, 1990 Miss. LEXIS 717 (Miss. 1990).

Jury instruction was proper where it paralleled statutory language of this section; therefore, jury could have believed all of defendants' story, but not found self-defense proper in this case where 3 people beat admittedly unarmed man. *Johnson v. State*, 512 So. 2d 1246, 1987 Miss. LEXIS 2703 (Miss.), cert. denied, 484 U.S. 968, 108 S. Ct. 462, 98 L. Ed. 2d 402, 1987 U.S. LEXIS 4990 (U.S. 1987), overruled in part, *Smith v. State*, 986 So. 2d 290, 2008 Miss. LEXIS 339 (Miss. 2008).

Testimony of aggravated assault defendant, whose sole defense is self defense, as to efforts, prior to alleged assault, to obtain assistance of law enforcement officers in response to threats against defendant by alleged victim are admissible as being highly relevant to defendant's state of mind leading up to alleged assault. *Brown v. State*, 464 So. 2d 516, 1985 Miss. LEXIS 1925 (Miss. 1985).

In an action for damages which arose when the decedent was shot and killed by a deputy sheriff, the killing would be justifiable under the provisions of the justifiable homicide statute where it was done in self-defense; the shooting was also necessary under the circumstances in order to preserve the peace and to apprehend the decedent, who had fired two rifles at the officers while resisting arrest. *Coghlan v. Phillips*, 447 F. Supp. 21, 1977 U.S. Dist. LEXIS 16951 (S.D. Miss. 1977), aff'd, 567 F.2d 652, 1978 U.S. App. LEXIS 12668 (5th Cir. Miss. 1978).

Trial court's refusal to grant a continuance to a father, who is charged with shooting a 17-year-old boy for slapping his daughter, was erroneous, where the affidavit in support of the motion for continuance showed that the accused's wife, a witness to the shooting, was hospitalized and averred that she would testify that

the victim was the aggressor to the affray and that the accused shot in apparent self-defense, and it further appeared that as a result of the absence of his wife as a witness, the accused was compelled to testify in his own behalf whether he desired to do so or not, since otherwise the state's case would have stood undisputed. *Ivy v. State*, 229 Miss. 491, 91 So. 2d 521, 1956 Miss. LEXIS 630 (Miss. 1956).

Accused was not guilty of assault and battery with intent to kill sheriff were sheriff made an unlawful arrest without warrant by entering accused's own backyard, the accused did not use any more force than necessary in resisting arrest when she scuffled with the sheriff who as a result sustained a slight cut on arm, and where force used did not prevent the unlawful arrest. *Hartfield v. State*, 209 Miss. 787, 48 So. 2d 507, 1950 Miss. LEXIS 443 (Miss. 1950).

One being shot at by a sheriff and his posse who were seeking generally to take into custody persons whom they believed to have been present when a felony was committed had a right to return the fire. *Craft v. State*, 202 Miss. 43, 30 So. 2d 414, 1947 Miss. LEXIS 239 (Miss. 1947).

Acts of Negro in self-defense to an aggression by a white man did not warrant conviction for assault and battery. *Nichols v. State*, 198 Miss. 821, 24 So. 2d 14, 1945 Miss. LEXIS 253 (Miss. 1945).

If plaintiff approached defendant with menacing looks and drawn fists and defendant struck plaintiff to prevent assault and only struck until he overcame threatened assault, blows were justified. *Stamps v. Polk*, 143 Miss. 551, 108 So. 729, 1926 Miss. LEXIS 292 (Miss. 1926).

Where accused, in prosecuting for assault and battery, insulted other party who struck first blow, instruction of self-defense was error. *Wicker v. State*, 107 Miss. 690, 65 So. 885, 1914 Miss. LEXIS 133 (Miss. 1914).

Defendant was not precluded from claiming self-defense because after previous difficulty he had armed himself and sought out his adversary to renew the conflict, where it appeared that the defendant shot and wounded his adversary after the adversary had fired upon him, and the shooting was not in pursuance of an

original intent to kill. *Garner v. State*, 93 Miss. 843, 47 So. 500, 1908 Miss. LEXIS 148 (Miss. 1908).

Held that instruction on self-defense should not be modified by words “without fault in himself in bringing on the difficulty”. *Garner v. State*, 93 Miss. 843, 47 So. 500, 1908 Miss. LEXIS 148 (Miss. 1908).

11. —Civil suit as bar to prosecution.

The prosecutor in an indictment for an assault with intent to kill, who has commenced a civil suit for the injury, will not be compelled to elect or abandon the civil suit or the prosecution; both may be sustained. *Wheatley v. Thorn*, 23 Miss. 62, 1851 Miss. LEXIS 5 (Miss. 1851).

12. Double jeopardy.

Double jeopardy barred defendant’s second conviction for aggravated assault because the two convictions arose of the same occurrence, as the striking and strangling of the victim occurred during the same assault. *May v. State*, 267 So. 3d 803, 2018 Miss. App. LEXIS 632 (Miss. Ct. App. 2018), cert. denied, 267 So. 3d 280, 2019 Miss. LEXIS 169 (Miss. 2019).

Trial court did not err in denying petitioner post-conviction relief because he was not subjected to double jeopardy since the two crimes for which petitioner was indicted and to which he pleaded guilty, armed robbery and aggravated assault, required proof of an element which the other did not; petitioner could have been found guilty of armed robbery without having shot the victim, and he could have been found guilty of aggravated assault without taking the victim’s property. *Owens v. State*, 150 So. 3d 114, 2014 Miss. App. LEXIS 608 (Miss. Ct. App. 2014).

Defendant was not subject to double jeopardy, even though defendant was issued a citation for resisting arrest and was later convicted of simple assault on a law enforcement officer, where a clear reading of the statutes established that the two offenses contained an element that was lacking from the other. *Roncali v. State*, 980 So. 2d 959, 2008 Miss. App. LEXIS 223 (Miss. Ct. App. 2008).

Defendant’s claim of double jeopardy, pursuant to the Fifth Amendment, was

without merit where application of the Blockburger test revealed that elements of each of the crimes of shooting into a vehicle, Miss. Code Ann. § 97-25-47, and aggravated assault, Miss. Code Ann. § 97-3-7(2) were not contained in the other. *Graves v. State*, 969 So. 2d 845, 2007 Miss. LEXIS 676 (Miss. 2007).

Inmate’s convictions for aggravated assault and aggravated robbery did not violate his Fifth Amendment right to be free from double jeopardy because even though the charges arose from the same set of facts, the two charges had different elements that the State needed to prove and one was not a lesser-included offense of the other. *Thomas v. State*, 930 So. 2d 1264, 2005 Miss. App. LEXIS 993 (Miss. Ct. App. 2005).

Where defendant robbed the victim, a store clerk, at gunpoint, and pistol whipped the victim numerous times, the offenses of robbery with the use of a deadly weapon, and aggravated assault, clearly required different elements of proof, and double jeopardy did not apply. *Houston v. State*, 887 So. 2d 808, 2004 Miss. App. LEXIS 451 (Miss. Ct. App.), cert. denied, 888 So. 2d 1177, 2004 Miss. LEXIS 1448 (Miss. 2004).

Defendant’s conviction for aggravated assault on a law enforcement officer, pursuant to Miss. Code Ann. § 97-3-7(2)(b) was not obtained in violation of the Double Jeopardy Clause as conviction on that charge required proof of at least one element not present in the resisting arrest charge, Miss. Code Ann. § 97-9-73, on which defendant had earlier been convicted. *Powell v. State*, 806 So. 2d 1069, 2001 Miss. LEXIS 271 (Miss. 2001).

13. Evidence; generally.

Verdict finding defendant guilty of aggravated assault and firearm possession by a felon was not so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice because the victim testified that when she entered the house, the culprit, whom she identified as defendant, came out of a backroom, pointed a long gun at her, and told her to “hold it”; she heard a click from the gun and ran from the house for help; she

testified about the gun he aimed at her and its size; and the jury heard from the police regarding their pursuit and eventual capture of defendant and about the victim's identification of defendant as the burglar. *Johnson v. State*, 264 So. 3d 822, 2018 Miss. App. LEXIS 546 (Miss. Ct. App. 2018).

Trial court did not abuse its discretion in denying defendant's motion for a new trial because the jury did not believe defendant's version of the attack; even though defendant's version contained some inconsistencies and contradictions, the weight of the evidence, taken in the light most favorable to the verdict, supported the verdict of guilty for aggravated assault. *Kennedy v. State*, 236 So. 3d 829, 2017 Miss. App. LEXIS 575 (Miss. Ct. App. 2017).

Verdict in an aggravated assault upon a police officer case was not so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice because defendant's intentional actions of hitting and kicking the officer numerous times, which caused bruising, black eyes, and a broken nose, were likely to produce serious bodily harm. *Graham v. State*, 151 So. 3d 268, 2014 Miss. App. LEXIS 663 (Miss. Ct. App. 2014).

Defendant's convictions for murder and aggravated assault, under Miss. Code Ann. §§ 97-3-19(1), 97-3-7(2), were not against the weight of the evidence because allowing the verdict to stand would not have sanctioned an unconscionable injustice because there was nothing that would have led an appellate court to disagree with a jury's assessment of the conflicting testimony with which it was presented. *Readus v. State*, 997 So. 2d 941, 2008 Miss. App. LEXIS 249 (Miss. Ct. App. 2008), cert. denied, 999 So. 2d 852, 2009 Miss. LEXIS 27 (Miss. 2009).

Conviction for aggravated assault under Miss. Code Ann. § 97-3-7(2)(b) was supported by the weight of the evidence because witnesses testified that defendant was actively engaged in a drunken fight, a friend of defendant's testified that deadly force was not necessary, defendant admitted wielding a knife, no evidence was presented that the injuries were from an-

other source, and someone observed defendant stab a victim after blinding him with a shirt; therefore, a new trial was not warranted. *Lackie v. State*, 971 So. 2d 601, 2007 Miss. App. LEXIS 293 (Miss. Ct. App.), cert. denied, 973 So. 2d 244, 2007 Miss. LEXIS 683 (Miss. 2007).

Evidence substantially supported defendant's guilt in a simple assault of a police officer case where defendant did not dispute that the officer was a law enforcement officer who was acting in the scope of his duty on the night of the incident and the officer testified that defendant struck him behind the head with defendant's fist, while his back was turned to defendant; the officer also testified that he sustained a cut from defendant's blow. A witness testified that she saw defendant hit the officer toward the back of the neck with his fist or hand after the officer ordered defendant to stand back from the women defendant was pursuing and that the attack was unprovoked. *Enlow v. State*, 878 So. 2d 1111, 2004 Miss. App. LEXIS 710 (Miss. Ct. App.), cert. denied, 888 So. 2d 1177, 2004 Miss. LEXIS 1479 (Miss. 2004).

Defendant was properly convicted of aggravated assault where her husband was attacked in the middle of the night in the trailer in which he lived. *Favre v. State*, 877 So. 2d 554, 2004 Miss. App. LEXIS 656 (Miss. Ct. App. 2004).

State's identification of defendant consisted of the victim's eyewitness identification from a photo line-up and in-court identification, and a videotape of the robbery which showed the robber; moreover, the trial court instructed the jury to consider *Neil v. Biggers* to determine whether the identification made by the victim was credible and reliable, and the jury resolved the issue of credibility in favor of the State's witnesses. Thus, the evidence was sufficient to sustain defendant's convictions for robbery with the use of a deadly weapon, and aggravated assault. *Houston v. State*, 887 So. 2d 808, 2004 Miss. App. LEXIS 451 (Miss. Ct. App.), cert. denied, 888 So. 2d 1177, 2004 Miss. LEXIS 1448 (Miss. 2004).

Evidence was sufficient to support defendant's aggravated assault conviction where numerous witnesses testified that

defendant attacked the victim with a metal object, that the victim was unarmed and did not attempt to fight back, that onlookers attempted to stop defendant, and that defendant continued to beat the victim after he was on the ground. Although defendant attempted to make a case of self-defense, reasonable and fair-minded jurors could have found defendant guilty. *Hoye v. State*, 867 So. 2d 266, 2004 Miss. App. LEXIS 168 (Miss. Ct. App. 2004).

Evidence was sufficient to support defendant's conviction for attempted aggravated assault on a police officer where three officers present at the scene testified that defendant had pointed a gun at them and refused demands that he drop it, an officer testified that he saw the gun as it was fired and that defendant was the first one to shoot, and an investigator concluded that the bullets fired from defendant's gun were shot in an officer's direction. *Stringer v. State*, 862 So. 2d 566, 2004 Miss. App. LEXIS 4 (Miss. Ct. App. 2004).

Evidence was sufficient to convict a defendant of aggravated assault, where his accomplice admitted in his statement for his plea agreement that he called to defendant to assist him while he was fighting with the assault victim, and the victim identified defendant at trial. *Wells v. State*, 849 So. 2d 1231, 2003 Miss. LEXIS 213 (Miss. 2003).

Evidence that defendant grabbed the victim's wrists in an aggressive manner was sufficient to support defendant's conviction for simple assault. *Griffith v. City of Bay St. Louis*, 797 So. 2d 1037, 2001 Miss. App. LEXIS 302 (Miss. Ct. App. 2001).

Defendant struck the victim with a mop handle, inflicting pain and injury on her so she would be quiet while he assaulted her; thus, the evidence was sufficient to convict defendant of aggravated assault and the trial court properly denied defendant's motion for directed verdict. *Bridges v. State*, 790 So. 2d 230, 2001 Miss. App. LEXIS 276 (Miss. Ct. App. 2001).

State's introduction of evidence that defendant in aggravated assault case has previously been in jail does not prejudice jury where reference to jail does not

specify any particular offense and court sustains objection of defendant's attorney and instructs jury to disregard reference. *Stringer v. State*, 477 So. 2d 1335, 1985 Miss. LEXIS 2191 (Miss. 1985).

Prosecution in aggravated assault case may cross-examine defense witness as to whether witness has previously been character witness for defendant. *Stringer v. State*, 477 So. 2d 1335, 1985 Miss. LEXIS 2191 (Miss. 1985).

In prosecution for felonious assault by cutting with knife, attorney who is employed by defendant to represent him in divorce action is competent to testify against him in regard to what occurred since attorney when testifying in criminal case was not divulging any private or confidential communication between himself and his client, but was merely testifying as witness for state to a crime committed in presence of witness and in presence of third party. *Ferrell v. State*, 208 Miss. 539, 45 So. 2d 127, 1950 Miss. LEXIS 272 (Miss. 1950).

In prosecution for assault and battery with intent to kill, defendant's prior conviction of drunkenness is competent evidence against him when both sides, without objection, entered upon proof of fact whether he was drunk or drinking on night of crime, and defendant took stand as witness, as his prior conviction of crime was competent as bearing upon weight of his testimony and his credibility as witness. *Phillips v. State*, 43 So. 2d 208 (Miss. 1949).

On appeal from judgment of conviction on charge of assault with intent to kill, supreme court will accept testimony introduced by state as constituting true account, but, since burden of proof is on state, it will interpret that testimony in favor of defendant when it is manifestly capable of two reasonable interpretations. *Craddock v. State*, 204 Miss. 606, 37 So. 2d 778, 1948 Miss. LEXIS 393 (Miss. 1948).

In prosecution under this section [Code 1942, § 2011], questions so framed as to impress jury that accused is man of violent and quarrelsome disposition and that he has committed serious assaults upon other persons on different occasions in past, repeatedly asked by prosecuting attorney, objections to which are repeatedly

sustained, are improper, and defendant's motion for mistrial therefor should be sustained. *Buchanan v. State*, 204 Miss. 304, 37 So. 2d 318, 1948 Miss. LEXIS 367 (Miss. 1948).

14. — Admissibility.

In a case in which strangulation was an element of the crime charged in the indictment, the trial court did not commit plain error by permitting a law enforcement officer to testify to medical causation that the victim's injuries appeared to be a result of strangulation because defendant failed to object to the testimony at trial and, in fact, emphasized at on cross examination. *Kirk v. State*, 160 So. 3d 685, 2015 Miss. LEXIS 68 (Miss. 2015).

Defendant's convictions for capital murder in violation of Miss. Code Ann. § 97-3-19(2)(e), aggravated assault in violation of Miss. Code Ann. § 97-3-7(2), and conspiracy to commit aggravated assault were appropriate because the victim's autopsy photographs were admissible since their probative value was not outweighed by any danger of undue prejudice and since there was a meaningful evidentiary purpose. *Williams v. State*, 3 So. 3d 105, 2009 Miss. LEXIS 68 (Miss. 2009).

In a case in which defendant was convicted of violating Miss. Code Ann. § 97-3-7(2)(b), the trial judge did not err by not admitting evidence of the victim's continued intimacy with defendant after the assault. Defendant had argued that such evidence might be relevant in assessing her veracity, but the trial judge would not allow the testimony into evidence finding that any subsequent fraternization between defendant and the victim was irrelevant; the trial judge stated that the crime was committed not only against the victim but also against the laws of the State of Mississippi, and defendant cited no relevant authority for the appellate court to determine otherwise. *Carter v. State*, 995 So. 2d 847, 2008 Miss. App. LEXIS 700 (Miss. Ct. App. 2008).

Where defendant was convicted of aggravated assault with a weapon, a violation of Miss. Code Ann. § 97-3-7, the trial court did not err in admitting a second knife into evidence because a witness testified that after defendant stabbed the

victim with a butcher knife, he tried to stab him with a different knife, and the police found defendant with the second knife in his hands when he was arrested, and it was not a butcher knife, thereby corroborating the witness's testimony. *Clark v. State*, 2005 Miss. App. LEXIS 371 (Miss. Ct. App. June 7, 2005), sub. op., op. withdrawn, 928 So. 2d 192, 2006 Miss. App. LEXIS 135 (Miss. Ct. App. 2006).

Trial court did not err in granting a motion in limine barring any mention of the civil suit pending between the victim and the rescue mission that he and defendant were living in where defendant claimed that had such evidence been allowed the bias and animosity of the victim towards defendant would have been proven and would have supported defendant's self-defense theory. Notwithstanding the trial court's ruling, after an examination of the record, the appellate court found that defendant was not prevented from testifying regarding the alleged bias of the prosecution's witnesses and the jury heard and considered that testimony and found the prosecution's witnesses more credible. *Clark v. State*, 2005 Miss. App. LEXIS 371 (Miss. Ct. App. June 7, 2005), sub. op., op. withdrawn, 928 So. 2d 192, 2006 Miss. App. LEXIS 135 (Miss. Ct. App. 2006).

Trial court did not err in excluding evidence of defendant's fear of the victim that defendant claimed was relevant to his self-defense claim because defendant was able to testify about his fears; furthermore, the prosecution offered evidence regarding defendant's alleged fears; the trial court merely excluded the repetition of such testimony on re-direct. *Clark v. State*, 2005 Miss. App. LEXIS 371 (Miss. Ct. App. June 7, 2005), sub. op., op. withdrawn, 928 So. 2d 192, 2006 Miss. App. LEXIS 135 (Miss. Ct. App. 2006).

In a prosecution for aggravated assault under Miss. Code Ann. § 97-3-7, the trial court did not err in allowing evidence regarding an altercation between defendant and the victim prior to the assault; the altercation, allegedly a prior bad act, was properly admitted to establish motive under Miss. R. Evid. 404(b), and the probative value of the evidence outweighed the prejudice caused under Miss. R. Evid.

403. *Brown v. State*, 864 So. 2d 1009, 2004 Miss. App. LEXIS 55 (Miss. Ct. App. 2004).

Evidence of alleged racial slurs made by the defendant were improperly admitted into evidence as race is not an element of a violation of subsection (1)(c) and as the probative value, if any, of the defendant's alleged racial slurs was clearly substantially outweighed by the danger of unfair prejudice. *Tate v. State*, 784 So. 2d 208, 2001 Miss. LEXIS 123 (Miss. 2001).

Prosecutor's cross-examination of defense witness, concerning reason defendant had so much money in his house in the form of small bills, was entirely irrelevant to charge of aggravated assault and constituted improper attempt to give jury the inference that defendant needed small bills in order to deal narcotics. *Cotton v. State*, 675 So. 2d 308, 1996 Miss. LEXIS 198 (Miss. 1996).

In a prosecution for aggravated assault, a witness' rebuttal testimony that the defendant had visited her house 3 days before the assault looking for the victim and that he had a gun in his pocket, did not violate Rule 608(b), Miss. R. Evid. because it was not introduced as a specific instance of conduct to impeach the defendant's credibility. Additionally, the impeachment was not on a collateral issue since the issue of whether the victim or the defendant had a gun and which one was the aggressor was a central factual issue. The witness' testimony was not reputation or character evidence but a statement of fact relevant to the merits, and was therefore admissible. *Lewis v. State*, 580 So. 2d 1279, 1991 Miss. LEXIS 314 (Miss. 1991).

In a prosecution for aggravated assault, evidence of a drug transaction involving the defendant's husband was properly admitted into evidence where the State contended that the defendant shot 6 nightclub patrons because of a beating her husband received during the drug transaction, the evidence was introduced for the purpose of establishing the defendant's motive for the shooting, and no evidence was presented to suggest that the defendant was involved in any drug transaction at the nightclub on the night of the shooting. *Hogan v. State*, 580 So. 2d 1275, 1991 Miss. LEXIS 324 (Miss. 1991).

Although wide latitude should be given in the cross-examination of witnesses, basic fairness requires that, before the State questions the accused as to whether he or she is guilty of a series of crimes unrelated to the charges being prosecuted, it have some basis in fact for such questioning. This would be the case even if the commission of such crimes were admissible evidence. Thus, where the record did not show any evidentiary basis to ask such questions, the State's conduct in cross-examining the defendant in a sexual battery prosecution about unrelated acts of deviant, sexual conduct with his stepchildren constituted reversible error even though the defense objection was sustained. *Hosford v. State*, 525 So. 2d 789, 1988 Miss. LEXIS 217 (Miss. 1988).

Admission into evidence of results of blood alcohol test at trial for manslaughter and aggravated assault arising out of a motor vehicle accidents was reversible error, where deputy sheriff who investigated the accident had insufficient probable cause to request a blood alcohol test for defendant driver, in view of deputy's statement that he smelled no odor of alcohol on defendant either at the accident scene or at the hospital, he observed no whiskey bottles or beer cans in defendant's car, no aspect of defendant's speech, appearance or behavior indicated that he was under the influence of alcohol, and deputy admitted that the real reason for requesting the blood alcohol test was because it was sheriff department policy to do so when someone was killed in an automobile accident. *Cole v. State*, 493 So. 2d 1333, 1986 Miss. LEXIS 2641 (Miss. 1986).

Testimony of aggravated assault victim as to victim's reluctance to testify based on fear for mother, who lives close to defendant, and upon fact that someone had come looking for victim's address with pistol is admissible on redirect examination where defense counsel has elicited from witness on cross-examination that victim did not want to testify in case. *Stringer v. State*, 477 So. 2d 1335, 1985 Miss. LEXIS 2191 (Miss. 1985).

In a prosecution for aggravated assault under subsection (2) of this section, the trial court properly admitted testimony by a witness that he met the automobile

driven by defendant approximately one fourth mile from the collision scene and was required to drive off the road in order to prevent a collision. *Gray v. State*, 427 So. 2d 1363, 1983 Miss. LEXIS 2351 (Miss. 1983).

In a prosecution for aggravated assault with an automobile that arose when the victim, who had attempted to intervene in an altercation between defendant and a third person over an automobile collision, was struck by either the open door or the rear of defendant's car, the trial court did not err in permitting the state to introduce evidence about the collision and altercation where such action on defendant's part was intimately connected with and related to the crime charged and was relevant to establish defendant's motive. *McGee v. State*, 365 So. 2d 302, 1978 Miss. LEXIS 2417 (Miss. 1978).

Confession of defendant, charged with assault and battery with intent to kill his wife, made and signed at a time when the wife was still living, was not inadmissible on the ground that the officers misrepresented the wife's condition or that it constituted a promise of leniency. *Harris v. State*, 209 Miss. 102, 46 So. 2d 75, 1950 Miss. LEXIS 364 (Miss. 1950).

General reputation of deceased for peace in murder trial cannot be shown until or unless such reputation is first attacked by defense, and same rule applies to injured party in lesser offense of assault and battery with intent to kill. *Hinton v. State*, 209 Miss. 608, 45 So. 2d 805, 1950 Miss. LEXIS 420 (Miss.), cert. denied, 340 U.S. 802, 71 S. Ct. 68, 95 L. Ed. 590, 1950 U.S. LEXIS 1573 (U.S. 1950).

Testimony of sheriff that shortly after an alleged assault with intent to murder, he smelled liquor on defendant's breath is admissible for purpose of showing defendant's state of mind at time of attack, since no motive therefor was in evidence. *Hughes v. State*, 207 Miss. 594, 42 So. 2d 805, 1949 Miss. LEXIS 372 (Miss. 1949).

Introduction in evidence of a large stick in a prosecution for assault and battery with intent to kill constituted reversible error, where there was no showing that such stick was used in the assault and battery. *Henley v. State*, 202 Miss. 37, 30

So. 2d 423, 1947 Miss. LEXIS 238 (Miss. 1947).

In prosecution for assault and battery with intent to murder, largely controlled by circumstantial evidence, any circumstances logically tending to show motive held competent. *Sauer v. State*, 166 Miss. 507, 144 So. 225, 1932 Miss. LEXIS 307 (Miss. 1932).

Threat is admissible, though it be conditional. *Cordell v. State*, 136 Miss. 293, 101 So. 380, 1924 Miss. LEXIS 130 (Miss. 1924).

Where the evidence is conflicting as to who was aggressor, uncommunicated threats are admissible. *Miles v. State*, 99 Miss. 165, 54 So. 946, 1910 Miss. LEXIS 29 (Miss. 1910).

Error to exclude obscene postal card alleged by prosecuting witness to have caused assault. *De Silva v. State*, 91 Miss. 776, 45 So. 611, 1907 Miss. LEXIS 190 (Miss. 1907).

15. — — Nature of injuries.

Trial court did not abuse its discretion by allowing the prosecution to display the injured child to the jury because: (1) under Miss. Const. Art. 3, § 26A and Miss. Code Ann. § 99-43-21 (Rev. 2007), the victim had the right to be present and be heard during the criminal proceedings; (2) the State was required to offer proof of serious bodily injury in order to convict defendant of aggravated assault; and (3) the probative value of the jury's viewing the child's injuries was not substantially outweighed by unfair prejudice to defendant. *Harris v. State*, 979 So. 2d 721, 2008 Miss. App. LEXIS 197 (Miss. Ct. App. 2008).

In order to prove a conviction for aggravated assault in violation of Miss. Code Ann. § 97-3-7(2)(b), the state was not required to show that the victim suffered serious bodily injury, but was only required to show that defendant's injurious action was likely to cause such a result. *Beyers v. State*, 930 So. 2d 456, 2006 Miss. App. LEXIS 397 (Miss. Ct. App. 2006).

Colored photographs of the victim's face before and after surgery were admissible in an assault prosecution where the photographs were necessary to aid the jury in its decision of whether the assault with fists constituted aggravated assault or

simple assault. *Gardner v. State*, 573 So. 2d 716, 1990 Miss. LEXIS 813 (Miss. 1990).

It was competent for aggravated assault victim to describe the nature and extent of injuries received as result of being shot by the defendant, since the essence of the offense of aggravated is that the accused has knowingly caused bodily injury to another with a deadly weapon likely to produce death or serious bodily harm. *Cooley v. State*, 495 So. 2d 1362, 1986 Miss. LEXIS 2715 (Miss. 1986).

Admission in evidence of a photograph of aggravated assault victim's leg wound was not error, since it was relevant to prosecution's need to show infliction of a wound with a deadly weapon in order to succeed under the indictment, and there was no basis to believe its probative value was substantially outweighed by danger of unfair prejudice. *Cooley v. State*, 495 So. 2d 1362, 1986 Miss. LEXIS 2715 (Miss. 1986).

Admission of evidence as to stabbing victim's considerable bleeding, his scar, and the nature and size of his wound, was not reversible error, since its inflammatory or prejudicial effect, if any, on jury did not outweigh its relevancy to the issue as to whether the assault upon the victim was an aggravated one. *Norris v. State*, 490 So. 2d 839, 1986 Miss. LEXIS 2477 (Miss. 1986).

16. — — Other offenses or conduct.

Defendant was entitled to a new trial as to an aggravated assault count because a retroactive misjoinder occurred as the admission into evidence by stipulation of defendant's prior felony conviction regarding a felon in possession of a knife count, when the evidence was insufficient to sustain the felon in possession count, prejudiced defendant's defense on the aggravated assault count. *Williams v. State*, 37 So. 3d 717, 2010 Miss. App. LEXIS 301 (Miss. Ct. App. 2010).

In a case in which defendant appealed his conviction for violating Miss. Code Ann. § 97-3-7(2)(a), he unsuccessfully argued that the trial court erred in allowing the victim's wife to testify about an encounter she and defendant had months after the incident. Defendant contended

that the wife's testimony was not relevant, and its prejudicial effect outweighed its probative value in violation of Miss. R. Evid. 403, but the evidence was offered to show defendant's state of mind on the day of the assault; the trial court weighed the probative value of the evidence against the potential for undue prejudice. *David v. State*, 29 So. 3d 129, 2010 Miss. App. LEXIS 112 (Miss. Ct. App. 2010).

In defendant's trial on a charge of aggravated assault for stabbing the woman with whom he lived, the trial court erred in permitting the prosecutor to inquire into the details of defendant's previous conviction for aggravated assault for shooting a woman. The error was not harmless because evidence of defendant's prior conviction for the same crime of aggravated assault was highly prejudicial and because it permitted the exact inference that Miss. R. Evid. 404(b) sought to prevent. *Thomas v. State*, 19 So. 3d 130, 2009 Miss. App. LEXIS 192 (Miss. Ct. App.), cert. denied, 19 So. 3d 82, 2009 Miss. LEXIS 485 (Miss. 2009).

In defendant's trial on a charge of aggravated assault for stabbing the woman with whom he lived, the trial court erred in permitting the prosecutor to inquire into the details of his previous conviction for aggravated assault for shooting a woman. Although the prosecutor argued that the evidence was admissible under Miss. R. Evid. 404(b) to show motive, opportunity, or intent because it was evidence that defendant liked to assault women, there was no proof that defendant's conviction for shooting another woman years earlier had any effect upon his motive, opportunity, or intent to stab his current victim. *Thomas v. State*, 19 So. 3d 130, 2009 Miss. App. LEXIS 192 (Miss. Ct. App.), cert. denied, 19 So. 3d 82, 2009 Miss. LEXIS 485 (Miss. 2009).

Defendant's conviction for aggravated domestic violence against his girlfriend pursuant to Miss. Code Ann. § 97-3-7(4) was appropriate because defendant's statements in which he alluded to prior domestic violence were admissible under Miss. R. Evid. 404(b) to show the absence of an accident; additionally, the circuit court did not abuse its discretion when it found that the evidence was more proba-

tive then prejudicial. *Fugate v. State*, 951 So. 2d 604, 2007 Miss. App. LEXIS 145 (Miss. Ct. App. 2007).

Defendant's conviction for aggravated assault in violation of Miss. Code Ann. § 97-3-7(2)(b) was appropriate because the testimony provided by the victim and another dispelled the argument in support of allowing testimony under Miss. R. Evid. 404(a)(2) to prove a character trait for violence on the part of the victim; the evidence at issue failed to demonstrate that the victim was the initial aggressor during a prior incident. *Gates v. State*, 936 So. 2d 335, 2006 Miss. LEXIS 384 (Miss. 2006).

Where officers received a report of a robbery in a nearby state and were warned to be on the lookout (BOLO), and where they then pursued defendant who hit three police cars during the chase, in defendant's trial on counts of assaulting a police officer, the trial judge did not abuse his discretion in admitting the BOLO warning and the gun recovered from defendant into evidence, because those items were essential to the State's presentation of a complete and coherent story to the jury; further, the trial judge did not err in not giving, sua sponte, a limiting instruction. *Conerly v. State*, 879 So. 2d 1101, 2004 Miss. App. LEXIS 762 (Miss. Ct. App. 2004).

Witness' references to aggravated assaults allegedly committed by defendant in past were invited by defense counsel during cross-examination of witness and, in any event, no serious or irreparable damage occurred, particularly in view of direction to jury to ignore inappropriate references. *Hoops v. State*, 681 So. 2d 521, 1996 Miss. LEXIS 433 (Miss. 1996).

Affiliation or membership with street gang constitutes "bad act" within meaning of rule that allows evidence of other bad acts to be admitted to prove motive. *Hoops v. State*, 681 So. 2d 521, 1996 Miss. LEXIS 433 (Miss. 1996).

Probative value of evidence of defendant's alleged involvement in street gang to show motive to commit aggravated assault against rival gang member was not outweighed by danger of unfair prejudice. *Hoops v. State*, 681 So. 2d 521, 1996 Miss. LEXIS 433 (Miss. 1996).

Foundation for admission of evidence concerning defendant's alleged involvement in street gang was laid by one witness' testimony that he knew defendant was gang member, and defendant's testimony that he "hung out" with gang members. *Hoops v. State*, 681 So. 2d 521, 1996 Miss. LEXIS 433 (Miss. 1996).

An aggravated assault conviction would be reversed and the case remanded for a new trial where evidence of the defendant's prior misdemeanor assault conviction was improperly admitted into evidence. *Ivy v. State*, 522 So. 2d 740, 1988 Miss. LEXIS 65 (Miss. 1988).

At trial of charge of simple assault on a police officer, evidence of neighbor's complaint against defendant for disturbing the peace, issuance of arrest warrant, and arrest of defendant for disturbing the peace, were admissible in evidence under exception to general rule that proof of a crime distinct from that alleged in indictment is not admissible against the accused. *Thomas v. State*, 495 So. 2d 481, 1986 Miss. LEXIS 2673 (Miss. 1986).

At trial of charge of simple assault on police officer, evidence of defendant's threatening act against neighbor, at neighbor's house, who had complained about loud noise from defendant's lawn party disturbing the peace, was admissible in evidence, since the incident was integrally related to the assault which occurred a couple of hours later in the general vicinity of the lawn party. *Thomas v. State*, 495 So. 2d 481, 1986 Miss. LEXIS 2673 (Miss. 1986).

In prosecution for aggravated assault based upon shooting of one person, testimony that another person was also shot and that defendant fled to another county for 2 weeks is admissible as constituting part of *res gestae*. *Davis v. State*, 476 So. 2d 608, 1985 Miss. LEXIS 2248 (Miss. 1985).

17. — —Self-defense.

In a prosecution for simple assault on a law enforcement officer, in which the defendant claimed that a deputy sheriff attacked him without provocation and that he was attempting to defend himself, the defendant was precluded from introducing evidence of the deputy's reputation for

violence unless and until he introduced evidence of an overt act of aggression by the deputy. *Robinson v. State*, 566 So. 2d 1240, 1990 Miss. LEXIS 468 (Miss. 1990).

Testimony to the effect that on the night of the fight and a short time before it occurred, the assaulted party had expressed ill will toward the accused because of having been let out as church treasurer, which was also the matter which precipitated the fighting, was admissible on the issue of self-defense. *Ridgeway v. State*, 245 Miss. 506, 148 So. 2d 513, 1963 Miss. LEXIS 531 (Miss. 1963).

18. — Sufficiency.

Evidence that defendant fired his shotgun three times at the back of the victims' car as the victim was crouched between the car and an above-ground pool supported the jury's conclusion that defendant attempted to cause bodily injury to the victim and thus, was sufficient to support his attempted aggravated assault conviction. *Dehart v. State*, 290 So. 3d 373, 2020 Miss. App. LEXIS 20 (Miss. Ct. App. 2020).

Defendant's conviction was not against the manifest weight of the evidence, which included photographs of the holes in the above-ground pool and in the back of the victim's car and testimony that defendant was shooting at the car the victim was crouched behind and yelling and cursing at the victim. *Dehart v. State*, 290 So. 3d 373, 2020 Miss. App. LEXIS 20 (Miss. Ct. App. 2020).

There was sufficient evidence for the jury to find that the victim was wounded by a bullet and that defendant fired the bullet because a witness testified she saw the victim's back bleeding, the witness and the victim both testified that the victim was in a bed in the front bedroom when the shooting started, photographs showed a bullet hole directly above the bed where the victim slept, and the witness and the victim testified that the bullet hole had not been there before the shooting. *Morris v. State*, — So. 3d —, 2020 Miss. App. LEXIS 11 (Miss. Ct. App. Jan. 14, 2020), cert. denied, — So. 3d —, 2020 Miss. LEXIS 366 (Miss. 2020).

Evidence was sufficient to support defendant's aggravated assault conviction

because the victim testified that defendant shot the first victim and then pointed his gun at the victim, the victim turned and ran but was shot in the neck, and there was no evidence that anyone else fired a gun. *Allen v. State*, 299 So. 3d 917, 2020 Miss. App. LEXIS 122 (Miss. Ct. App. 2020).

Evidence was sufficient to support defendant's aggravated assault conviction because there was no evidence that anyone but defendant fired a gun, the victim was transported to a hospital and remained in the hospital for more than a month, the victim suffered a punctured lung and three broken ribs, and he testified that the bullet that struck him in his back remained lodged two inches from his heart and continued to cause him pain. *Allen v. State*, 299 So. 3d 917, 2020 Miss. App. LEXIS 122 (Miss. Ct. App. 2020).

State of Mississippi provided sufficient evidence for the trial court to deny defendant's directed verdict motion at defendant's trial for aggravated assault because the State presented eyewitness testimony that defendant used defendant's truck with the purpose and intent of harming the victim, following an argument with the victim, by hitting or clipping the victim with the truck as defendant revved the truck in a vacant parking lot. *Middleton v. State*, 281 So. 3d 858, 2019 Miss. App. LEXIS 33 (Miss. Ct. App. 2019).

Evidence was sufficient to support defendant's aggravated assault conviction because the victim testified that before the men left they threw gasoline on him and defendant used a cigarette lighter to set him on fire. The officer testified that when he arrived at the hospital the victim's room smelled of gasoline and he noticed that the victim had been burned. *Kidd v. State*, 284 So. 3d 777, 2019 Miss. App. LEXIS 342 (Miss. Ct. App. 2019).

Sufficient evidence supported defendant's conviction for aggravated assault on a correctional officer because the evidence showed defendant intentionally caused bodily injury by creating a substantial risk of death to the victim when defendant planned the assault and placed the victim in a chokehold. *Moffite v. State*, — So. 3d —, 2019 Miss. App. LEXIS 581 (Miss. Ct. App. Dec. 3, 2019), cert. denied,

— So. 3d —, 2020 Miss. LEXIS 423 (Miss. 2020).

Evidence showing that after the shooting first defendant made no attempt to leave the group involved and spent the night with the group in hotel was sufficient to support defendant's aggravated assault conviction. *Buchanan v. State*, — So. 3d —, 2019 Miss. App. LEXIS 579 (Miss. Ct. App. Dec. 3, 2019).

Trial court did not err in denying defendant's motion for JNOV, as reasonable juror could have inferred defendant shot the victim, who was holding his infant son, and thus, defendant possessed the intent to commit aggravated assault, in that he attempted to inflict serious bodily injury with a deadly weapon upon the baby. *McCray v. State*, 263 So. 3d 1021, 2018 Miss. App. LEXIS 325 (Miss. Ct. App. 2018), cert. denied, 263 So. 3d 665, 2019 Miss. LEXIS 75 (Miss. 2019).

Evidence was sufficient to convict defendant of aggravated assault because, even though no shooting occurred, the victim testified that when she entered the house, defendant came out of a backroom and pointed a long gun at her; she testified that she heard a click from the gun and ran from the house for help; the mere attempt to fire the gun supported the verdict for aggravated assault; and the jury heard the victim's testimony and deemed it sufficient to determine that defendant attempted to cause the victim bodily injury with a weapon. *Johnson v. State*, 264 So. 3d 822, 2018 Miss. App. LEXIS 546 (Miss. Ct. App. 2018).

Defendant's motion for a judgment notwithstanding the verdict was properly dismissed as substantial evidence supported the verdict convicting defendant of aggravated assault because the victim positively identified defendant as his shooter and testified that he knew defendant well; a witness testified that he saw defendant and his father driving around the neighborhood and then saw them pursuing the victim in their vehicle; an officer testified that, upon arriving at the police station after the shooting, he saw the victim receiving medical attention for his wounds and observed the shattered windows of the victim's truck; and the police recovered several shell casings from the street

in front of the home where the victim was shot. *Mack v. State*, 237 So. 3d 778, 2017 Miss. App. LEXIS 334 (Miss. Ct. App. 2017), cert. denied, 237 So. 3d 1270, 2018 Miss. LEXIS 90 (Miss. 2018).

Evidence was sufficient to warrant the trial court's denial of defendant's motion for a directed verdict or judgment notwithstanding the verdict because the deadly weapon element of aggravated assault could be found beyond a reasonable doubt; the victim told police and testified at trial that defendant hit her with a tire iron, her son corroborated the events, and her treating physician testified that her scalp laceration was consistent with being hit with a blunt object, such as a tire iron. *Kennedy v. State*, 236 So. 3d 829, 2017 Miss. App. LEXIS 575 (Miss. Ct. App. 2017).

Trial counsel was not ineffective because there was no reasonable probability that the outcome of defendant's trial for aggravated assault would have been different if counsel would have filed a post-trial motion for judgment notwithstanding the verdict (JNOV) since there was ample evidence of defendant's guilt; numerous witnesses said that defendant was moving toward the victim while shooting at him and that he was trying to get away from defendant. *Darnell v. State*, 202 So. 3d 281, 2016 Miss. App. LEXIS 565 (Miss. Ct. App. 2016).

It was not an abuse of discretion to deny defendant's new trial motion, after defendant was convicted of aggravated assault, because (1) defendant had a gun, (2) the victim was unarmed, (3) gunshots were heard, and (4) defendant pursued the victim. *Tutwiler v. State*, 197 So. 3d 418, 2015 Miss. App. LEXIS 650 (Miss. Ct. App. 2015), cert. denied, 202 So. 3d 613, 2016 Miss. LEXIS 352 (Miss. 2016).

It was no error to deny defendant a peremptory instruction that the State did not prove aggravated assault elements, or defendant's motion for judgment notwithstanding the verdict, because (1) all witnesses said defendant had a gun, and (2) defendant admitted defendant shot the victim. *Tutwiler v. State*, 197 So. 3d 418, 2015 Miss. App. LEXIS 650 (Miss. Ct. App. 2015), cert. denied, 202 So. 3d 613, 2016 Miss. LEXIS 352 (Miss. 2016).

Evidence was sufficient to convict defendant of aggravated assault because the victim unequivocally identified defendant as her assailant, both initially to law enforcement and at trial; the victim's testimony was more than sufficient to prove beyond a reasonable doubt that defendant was the one who caused the victim's injuries; and it was possible for a reasonable juror to find defendant guilty beyond a reasonable doubt based on the victim's testimony, the officers' testimony, and the photographic evidence. *Casey v. State*, 179 So. 3d 74, 2015 Miss. App. LEXIS 578 (Miss. Ct. App. 2015).

Trial court properly denied defendant's motion for a new trial because the evidence at trial was sufficient to convict him of aggravated assault on a law enforcement officer and robbery where, inter alia, a surveillance video admitted into evidence showed him as an inmate grab a correctional officer, throw her around and choke her while she was screaming in obvious fear for her life, the evidence also established that defendant stealthily grabbed her cell phone and that she was in fear for her life when he took her phone. *Pritchett v. State*, 171 So. 3d 594, 2015 Miss. App. LEXIS 407 (Miss. Ct. App. 2015).

Sufficient evidence supported defendant's conviction for aggravated domestic violence based on evidence that he and the victim were married, his wife's testimony that defendant strangled her and she could not breathe and lost consciousness, and the deputies' identification of pictures showing her injuries. *Kirk v. State*, 160 So. 3d 685, 2015 Miss. LEXIS 68 (Miss. 2015).

Evidence was sufficient to convict defendant of aggravated assault and the verdict was not against the overwhelming weight of the evidence because a witness testified that she saw a rifle in the hands of the co-defendant as he and defendant accosted the victim; the victim's brother testified he took off running because he saw guns; an accomplice testified that, at some point during the beating, defendant hit the victim with an assault rifle; the officer who found the victim naked and unconscious testified that the victim had a severe head wound; and the accomplice's

testimony was corroborated by another witness and other evidence, including the victim's blood on defendant's legs, and the victim's bloodied clothes in defendant's bedroom. *Donelson v. State*, 158 So. 3d 1154, 2014 Miss. App. LEXIS 426 (Miss. Ct. App. 2014), cert. denied, 158 So. 3d 1153, 2015 Miss. LEXIS 134 (Miss. 2015).

Defendant's aggravated assault conviction was not against the weight of the evidence because (1) testimonial inconsistencies did not warrant a new trial, and, viewing the evidence in the light most favorable to the verdict and considering defendant's admission to driving around "enraged" before going to a park to confront and fight the victim, and the victim's testimony that the victim did not provoke the shooting, the jury's inferences were reasonable and the verdict was not unconscionable. *Duke v. State*, 146 So. 3d 401, 2014 Miss. App. LEXIS 456 (Miss. Ct. App. 2014).

Sufficient evidence supported defendant's aggravated assault conviction because (1) proof was offered on each element, (2) the jury resolved testimonial conflicts, (3) defendant admitted arming himself to confront the victim, and (4) the evidence let the jury reject defendant's self-defense claim. *Duke v. State*, 146 So. 3d 401, 2014 Miss. App. LEXIS 456 (Miss. Ct. App. 2014).

Circuit court properly denied defendant's motion for a new trial because the evidence was sufficient to convict him of aggravated assault where numerous eyewitnesses testified that defendant had been by a car with a gun and that multiple shots were fired at the car as the victim was driving away, a bullet hole was found in the driver's side door, a spent projectile was recovered from by the driver's side door, and gunshot residue was found on defendant's hands. *Brown v. State*, 157 So. 3d 836, 2014 Miss. App. LEXIS 393 (Miss. Ct. App. 2014), cert. denied, 157 So. 3d 835, 2015 Miss. LEXIS 70 (Miss. 2015).

Evidence that defendant was antagonizing the victim, who attempted to restrain defendant to prevent defendant from hitting him, and that defendant retaliated and bit off part of the victim's ear was sufficient to defeat defendant's motion for JNOV as to the charge of aggra-

vated assault. *Shaw v. State*, 139 So. 3d 79, 2013 Miss. App. LEXIS 662 (Miss. Ct. App. 2013).

In an aggravated assault case, the verdict was not against the overwhelming weight of the evidence because the jury obviously rejected defendant's theory that he was acting in self-defense and that the victim, who defendant alleged was the aggressor, inadvertently stabbed himself five times during the scuffle. *Ross v. State*, 121 So. 3d 278, 2013 Miss. App. LEXIS 576 (Miss. Ct. App. 2013).

Evidence was sufficient to convict defendant of aggravated assault as the victim testified that he saw defendant coming toward him with a butcher knife, that they wrestled, and that he received multiple stab wounds before the knife's blade and handle broke; and the State proved that defendant was not acting in self-defense. *Ross v. State*, 121 So. 3d 278, 2013 Miss. App. LEXIS 576 (Miss. Ct. App. 2013).

Evidence was sufficient to convict defendant of aggravated assault in the attempted shooting of the victim, and the verdict was not against the overwhelming weight of the evidence, because defendant had lost a fight with the victim and was bloodied and humiliated; immediately before the shooting, defendant threatened the victim; and the jury could have concluded that defendant simply missed when he tried to shoot the victim. *Winn v. State*, 127 So. 3d 289, 2013 Miss. App. LEXIS 557 (Miss. Ct. App. 2013).

Evidence was sufficient to find defendant guilty of aggravated domestic violence by either strangulation or attempted strangulation because the record contained evidence that defendant intentionally blocked the nose or mouth of the victim by any means. *Clark v. State*, 122 So. 3d 129, 2013 Miss. App. LEXIS 533 (Miss. Ct. App. 2013).

Evidence was sufficient to convict defendant of aggravated assault and armed robbery and the verdicts were not against the weight of the evidence as he was present, consenting, aiding, and abetting the commission of the robbery by one of the accomplices, and the two accomplices' testimony was more than slightly supported by corroborating eyewitness testi-

mony and forensic evidence. *Grossley v. State*, 127 So. 3d 1143, 2013 Miss. App. LEXIS 384 (Miss. Ct. App. 2013), cert. denied, 131 So. 3d 577, 2014 Miss. LEXIS 26 (Miss. 2014).

Sufficient evidence supported defendant's conviction for aggravated assault because even if the victim's alleged gun had been found, the jury still could have concluded defendant was the aggressor, the shooting resulted from mutual combat, or even that the victim was reaching for his own gun in self-defense. *Wansley v. State*, 114 So. 3d 793, 2013 Miss. App. LEXIS 316 (Miss. Ct. App.), cert. denied, 127 So. 3d 1115, 2013 Miss. LEXIS 655 (Miss. 2013).

Conviction of aggravated assault was supported by sufficient evidence where an officer's testimony that defendant became a suspect in the shooting did not constitute an inadmissible identification, and the victim's identification of defendant as the shooter was uncontradicted, as was the victim's account of the entire incident. *Keithley v. State*, 111 So. 3d 1202, 2013 Miss. LEXIS 161 (Miss. 2013).

Evidence was sufficient to support defendant's conviction for aggravated assault under Miss. Code Ann. § 97-3-7(2)(a)(ii) because defendant's sister-in-law testified that after defendant threatened and hit her with the butt of the gun, he intentionally shot her. *Smith v. State*, 111 So. 3d 119, 2013 Miss. App. LEXIS 176 (Miss. Ct. App. 2013).

Evidence that defendant choked the victim with his hands until she nearly passed out was sufficient to support a jury's decision that defendant was guilty of aggravated assault. *Sellers v. State*, 108 So. 3d 456, 2012 Miss. App. LEXIS 533 (Miss. Ct. App. 2012), cert. denied, 107 So. 3d 998, 2013 Miss. LEXIS 126 (Miss. 2013).

Weight of the evidence supported defendant's convictions for aggravated assault and conspiracy to commit aggravated assault because defendant did not specify any contradictory evidence that showed his guilty verdict was unconscionably unjust. *Moore v. State*, 105 So. 3d 390, 2012 Miss. App. LEXIS 506 (Miss. Ct. App. 2012), cert. denied, 109 So. 3d 567, 2013 Miss. LEXIS 101 (Miss. 2013).

Sufficient evidence supported defendant's conviction for misdemeanor domes-

tic violence, pursuant to Miss. Code Ann. § 97-3-7(3), because the 911 dispatcher testified the victim, who was defendant's husband, stated defendant bit him during an altercation, pictures of the victim's injuries were admitted into evidence, and defendant admitted biting the victim; the husband's decision not to cooperate with the prosecution did not preclude a charge of domestic violence against defendant, pursuant to Miss. Code Ann. § 99-3-7(3)(a). *Anderson v. State*, 102 So. 3d 304, 2012 Miss. App. LEXIS 510 (Miss. Ct. App. 2012), cert. dismissed, 105 So. 3d 326, 2013 Miss. LEXIS 37 (Miss. 2013).

Evidence was legally insufficient to sustain a conviction for simple assault domestic violence under Miss. Code Ann. § 97-3-7 because appellant did not confess to committing the assault, there was no eyewitness testimony, and there were other reasonable hypotheses consistent with appellant's innocence as to how an incident occurred. *Inter alia*, the victim could have sustained injuries after he attacked appellant first. *Mills v. City of Water Valley*, 66 So. 3d 193, 2011 Miss. App. LEXIS 371 (Miss. Ct. App. 2011).

In a case of aggravated assault under Miss. Code Ann. § 97-3-7(2)(b), the evidence was sufficient to prove defendant shot the victim "purposely" or "knowingly" where defendant shot the victim eight or nine times following an argument and was aware of defendant's actions before and after the shooting. *Williams v. State*, 61 So. 3d 981, 2011 Miss. App. LEXIS 270 (Miss. Ct. App. 2011).

Evidence was sufficient to sustain a conviction for simple assault, pursuant to Miss. Code Ann. § 99-19-81, where the assault victim testified that defendant attacked her with a knife immediately after defendant fatally stabbed another victim in the chest. *Porter v. State*, 33 So. 3d 535, 2010 Miss. App. LEXIS 206 (Miss. Ct. App. 2010).

While defendant and the State presented conflicting testimony in defendant's aggravated assault trial, the verdict was not against the overwhelming weight of the evidence where the State's proof met the elements of aggravated assault pursuant to Miss. Code Ann. § 97-3-7(2), because the jury was the sole judge

of the witnesses' credibility. *Camper v. State*, 24 So. 3d 1072, 2010 Miss. App. LEXIS 5 (Miss. Ct. App. 2010).

Evidence was insufficient to support defendant's convictions for aggravated assault under Miss. Code Ann. § 97-3-7(2), and other crimes, because, by limiting cross-examination, the jury was denied the ability to properly resolve the weight and credibility of the testimony of the only witness capable of identifying the perpetrator. Therefore, the record failed to reflect beyond a reasonable doubt that the error complained of did not contribute to the verdict. *Mendenhall v. State*, 18 So. 3d 915, 2009 Miss. App. LEXIS 670 (Miss. Ct. App. 2009).

Evidence was sufficient to convict defendant of aggravated assault where defendant attempted to purposely or knowingly cause bodily injury to the law enforcement officers; defendant was described as agitated, irate, and hostile, and he made slashing motions at the deputies with a knife, and he was holding his son in front of him as a shield. *Babb v. State*, 17 So. 3d 100, 2009 Miss. App. LEXIS 70 (Miss. Ct. App.), cert. denied, 17 So. 3d 99, 2009 Miss. LEXIS 440 (Miss. 2009).

In defendant's trial for kidnapping, sexual battery, and aggravated assault, the evidence was sufficient to sustain defendant's conviction because the victim testified that defendant put his hand over the victim's neck and began choking her; the victim also testified that she lost consciousness, and a nurse testified that the victim suffered petechiae and hemorrhaging to her eyes, which could be caused by strangulation. There was more than sufficient for a rational trier of fact to find the essential elements of aggravated assault. *Moore v. State*, 996 So. 2d 756, 2008 Miss. LEXIS 601 (Miss. 2008).

In an aggravated domestic assault case, for purposes of expert testimony, to the extent that the officer blurred the line between fact and opinion testimony with regard to his testimony that he would have expected defendant to have more severe injuries if he had been defending himself against a knife attack, any error was harmless in light of the overwhelming weight of the evidence of his guilt, including (1) the photographs of the victim's

injuries; (2) the photographs of the ironing board he used to beat the victim; (3) the photographs of defendant's injuries; and (4) the testimony of the victim and her neighbor. *Hicks v. State*, 6 So. 3d 1099, 2008 Miss. App. LEXIS 481 (Miss. Ct. App. 2008), cert. denied, 11 So. 3d 1250, 2009 Miss. LEXIS 161 (Miss. 2009).

As the trier of fact, the jury found that the overwhelming weight of the evidence showed that defendant deliberately and knowingly shot the husband without authority of law and not in necessary self-defense and thus was guilty of aggravated assault under Miss. Code Ann. § 97-3-7(2). The court found no error with such finding, as the evidence included that defendant and her husband were fighting, that she shot him, and that he hit her after being shot in an effort to obtain the gun; thus, the trial court did not abuse its discretion in denying defendant's motion for a new trial. *Lawrence v. State*, 3 So. 3d 754, 2008 Miss. App. LEXIS 406 (Miss. Ct. App. 2008), cert. denied, 11 So. 3d 1250, 2009 Miss. LEXIS 101 (Miss. 2009).

Evidence was sufficient to convict defendant of two counts of simple assault when the testimony presented at trial showed that defendant had pointed an assault rifle at police officers. *McGregory v. State*, 979 So. 2d 12, 2008 Miss. App. LEXIS 207 (Miss. Ct. App. 2008).

Where defendant and his cohort had been riding around discussing ways to make money, they approached the victims' house, knocked on the door, made up a story about running out of gas, then shot two victims, and fled the house when one of the victims' did not go down after being shot multiple times. A rational juror could have found beyond a reasonable doubt that defendant aided and abetted the crimes of armed robbery and aggravated assault in violation of Miss. Code Ann. § 97-3-7. *Hughes v. State*, 983 So. 2d 270, 2008 Miss. LEXIS 153 (Miss.), cert. denied, 555 U.S. 1052, 129 S. Ct. 633, 172 L. Ed. 2d 620, 2008 U.S. LEXIS 8544 (U.S. 2008).

Sufficient evidence supported defendant's conviction for aggravated assault, in violation of Miss. Code Ann. § 97-3-7(2)(a), where defendant admitted to discharging a weapon with the intent to

scare the victim, and aggravated the conditions of the crime by employing a deadly weapon. *Harris v. State*, 970 So. 2d 151, 2007 Miss. LEXIS 709 (Miss. 2007).

Defendant's convictions for the simple assault of a peace officer in violation of Miss. Code Ann. § 97-3-7(1) were appropriate because the evidence was sufficient. The State presented ample evidence that defendant attacked the officers with punches and kicks and the officers testified that they had no idea what the purpose of defendant's actions was or whether he was armed; the officers also admitted that those unknowns and defendant's physical attacks placed them in fear of imminent serious bodily harm. *Graham v. State*, 967 So. 2d 670, 2007 Miss. App. LEXIS 721 (Miss. Ct. App. 2007).

Evidence was sufficient to sustain defendant's conviction for aggravated assault under Miss. Code Ann. § 97-3-7(2)(b) and was not against the weight of the evidence because: (1) the victim, who was renting a garage apartment from the home owner, stated that when he first went into the house, defendant was in bed, but while he was in the kitchen defendant kicked in the door and stated that he was going to kill the victim; (2) the victim testified that defendant hit and pushed the home owner against the wall then began attacking him; (3) and the victim testified that he eventually overpowered defendant and threw him on a bed, but not before defendant stabbed him while he was coming through the hall. *White v. State*, 958 So. 2d 241, 2007 Miss. App. LEXIS 372 (Miss. Ct. App. 2007).

Given the evidence in the record, a reasonable juror could find defendant guilty of aggravated assault beyond a reasonable doubt under Miss. Code Ann. § 97-3-7; the evidence showed that defendant initiated the altercation, struck the first blow, and repeatedly stabbed the victim. *Bobo v. State*, 953 So. 2d 282, 2007 Miss. App. LEXIS 196 (Miss. Ct. App. 2007).

Defendant's argument that the jury did not have sufficient evidence to convict her of aggravated assault, in violation of Miss. Code Ann. § 97-3-7(2), was without merit; the State presented credible evidence that defendant knowingly stabbed the victim

with a knife. Even if the victim had struck defendant prior to the stabbing, the jury could have found that defendant was not in imminent danger and used more force than reasonably necessary to repel the victim's assault. *Vaughn v. State*, 926 So. 2d 269, 2006 Miss. App. LEXIS 265 (Miss. Ct. App. 2006).

Defendant's convictions for aggravated assault and shooting into an occupied dwelling were not against the overwhelming weight of the evidence because: (1) the victim and a witness testified that they told police right away that defendant was the shooter; (2) the victim's mother testified that one week before the shooting the victim's sister and defendant's ex-girlfriend called home scared because defendant had threatened to shoot up the house or to set it on fire; (3) the victim's mother testified that it was that same week she spotted defendant trying to break into the home; and (4) defendant's brother-in-law testified that defendant admitted that he shot the victim. *Brown v. State*, 986 So. 2d 308, 2006 Miss. App. LEXIS 924 (Miss. Ct. App. 2006), rev'd, 986 So. 2d 270, 2008 Miss. LEXIS 340 (Miss. 2008).

Evidence was sufficient to convict defendant of aggravated assault, despite two witnesses' recantations; the elements of aggravated assault were proven, and it was the jury's responsibility to weigh the credibility of the witnesses' testimony at trial. *Townsend v. State*, 939 So. 2d 796, 2006 Miss. LEXIS 552 (Miss. 2006).

Defendant's conviction for aggravated assault in violation of Miss. Code Ann. § 97-3-7(2) was appropriate because, even though a DNA report itself was not admitted into evidence, the substance of its conclusion was before the jury and defendant failed to show that he was prejudiced by not possessing the report until the first day of his fourth trial. *Curry v. State*, 939 So. 2d 785, 2006 Miss. LEXIS 448 (Miss. 2006).

Evidence was sufficient to convict defendant of aggravated assault where the victim testified to her injuries and the act itself, and defendant presented no evidence to contradict this; reasonable minds could have found beyond a reasonable doubt that defendant was guilty. *Brown v. State*, 934 So. 2d 1039, 2006 Miss. App. LEXIS 540 (Miss. Ct. App. 2006).

Sufficient evidence existed to convict defendant of aggravated assault because the victim and the husband testified that defendant shot the victim, two defense witnesses testified that defendant shot in the direction of the victim, and only defendant denied either shooting the victim or having a gun. *Smith v. State*, 946 So. 2d 785, 2006 Miss. App. LEXIS 460 (Miss. Ct. App. 2006).

State produced evidence and witnesses tending to show that defendant did indeed commit simple assault upon a police officer; while it was true defendant called his own witnesses to contradict the State's evidence, the appellate court could not say that any rational trier of fact could not have found the essential elements of the crime beyond a reasonable doubt, particularly when the evidence was viewed in the light most favorable to the State. *Morris v. State*, 927 So. 2d 744, 2006 Miss. LEXIS 113 (Miss. 2006).

Regarding the assault charge on which defendant was convicted, the State must have proven (1) that under circumstances manifesting extreme indifference to human life (2) defendant did purposefully, knowingly or recklessly (3) attempt to cause or caused serious bodily injury to the officer, Miss. Code Ann. § 97-3-7(2); the testimony at trial established that defendant drove his vehicle with the officer's arm trapped in the closed driver's side window, evidencing defendant's indifference to human life, and defendant admitted that he rolled up the window and that he was trying to leave; there was testimony that the car window ripped the flesh from the officer's arm, and this evidence was sufficient to support the verdict. *Hubbard v. State*, 938 So. 2d 287, 2006 Miss. App. LEXIS 163 (Miss. Ct. App.), cert. denied, 937 So. 2d 450, 2006 Miss. LEXIS 543 (Miss. 2006).

Where the victim was shot in the thigh during the course of the carjacking, in circumstances from which jurors could have inferred the purposeful or knowing intent to injure another with a deadly weapon, the evidence supported a jury verdict convicting defendant of aggravated assault under Miss. Code Ann. § 97-3-7(2) and armed carjacking under Miss. Code Ann. § 97-3-117(2)(b). *Walters*

v. State, 932 So. 2d 860, 2006 Miss. App. LEXIS 115 (Miss. Ct. App.), cert. dismissed, 937 So. 2d 450, 2006 Miss. LEXIS 524 (Miss. 2006).

Evidence was sufficient to sustain defendant's convictions for aggravated assault, kidnapping, and unlawful possession of a firearm where, according to the victim's testimony, she was accosted by defendant who grabbed her, placed a gun to her head, and physically forced her into a van against her will; an eyewitness testified that he saw the victim jump out of the van and saw the van swing back in such a fashion so as to accomplish a "perfect hit" on the woman in flight. In addition, the State presented two witnesses attesting to the fact that defendant was in possession of a firearm, and it introduced the gun into evidence with additional proof that the gun was recovered when defendant was arrested. *Jones v. State*, 920 So. 2d 465, 2006 Miss. LEXIS 65 (Miss. 2006).

Where eyewitnesses testified that shots were fired from defendant's vehicle and the victim testified that defendant was the man who shot him, the evidence was sufficient to support the jury's verdict convicting defendant of aggravated assault. *Williams v. State*, 914 So. 2d 1246, 2005 Miss. App. LEXIS 850 (Miss. Ct. App. 2005).

Sufficient evidence existed to convict defendant of aggravated assault as defendant sprayed the victim with lighter fluid after setting his house on fire and the victim sustained second-degree burns to 50-60% of his body. *McIntosh v. State*, 917 So. 2d 78, 2005 Miss. LEXIS 754 (Miss. 2005).

Even by his own argument, defendant was responsible for aggravated assault and a reduced charge of manslaughter, to which he had plead guilty because he had heard the factual basis which the district attorney's office stated was proof should defendant's case go to trial and defendant had previously told the court that he had no disagreement with those statements. *Graham v. State*, 914 So. 2d 1256, 2005 Miss. App. LEXIS 915 (Miss. Ct. App. 2005).

Evidence was sufficient to sustain a conviction for causing serious bodily in-

jury where the victim testified that defendant threw a caustic substance down his shoulder, back, and leg, the substance gave him second degree burns, and defendant stated to the victim that he was "messed up now." *Chambliss v. State*, 919 So. 2d 30, 2005 Miss. LEXIS 364 (Miss. 2005).

Evidence presented at trial was legally sufficient to convict defendant of aggravated assault pursuant to Miss. Code Ann. § 97-3-7(2) because the victim identified defendant as one of her attackers, informed her rescuers that defendant and a codefendant had shot her, was shot at close range, and identified defendant and the codefendant at trial as her attackers. *Jones v. State*, 913 So. 2d 436, 2005 Miss. App. LEXIS 304 (Miss. Ct. App. 2005).

Court did not err in denying defendant's motion for judgment notwithstanding the verdict because the State proved the elements of aggravated assault, provided in Miss. Code Ann. § 97-3-7(2), against him; in a tape-recorded statement to the police following the shooting, defendant admitted firing two shots at the victim. Substantial evidence supported defendant's conviction. *Dunn v. State*, 891 So. 2d 822, 2005 Miss. LEXIS 42 (Miss. 2005).

Where the victim testified that defendant had cut her on the neck with a box cutter, requiring ten stitches, her uncorroborated testimony was sufficient evidence to sustain defendant's conviction for aggravated assault. *Wilks v. State*, 909 So. 2d 1252, 2005 Miss. App. LEXIS 108 (Miss. Ct. App. 2005).

Evidence was sufficient to sustain defendant's attempted aggravated assault conviction where the victim testified extensively about the crime, her testimony was corroborated by other witnesses, and photographs of the victim's injuries were admitted. *Wilson v. State*, 904 So. 2d 987, 2004 Miss. LEXIS 1410 (Miss. 2004).

Where defendant pulled out a gun and fired a shot at his live-in girlfriend, the evidence was sufficient to support his conviction for aggravated assault. The State presented three witnesses who testified that defendant shot the gun at least three times. *Griffin v. State*, 883 So. 2d 1201, 2004 Miss. App. LEXIS 965 (Miss. Ct. App. 2004).

Undisputed evidence revealed that defendant led police on a chase that spanned over two counties and that the police attempted to stop defendant numerous times, but he refused to stop, hitting three police cars in the process. Accepting the evidence in the light most favorable to the State, the jury was justified in finding defendant guilty of two counts of simple assault on a law enforcement officer and one count of aggravated assault on a law enforcement officer. *Conerly v. State*, 879 So. 2d 1101, 2004 Miss. App. LEXIS 762 (Miss. Ct. App. 2004).

Defendant's aggravated assault conviction for assaulting his elderly relative was supported by credible evidence, as the State offered testimony that: at the time of the attack the victim lived alone, supported herself, and prepared her own meals; the victim's identification of defendant as her attacker; and testimony from police officers that on at least two separate occasions the victim identified defendant as her attacker. *Robinson v. State*, 870 So. 2d 669, 2004 Miss. App. LEXIS 307 (Miss. Ct. App. 2004).

Sufficient evidence existed to support defendant's guilt for aggravated assault where the victim testified that defendant had shot him, and several witnesses not only placed defendant at the scene of the crime, but confirmed that he had shot the victim. *Anderson v. State*, 874 So. 2d 1000, 2004 Miss. App. LEXIS 188 (Miss. Ct. App. 2004).

Evidence was sufficient to convict defendant of aggravated assault where the jury must have determined that the victim's account of the stabbing was correct; allowing the verdict to stand did not create an unconscionable injustice. *Sanderson v. State*, 881 So. 2d 878, 2004 Miss. App. LEXIS 35 (Miss. Ct. App.), *aff'd* in part and *rev'd* in part, 883 So. 2d 558, 2004 Miss. LEXIS 1199 (Miss. 2004).

Where codefendants testified that defendant shot the owner of the lounge and fled with billfolds taken from the owner and patrons, and the owner and the co-owner both identified defendant as the shooter, the evidence was sufficient to sustain defendant's convictions for armed robbery and aggravated assault, even though the money and the gun were not

recovered and the bullet fragments were not retrieved from the ceiling and the victim's head. *Graham v. State*, 861 So. 2d 1053, 2003 Miss. App. LEXIS 1194 (Miss. Ct. App. 2003).

Evidence was sufficient to convict defendant where a person was guilty of simple assault if he either attempted or purposely, knowingly, or recklessly caused bodily injury to another; the officer was treated at a hospital for scratches that went from his neck to his chest, although defendant had argued that the slight injuries to the officer were inadvertent, the jury was entitled to disbelieve his account of the episode and find his conduct met the definition of assault under Miss. Code Ann. § 97-3-7(1). *Abram v. State*, 861 So. 2d 1064, 2003 Miss. App. LEXIS 1190 (Miss. Ct. App. 2003).

Evidence was sufficient to support defendant's aggravated assault conviction, because the evidence adduced at the trial consisted of not only the victim's testimony, but also that of three witnesses who either saw an altercation between defendant and the victim at a convenience store or saw defendant's actual possession of the firearm, and two of the witnesses were eyewitnesses to the altercation. *Davis v. State*, 866 So. 2d 1107, 2003 Miss. App. LEXIS 900 (Miss. Ct. App. 2003).

Evidence was sufficient to convict a defendant of aggravated assault, where his accomplice admitted in his statement for his plea agreement that he called to defendant to assist him while he was fighting with the assault victim, and the victim identified defendant at trial. *Wells v. State*, 849 So. 2d 1231, 2003 Miss. LEXIS 213 (Miss. 2003).

Where jury heard testimony from both sides and viewed a videotape of the assault, a reasonable and fair minded jury was presented enough evidence to reach a guilty verdict on the inmate's charge of assaulting a law enforcement officer for assaulting the prison warden. *Hicks v. State*, 845 So. 2d 755, 2003 Miss. App. LEXIS 434 (Miss. Ct. App. 2003).

Evidence was sufficient to convict defendant where testimony was presented that defendant was seen with a gun during the altercation, a muzzle flash from his gun, and that bullet casings from a weapon

matching defendant's gun were recovered; while there was testimony that at least one other person drew a gun inside the club that night, the jury decided to give that testimony less weight than the testimony supporting defendant's guilt. *Ander-son v. State*, 856 So. 2d 650, 2003 Miss. App. LEXIS 585 (Miss. Ct. App. 2003).

In a case where defendant threatened his estranged wife with a gun, forced her to have intercourse with him, and struck her, the evidence was sufficient to support defendant's rape and simple assault convictions based on the victim's testimony, as her testimony was not incredible on its face nor was it contradicted by other, more compelling, evidence. *Williams v. State*, 868 So. 2d 346, 2003 Miss. App. LEXIS 669 (Miss. Ct. App. 2003).

State did not fail to prove beyond a reasonable doubt that defendant had committed an aggravated assault where the victim presented testimony that went to all of the essential elements of aggravated assault – she was attacked by defendant, who was wielding a knife, and she received lacerations while attempting to defend herself from his attack; the victim's testimony was not impeached during cross-examination nor did the defense present evidence that would have made her version of events so improbable as to be unworthy of belief. *Page v. State*, 843 So. 2d 96, 2003 Miss. App. LEXIS 328 (Miss. Ct. App. 2003).

Victim's testimony that defendant lured her into a back room in a coin-operated laundry and attacked her with a knife causing a wound to the victim's hand was sufficient to support defendant's conviction of aggravated assault despite the fact that no other witness actually observed the assault or that the State did not present evidence of defendant's motive. *Page v. State*, 843 So. 2d 96, 2003 Miss. App. LEXIS 328 (Miss. Ct. App. 2003).

Defendant's conviction for aggravated assault was affirmed, where there was clearly substantial credible evidence upon which the jury could and did find that defendant assaulted the victim. *Alonso v. State*, 838 So. 2d 309, 2002 Miss. App. LEXIS 493 (Miss. Ct. App. 2002), cert. denied, 837 So. 2d 771, 2003 Miss. App. LEXIS 178 (Miss. Ct. App. 2003).

Evidence was sufficient where the victim and his nephew both testified to the circumstances which led to the victim's fateful meeting with defendant, the victim also testified with certainty that defendant was the man who shot him, and a doctor testified that metal fragments were recovered from the wound in the victim's leg. *Clay v. State*, 829 So. 2d 676, 2002 Miss. App. LEXIS 225 (Miss. Ct. App. 2002).

Evidence was sufficient to support defendant's conviction for aggravated assault of the victim, as the evidence showed that following a discussion over why defendant was driving a vehicle that the victim had given to his former girlfriend, defendant fired a gun at the victim three times, the victim was struck two times in the legs, and the victim had to obtain treatment at a local hospital for his gunshot wounds. *Satcher v. State*, 852 So. 2d 595, 2002 Miss. App. LEXIS 877 (Miss. Ct. App. 2002).

A conviction for aggravated assault was reduced where the state failed to prove every element of attempted assault, but instead proved threatened simple assault. *Genry v. State*, 1999 Miss. App. LEXIS 716 (Miss. Ct. App. Dec. 14, 1999), op. withdrawn, sub. op., 767 So. 2d 302, 2000 Miss. App. LEXIS 426 (Miss. Ct. App. 2000).

There was sufficient evidence from which the jury could find that the defendant's use of his fist was a means likely to produce death or serious bodily harm, notwithstanding that the victim was not hospitalized and suffered no broken bones, where the force of the defendant's blow knocked the victim across a table to the floor, knocked out a tooth, cut his lip, and broke his glasses. *Harrison v. State*, 737 So. 2d 385, 1998 Miss. App. LEXIS 1062 (Miss. Ct. App. 1998).

Evidence was sufficient to support convictions for aggravated assault and aggravated assault on a law enforcement officer where two deputies testified that the defendant fired a weapon in the direction of a carnival midway which was crowded with people and that, as they chased him toward the parking lot, he shot in their direction. *Gibson v. State*, 731 So. 2d 1087, 1998 Miss. LEXIS 575 (Miss. 1998).

Though the defendant contended that he shot the victim in self-defense only, there existed substantial evidence to support his conviction for aggravated assault where he admitted in a letter written to the district attorney as well as during trial that he shot the victim with a deadly weapon; two different accounts of the incident were given by the defendant and the victim, but the jury was the sole judge of the weight and worth of their testimony. *Brown v. State*, 726 So. 2d 248, 1998 Miss. App. LEXIS 1119 (Miss. Ct. App. 1998).

Evidence independent of defendant's alleged admissions established corpus delicti of aggravated assault where victim was admitted to hospital with gunshot wound to his leg, officers testified that victim, while at hospital, said that defendant shot him, and narcotics agent, who was defendant's brother, recovered weapon from defendant, who admitted shooting victim. *Cotton v. State*, 675 So. 2d 308, 1996 Miss. LEXIS 198 (Miss. 1996).

A conviction for aggravated assault would be reduced to a conviction for simple assault and the case remanded for resentencing where the evidence established that the defendant, a convict, had threatened a corrections officer with a simulated knife in order to obtain the officer's keys but there was no evidence that the convict had attempted to cause serious bodily injury to the officer even though he had had every opportunity to do so. *Murray v. State*, 403 So. 2d 149, 1981 Miss. LEXIS 2157 (Miss. 1981).

Where, in view of the direct contradictions in the state's proof taken alone, and of the material conflicts in the evidence as a whole, reasonable man engaged solely in the search for clues and uninfluenced by other considerations could not safely act upon the evidence as produced, conviction was reversed and remanded in order that another jury might pass upon it. *Cobb v. State*, 233 Miss. 54, 101 So. 2d 110, 1958 Miss. LEXIS 356 (Miss. 1958).

Where it appears that at the time the accused at bar fired his gun, the prosecutor armed with a stick was chasing him intending to beat him, state must show that gun was fired with intent to kill and with malice aforethought. *Cunningham v.*

State, 87 Miss. 417, 39 So. 531, 1905 Miss. LEXIS 128 (Miss. 1905).

A defendant is not guilty of shooting with intent to kill another if, when he discharged his gun, he could not see and could not have shot, the other person, a house being between them. *Lott v. State*, 83 Miss. 609, 36 So. 11, 1903 Miss. LEXIS 79 (Miss. 1903).

19. — — Charge or conviction supportable.

Evidence was sufficient to convict defendant of domestic aggravated assault because an officer was told that defendant, the victim's husband, had beaten her; when questioned by a nurse, the victim reported that she had been tied up and restrained for an extended period, dragged down a hallway, struck with a hammer (on her hands), and had her head slammed in an oven door; a physician treated the victim for multiple rib fractures, contusions, and lacerations; and a sergeant found and collected a hammer with hair and blood, which later was confirmed as belonging to the victim. *Chase v. State*, — So. 3d —, 2020 Miss. App. LEXIS 47 (Miss. Ct. App. Feb. 18, 2020), cert. denied, — So. 3d —, 2020 Miss. LEXIS 432 (Miss. 2020).

Circuit court properly sentenced defendant to 30 years in custody for aggravated assault because, inter alia, three witnesses' descriptions of the shooter matched defendant's physical appearance, the jury instruction regarding the identification of defendant, by the single eyewitness who knew him before the shooting and identified him in a photo array and at trial, was a correct statement of law and left it to the jury to judge the witness's credibility and weigh it against the other evidence presented at trial, defendant failed to inform the trial court of the witness's alleged bias, prejudice, or interest, and he also failed to inform the prosecution of his alibi defense. *Robinson v. State*, 247 So. 3d 1212, 2018 Miss. LEXIS 175 (Miss. 2018).

Defendant was properly convicted of felony fleeing a law enforcement officer and aggravated assault on a law enforcement officer because the arresting officer testified that, based on his observations,

he had reasonable suspicion of a crime of domestic violence, the arresting officer and the backup officer testified that, before the pursuit began, they saw defendant run a stop sign, and the arresting officer testified that, during his investigation, defendant threatened to kill him and, as he approached defendant's vehicle after the pursuit, defendant tried to hit him with his vehicle. *Topps v. State*, 227 So. 3d 1177, 2017 Miss. App. LEXIS 572 (Miss. Ct. App. 2017).

Jury's finding that defendant strangled the victim, defendant's spouse, was not against the overwhelming weight of the evidence because the victim testified that defendant strangled the victim, the first responding officer testified that the victim's neck was red with abrasions, and some of the pictures of the victim's neck showed redness and an abrasion. *Ryan v. State*, 245 So. 3d 491, 2017 Miss. App. LEXIS 466 (Miss. Ct. App. 2017).

Testimony from several witnesses that the victim was trying to run away from defendant and posed no threat when he was shot from behind and that both victims were trying to leave the venue when defendant shot them was sufficient to support defendant's convictions for aggravated assault and murder. *Scott v. State*, 220 So. 3d 957, 2017 Miss. LEXIS 268 (Miss. 2017).

Trial court properly denied defendant's motion for a judgment notwithstanding the verdict, or in the alternative, for a new trial, because the evidence was sufficient to find defendant guilty of first-degree murder and aggravated assault where defendant stated that she shot both victims, a former chief medical examiner testified that the second victim died of a fatal gunshot wound to the head and that the manner of death was homicide, and a paramedic testified that the first victim was shot in the right shoulder, hand, and that the bullet grazed her right side. *Peoples v. State*, 270 So. 3d 926, 2018 Miss. App. LEXIS 454 (Miss. Ct. App. 2018).

Circuit court properly denied defendant's motion for a judgment of acquittal, or in the alternative, for a new trial because, regardless of any inconsistencies as to when the victim identified defendant as

the shooter, the victim testified that he had known defendant for several years and that he was "a hundred percent positive it was defendant who was driving the car," the victim later identified defendant from a photo lineup, particles indicative of gunshot residue were found on defendant's hands, and the weight of the evidence supported the jury's finding that defendant was guilty of attempted aggravated assault. *Brown v. State*, 269 So. 3d 1262, 2018 Miss. App. LEXIS 422 (Miss. Ct. App. 2018).

Evidence supported defendant's felony aggravated domestic violence conviction because, while defendant did not expressly admit that defendant choked defendant's spouse, defendant did admit that defendant applied pressure to the neck of defendant's spouse. This explanation, the testimony of defendant's spouse as to what happened in the assault, the expert opinion of the doctor who treated defendant's spouse, and the photographs of injuries which the spouse sustained supported the inference that defendant did in fact strangle defendant's spouse. *Lewis v. State*, 215 So. 3d 994, 2017 Miss. App. LEXIS 182 (Miss. Ct. App. 2017).

Evidence supported defendant's conviction for aggravated assault because the victim testified as to hearing someone say, "Freeze; don't move," looking up to see defendant pointing a gun at the victim, and being shot when running away. Furthermore, defendant's alleged accomplice testified that defendant shot the victim as the alleged accomplice was selling marijuana to the victim, and another witness testified that immediately after the shooting the victim said that defendant shot the victim. *Miskell v. State*, 230 So. 3d 345, 2017 Miss. App. LEXIS 633 (Miss. Ct. App. 2017).

There was sufficient evidence to convict defendant of attempted aggravated assault based on his act of shooting at a car; there was testimony that there were impact marks on the vehicle after the shooting. *Holmes v. State*, 201 So. 3d 491, 2015 Miss. App. LEXIS 668 (Miss. Ct. App. 2015).

Defendant was properly convicted of simple assault of a law-enforcement officer because defendant fired his gun at an

off-duty deputy, who was acting as a security guard at a restaurant, after being asked to leave the restaurant, defendant clearly was aware that the deputy was a police officer, the deputy was acting within the scope of his duty as a law-enforcement officer when defendant assaulted him, and the deputy was statutorily permitted to wear his official uniform while in the performance of private security services. *Bates v. State*, 172 So. 3d 695, 2015 Miss. LEXIS 434 (Miss. 2015).

Defendant assaulted a law enforcement officer, while the officer was acting within the scope of the officer's duty as a law enforcement officer, because, when defendant assaulted a sheriff's deputy, the deputy was working off-duty, but in uniform with the sheriff's approval, as a private security guard at a restaurant. Defendant violated the peace by threatening the deputy when escorted from the restaurant and then firing a gun at the deputy in the parking lot. *Bates v. State*, 172 So. 3d 805, 2014 Miss. App. LEXIS 425 (Miss. Ct. App. 2014), *aff'd*, 172 So. 3d 695, 2015 Miss. LEXIS 434 (Miss. 2015).

Defendant was properly convicted of aggravated assault on a law enforcement officer after he admitted that he beat a jailer with a sock full of bars of soap, then repeatedly kicked him, breaking his hip and pelvis, because defendant admitted assaulting the jailer, who he also did not dispute was a law enforcement officer, there was obviously sufficient evidence of serious bodily injury, and the State was not required to offer expert or medical evidence to prove aggravated assault. *Rickman v. State*, 150 So. 3d 983, 2014 Miss. App. LEXIS 249 (Miss. Ct. App.), *cert. denied*, 150 So. 3d 708, 2014 Miss. LEXIS 575 (Miss. 2014).

Defendant's conviction for aggravated assault was not against the overwhelming weight of the evidence because three witnesses all testified that he was firing a shotgun from behind a big pine tree near the road; the witnesses' testimony was corroborated by a spent shotgun shell which was recovered near the tree and by some of the wounds of one of the victims that were attributed to a shotgun; and another witness saw defendant with the shotgun shortly before the shooting.

Hayes v. State, 168 So. 3d 1065, 2013 Miss. App. LEXIS 744 (Miss. Ct. App. 2013), *cert. denied*, 2014 Miss. LEXIS 297 (Miss. June 12, 2014), *cert. denied*, 140 So. 3d 940, 2014 Miss. LEXIS 296 (Miss. 2014).

Evidence was sufficient to convict defendant of simple assault and the verdict was not against the weight of the evidence because defendant presented no evidence that he feared imminent death or great bodily harm to himself or to his daughter justifying the use of force; defendant pinned the victim in the door of his vehicle; and the victim testified that she called out in pain several times and had bruises as a result of the incident. *Matthews v. City of Madison*, 143 So. 3d 579, 2013 Miss. App. LEXIS 611 (Miss. Ct. App. 2013), *aff'd*, 143 So. 3d 571, 2014 Miss. LEXIS 373 (Miss. 2014).

Evidence was sufficient to find defendant guilty of aggravated assault because the victim identified defendant as the shooter in a photo lineup prior to trial and another eyewitness identified defendant at trial as the person who shot the victim. *Haywood v. State*, 130 So. 3d 1127, 2013 Miss. App. LEXIS 290 (Miss. Ct. App. 2013), *cert. denied*, 131 So. 3d 577, 2014 Miss. LEXIS 77 (Miss. 2014).

Evidence presented at trial was sufficient to support defendant's convictions of aggravated assault (Miss. Code Ann. § 97-3-7(2)(a)) and burglary of a dwelling (Miss. Code Ann. § 97-17-23), as it established that he drove two men to pick up a crowbar and then drove them to the victim's house, where they used the crowbar to pry open the door and assault the victim; moreover, his confession established his involvement in the crimes. *Whitaker v. State*, 114 So. 3d 725, 2012 Miss. App. LEXIS 481 (Miss. Ct. App. 2012), *cert. denied*, 2013 Miss. LEXIS 331 (Miss. June 6, 2013).

Defendant's convictions for aggravated assault and conspiracy to commit aggravated assault were sufficiently supported by the evidence because the jury could have reasonably inferred that an agreement existed between defendant and his nephews to help defendant carry out the assault. *Moore v. State*, 105 So. 3d 390, 2012 Miss. App. LEXIS 506 (Miss. Ct.

App. 2012), cert. denied, 109 So. 3d 567, 2013 Miss. LEXIS 101 (Miss. 2013).

Evidence was sufficient to convict defendant of aggravated assault. Though a witness never stated that she saw him fire a gun, her testimony that he had a firearm and was near the scene of the incident just before the shooting, that he was running behind her holding a gun, and that she then heard shooting, constituted circumstantial evidence to that effect. *Jones v. State*, 95 So. 3d 641, 2012 Miss. LEXIS 410 (Miss. 2012).

Trial court did not err by denying defendant's motion for a directed verdict because under the indictment, which charged defendant with attempted aggravated assault in violation of Miss. Code Ann. § 97-3-7(2), the State simply had to prove that defendant attempted to cause bodily injury to the victim with a deadly weapon, and based on the evidence presented at trial, a reasonable jury could have concluded that defendant intended to cause bodily injury to the victim by using a deadly weapon; during the trial, the victim testified that he was involved in an altercation with defendant on the day of the incident, the victim and witnesses all testified that they saw defendant raise a gun and fire the gun at their car, and a bullet was recovered from the seal of the driver's side door, which was where the victim was sitting. *Johnson v. State*, 50 So. 3d 335, 2010 Miss. App. LEXIS 274 (Miss. Ct. App. 2010), cert. denied, 50 So. 3d 1003, 2011 Miss. LEXIS 7 (Miss. 2011).

Circuit court did not err in denying a defendant's motion for a directed verdict because the evidence before the jury was more than sufficient to sustain a finding of guilty of aggravated assault in violation of Miss. Code Ann. § 97-3-7(2); the evidence showed that defendant shot the victim after a tussle over the gun had transpired, and regardless of whether defendant was attempting to pistol whip or shoot the victim, there was still sufficient evidence to show that defendant knowingly and purposely caused bodily injury to the victim by using a deadly weapon. *Adams v. State*, 33 So. 3d 1179, 2010 Miss. App. LEXIS 207 (Miss. Ct. App. 2010).

Defendant was properly convicted of aggravated assault, a violation of Miss.

Code Ann. § 97-3-7(2), because, although the circuit judge abused her discretion by prohibiting defendant from developing evidence to impeach the victim's earlier denial of bias against defendant, due to the overwhelming evidence of defendant's guilt, the complained of error was harmless. *Banks v. State*, 45 So. 3d 676, 2010 Miss. App. LEXIS 84 (Miss. Ct. App. 2010).

Defendant's argument that the State failed to prove an essential element of aggravated assault on a law enforcement officer because he did not knowingly shoot the law enforcement officers was without merit Miss. Code Ann. § 97-3-7(2). Defendant asserted that he thought someone was breaking into the apartment and fired a gun toward the door in self-defense, but the appellate court stated that the jury was presented with sufficient evidence to determine that defendant knew or should have known that the men outside his door were police officers; in part, an officer testified that all members of the team were announcing their presence as loudly as they could. *Mayers v. State*, 42 So. 3d 33, 2010 Miss. App. LEXIS 88 (Miss. Ct. App.), cert. denied, 42 So. 3d 24, 2010 Miss. LEXIS 437 (Miss. 2010).

Defendant's conviction for aggravated assault in violation of Miss. Code Ann. § 97-3-7(2)(b) was appropriate because it was entirely likely for reasonable jurors to conclude that the act of attaching a home-made knife to the end of a crutch and then extending the crutch in the vicinity of the victim's head and neck amounted to an attempt at causing bodily injury with a weapon likely to cause serious bodily injury. *Kendrick v. State*, 21 So. 3d 1186, 2009 Miss. App. LEXIS 811 (Miss. Ct. App. 2009).

Defendant's convictions for house burglary, aggravated assault in violation of Miss. Code Ann. § 97-3-7(2), armed robbery, and auto theft were proper because the evidence was sufficient. In part, defendant severely beat the victim, demanded that she give him her purse, and then took her purse, a gun, and a set of keys to the victim's vehicle. The victim later identified defendant, based upon her own independent recollection, in a photographic lineup. *Brunner v. State*, 37 So. 3d 645,

2009 Miss. App. LEXIS 755 (Miss. Ct. App. 2009), cert. denied, 36 So. 3d 455, 2010 Miss. LEXIS 323 (Miss. 2010).

Conviction for aggravated assault under Miss. Code Ann. § 97-3-7(2) was not contrary to the weight of the evidence because the State was not required to produce an actual item used to cut the victim's throat. The victim testified about her stabbing and the object used, and she also showed the jury the scars on her neck. *Perryman v. State*, 16 So. 3d 41, 2009 Miss. App. LEXIS 145 (Miss. Ct. App.), cert. denied, 15 So. 3d 426, 2009 Miss. LEXIS 404 (Miss. 2009).

Where defendant disarmed his victim and fired the gun in the victim's direction and into a crowded nightclub, killing the victim and another and wounding three others, the trial court did not err in denying defendant's motion for a judgment notwithstanding the verdict because the evidence was sufficient to support defendant's convictions of murder, aggravated assault, and felon in possession of a firearm. *Roberson v. State*, 19 So. 3d 95, 2009 Miss. App. LEXIS 98 (Miss. Ct. App. 2009).

Defendant's conviction for aggravated assault in violation of Miss. Code Ann. § 97-3-7(2) was appropriate even though there was no direct proof that defendant intended to cause serious bodily injury to the victim because the existence of such intent could have been logically deduced from the victim's testimony that he feared for his own safety, along with other testimony that defendant appeared to have come straight at the victim with his vehicle. *Commodore v. State*, 994 So. 2d 864, 2008 Miss. App. LEXIS 658 (Miss. Ct. App. 2008).

Trial court did not abuse its discretion by denying a defendant's motion for a new trial with respect to a simple assault charge because: (1) the only essential fact in dispute was whether a car was occupied when defendant fired shots into it; (2) evidence that the car was occupied included testimony by four adults that each of them and two minor children were in the car at the time; (3) the only contradictory evidence was defendant's own testimony and a written statement of his wife, which was taken shortly after the inci-

dent; and (4) at trial, defendant's wife changed her version of the events and testified that she was suffering from post-traumatic stress at the time she wrote the statement. *Smith v. State*, 982 So. 2d 1007, 2008 Miss. App. LEXIS 304 (Miss. Ct. App. 2008).

Evidence was sufficient to support a conviction of both murder and aggravated assault, under Miss. Code Ann. §§ 97-3-19(1), 97-3-7(2), because a rational juror could have concluded beyond a reasonable doubt that defendant was guilty of both murder and aggravated assault because (1) the evidence tended to show that defendant acted recklessly in the commission of an imminently dangerous act and with extreme indifference to human life; (2) the State produced evidence showing that defendant fired a gun inside of an apartment that contained two unarmed individuals, as well as several children; (3) the State also established that defendant's firing of the gun resulted in the death of his wife and serious bodily injury to his stepson; and (4) defendant admitted pulling out the gun and firing it inside the apartment. *Readus v. State*, 997 So. 2d 941, 2008 Miss. App. LEXIS 249 (Miss. Ct. App. 2008), cert. denied, 999 So. 2d 852, 2009 Miss. LEXIS 27 (Miss. 2009).

Defendant's conviction for the aggravated assault of his sister-in-law in violation of Miss. Code Ann. § 97-3-7(2)(b) was appropriate because the evidence presented to the jury was more than sufficient to prove that an individual committed the assassination of defendant's brother, as well as the aggravated assault of the brother's wife while in the employ of defendant. In part, two witnesses testified that after their failed attempts to murder the brother and his wife in exchange for money, defendant contacted them and told them that he found someone else to complete the job. *Vickers v. State*, 994 So. 2d 200, 2008 Miss. App. LEXIS 208 (Miss. Ct. App.), cert. denied, 998 So. 2d 1010, 2008 Miss. LEXIS 675 (Miss. 2008).

Defendant's conviction for simple assault in violation of Miss. Code Ann. § 97-3-7(1) was appropriate because the evidence supported the reckless element of simple assault, whether the act was intentional or not, and a resulting bodily injury.

Defendant admitted that he grabbed the victim's shirt, and the end result of that scuffle was the victim's broken leg. *Graves v. State*, 984 So. 2d 1035, 2008 Miss. App. LEXIS 92 (Miss. Ct. App. 2008).

Evidence was sufficient to convict defendant of aggravated assault under Miss. Code Ann. § 97-3-7(2)(b) because: (1) the jury was instructed as to an alibi defense and resolved the issue against defendant; (2) evidence was presented that defendant was angry with the victim because of the victim's refusal to provide him with free liquor, and that defendant lunged at and pushed the victim, who was left with a knife dangling in his neck; (3) testimony that the victim did not see the knife being projected at him was of no consequence. *Crawford v. State*, 972 So. 2d 44, 2008 Miss. App. LEXIS 5 (Miss. Ct. App. 2008).

Defendant's conviction for aggravated assault in violation of Miss. Code Ann. § 97-3-7(2)(a) was appropriate because he admitted on cross-examination that the victim was seated in a vehicle when defendant fired the shot. Even if the appellate court was to believe that the victim was at some point wielding a baseball bat and that, at that point in time, defendant was afraid of being struck by the bat, defendant's own testimony revealed that the victim was not posing a threat when defendant fired the pistol. *Dao v. State*, 984 So. 2d 352, 2007 Miss. App. LEXIS 816 (Miss. Ct. App. 2007), cert. denied, 984 So. 2d 277, 2008 Miss. LEXIS 281 (Miss. 2008).

Defendant's conviction for aggravated assault pursuant to Miss. Code Ann. § 97-3-7(2) was appropriate because the victim testified that defendant swung at him and that he was bleeding as a result; another witness testified that he observed defendant and the victim argue and saw a "hand motion" from defendant during that argument, and afterwards the victim stated that defendant had cut him. *White v. State*, 958 So. 2d 290, 2007 Miss. App. LEXIS 412 (Miss. Ct. App. 2007).

Evidence supported a finding that defendant committed a delinquent act when she assaulted a teacher under Miss. Code Ann. § 97-3-7(1); defendant admitted to pushing a desk in front of the teacher, and she never claimed that this was an acci-

dent or that she did not intend to injure the teacher. In the Interest of K.G., 957 So. 2d 1050, 2007 Miss. App. LEXIS 403 (Miss. Ct. App. 2007).

Evidence was legally sufficient for the jury to find defendant guilty of simple assault on a law enforcement officer under Miss. Code Ann. § 97-3-7(1) because: (1) the state produced evidence that the deputy was a law enforcement officer acting within the scope of his duty when he encountered defendant during a traffic stop; (2) the deputy testified that defendant struck him in the left temple area; (3) the deputy stated that defendant struck at his mouth and he positioned himself for a second strike; (4) the deputy testified that defendant used his left elbow while striking him in the temple and that the strike had to be intentional due to defendant having to extend his elbow behind his back to strike the deputy; (5) the deputy testified that defendant used his fist when striking him in the mouth; and (6) the deputy's testimony alone was sufficient for a conviction. *Keys v. State*, 963 So. 2d 1193, 2007 Miss. App. LEXIS 299 (Miss. Ct. App.), cert. denied, 973 So. 2d 245, 2007 Miss. LEXIS 703 (Miss. 2007).

In a simple assault on a law enforcement officer case, the trial court properly denied defendant's motion for a new trial because the weight of the evidence supported the verdict because: (1) the deputy testified that defendant intentionally struck him in the temple and the mouth; (2) although defendant denied drinking alcohol, 13 beer cans were found in the toolbox in the back of his truck; (3) an empty beer can was found on the floor of his truck; (4) defendant admitted that he resisted arrest because the deputy was trying to charge him for a crime for which he claimed he did not commit; and (5) although defendant claimed that he might have accidentally hit the deputy, the deputy testified that he was struck intentionally. *Keys v. State*, 963 So. 2d 1193, 2007 Miss. App. LEXIS 299 (Miss. Ct. App.), cert. denied, 973 So. 2d 245, 2007 Miss. LEXIS 703 (Miss. 2007).

Conviction for aggravated assault under Miss. Code Ann. § 97-3-7(2)(b) was supported by the sufficiency of the evidence because witnesses testified that de-

fendant was an aggressor in a drunken fight, he was the only person with a knife, and he was involved voluntarily; therefore, a trial court's failure to grant a motion for a directed verdict, failure to give a peremptory instruction, or failure to grant a judgment notwithstanding the verdict was not erroneous. *Lackie v. State*, 971 So. 2d 601, 2007 Miss. App. LEXIS 293 (Miss. Ct. App.), cert. denied, 973 So. 2d 244, 2007 Miss. LEXIS 683 (Miss. 2007).

Defendant's convictions for two counts of aggravated assault were appropriate because the appellate court was unable to say that the prosecutor's overzealousness impacted the jury's verdict; there were several witnesses, in addition to the two victims, that testified that defendant was the perpetrator of the assault on the one victim and the other victim's testimony alone was sufficient to support defendant's conviction for stabbing her. *Whitehead v. State*, 967 So. 2d 56, 2007 Miss. App. LEXIS 181 (Miss. Ct. App.), cert. denied, 966 So. 2d 172, 2007 Miss. LEXIS 601 (Miss. 2007).

Evidence was sufficient to support defendant's conviction of aggravated assault for pouring a bottle of rubbing alcohol on his girlfriend and then setting her on fire because, even though defendant and his girlfriend argued that the fire was an accident, the state offered substantial evidence to contradict their testimony. *Taylor v. State*, 954 So. 2d 944, 2007 Miss. LEXIS 183 (Miss. 2007).

Defendant's conviction for aggravated assault was appropriate because the evidence showed that the victim's knife wound required 40 stitches and that defendant nearly severed the victim's ear in his attack on the victim. *Kimble v. State*, 920 So. 2d 1058, 2006 Miss. App. LEXIS 106 (Miss. Ct. App. 2006).

Defendant's conviction for aggravated assault was appropriate because the evidence was sufficient to support the jury's verdict; the state had produced four witnesses, all of whom testified that the victim did not have a knife, or any other weapon, at the time of the incident, thus negating defendant's argument that the victim was the aggressor. *Hawthorne v. State*, 944 So. 2d 928, 2006 Miss. App. LEXIS 910 (Miss. Ct. App. 2006).

There was sufficient evidence to sustain a conviction for aggravated assault, despite the fact that a victim did not actually see defendant ram his car before a robbery allegedly occurred, because defendant admitted to being in an accident, portions of defendant's vehicle were found at the scene, and defendant's vehicle sustained heavy damage. *Sanders v. State*, 949 So. 2d 92, 2006 Miss. App. LEXIS 702 (Miss. Ct. App. 2006).

Motion for judgment notwithstanding the verdict or a new trial was properly denied because there was sufficient evidence to sustain a conviction for aggravated assault where a murder victim's son was injured with a knife while trying to fend off the attack; the knife used was a deadly weapon, and the fact that no permanent injuries were suffered did not mean that the correct charge was simple assault. *Wilson v. State*, 936 So. 2d 357, 2006 Miss. LEXIS 435 (Miss. 2006).

Defendant's convictions for murder and aggravated assault in violation of Miss. Code Ann. § 97-3-19 and Miss. Code Ann. § 97-3-7(2) were proper because there was sufficient evidence from which a rational jury could have concluded that defendant possessed the gun and shot the victim with the gun, without any struggle between the two. *Anthony v. State*, 936 So. 2d 471, 2006 Miss. App. LEXIS 590 (Miss. Ct. App. 2006).

Defendant's convictions for murder and aggravated assault were proper where the evidence was sufficient to support the convictions because the State not only produced a complaining victim, but also an eyewitness to the crime. Additionally, the living victim testified that defendant shot him in the neck after defendant shot and killed the other victim. *McGee v. State*, 929 So. 2d 353, 2006 Miss. App. LEXIS 53 (Miss. Ct. App. 2006).

Defendant's actions at the first victim's home were sufficient to support defendants' convictions for the crimes of burglary and simple assault because (1) defendants were present at the home for the sole purpose to obtain money; (2) when the victims did not voluntarily allow defendants into the home, defendants went into a rage and broke into the dwelling and assaulted two of the victims; (3) one of the

defendants then proceeded to commit a further act of violence when he burst the windshield of one of the second victim's vehicle with a large rock; (4) the other defendant continued to threaten and intimidate the first victim until she surrendered her paycheck whereupon defendants left the premises and cashed the check in order to satisfy a debt; and (5) the jury could reasonably infer that defendants formed the intent to assault those inside the home immediately upon gaining entry to the home. *Arbuckle v. State*, 894 So. 2d 619, 2004 Miss. App. LEXIS 1080 (Miss. Ct. App. 2004), cert. dismissed, 904 So. 2d 184, 2005 Miss. LEXIS 397 (Miss. 2005).

Defendant's convictions on two counts of aggravated assault were proper under Miss. Code Ann. § 97-3-7(2)(b) where the elements of the offense were clearly established; defendant had a knife and struck the victims, both of whom required medical attention. Further, a witness testified that she had seen defendant walk through her backyard and throw down an object, which later turned out to be the knife. *McManis v. State*, 901 So. 2d 648, 2004 Miss. App. LEXIS 901 (Miss. Ct. App. 2004), cert. denied, 901 So. 2d 1273, 2005 Miss. LEXIS 300 (Miss. 2005).

Where victim and defendant's ex-girlfriend both testified defendant stabbed the victim when he was asked to leave his ex-girlfriend's apartment, sufficient evidence existed to support defendant's conviction for aggravated assault. *Shorter v. State*, 888 So. 2d 452, 2004 Miss. App. LEXIS 608 (Miss. Ct. App.), cert. denied, 888 So. 2d 1177, 2004 Miss. LEXIS 1478 (Miss. 2004).

There was sufficient evidence to support a conviction for aggravated assault based on the fact that victims of a robbery were put in fear for their lives by the exhibition of a deadly weapon; moreover, the evidence showed that defendant and another man used a baseball bat to beat a victim into unconsciousness, another victim was raped, and several victims were tied together with telephone cords and wires. *Perkins v. State*, 863 So. 2d 47, 2003 Miss. LEXIS 657 (Miss. 2003).

State was not required to prove that defendant had a prior conviction for

simple domestic violence as the State was only required to prove that a simple domestic violence charge had been proven since defendant was not convicted of the original charge of domestic violence, second offense, and, indeed, the trial court granted defendant's motion to dismiss the second offense aspect of the charge. *Murrell v. City of Indianola*, 858 So. 2d 183, 2003 Miss. App. LEXIS 1005 (Miss. Ct. App. 2003).

Though the testimony of defendant and the woman conflicted about his intent in entering the woman's home, the jury was entitled to believe the woman's testimony, as opposed to defendant's testimony, that defendant forced his way into her house, placed a makeshift noose around her neck, and threatened to kill her, as defendant admitted entering her house and backing her against a wall; accordingly, the evidence was legally sufficient to support defendant's conviction for aggravated assault as the evidence was not such that no reasonable juror could have assigned guilt to defendant on that charge. *Ferguson v. State*, 865 So. 2d 369, 2003 Miss. App. LEXIS 792 (Miss. Ct. App. 2003), cert. denied, 866 So. 2d 473, 2004 Miss. LEXIS 76 (Miss. 2004).

Because (1) the evidence showed that, while police attempted to arrest defendant on an outstanding warrant, defendant jumped into a vehicle, twice drove the vehicle to strike a police officer, and then defendant drove the vehicle into another police officer vehicle, causing injury, and (2) the court was not persuaded that the evidence tending to demonstrate defendant's innocence was of such weight that it constituted a substantial miscarriage of justice to permit the present verdicts to stand, the court affirmed defendant's convictions of taking possession of or taking away a motor vehicle and aggravated assault on a law enforcement officer. *Hogan v. State*, 854 So. 2d 497, 2003 Miss. App. LEXIS 852 (Miss. Ct. App. 2003).

Where jury heard testimony from both sides and viewed a videotape of the assault, a reasonable and fair minded jury was presented enough evidence to reach a guilty verdict on the inmate's charge of assaulting a law enforcement officer for assaulting the prison warden. *Hicks v.*

State, 845 So. 2d 755, 2003 Miss. App. LEXIS 434 (Miss. Ct. App. 2003).

There was sufficient evidence presented to support defendant's conviction on the charge of aggravated assault because a physician testified that a victim had been assaulted with a gun, a blood covered magazine clip for a gun was found under a seat where defendant had been sitting, and witnesses testified that they had noticed laser lights on their chests when defendant was in their presence. Crosby v. State, 856 So. 2d 523, 2003 Miss. App. LEXIS 403 (Miss. Ct. App.), cert. denied, 860 So. 2d 1223, 2003 Miss. LEXIS 814 (Miss. 2003).

Evidence was sufficient to convict a defendant of aggravated assault, where his accomplice admitted in his statement for his plea agreement that he called to defendant to assist him while he was fighting with the assault victim, and the victim identified defendant at trial. Wells v. State, 849 So. 2d 1231, 2003 Miss. LEXIS 213 (Miss. 2003).

Defendant's conviction for aggravated assault was proper where his objection to other wrong or criminal acts being admitted was untimely and where the evidence was sufficient to find him guilty of the crime; two eyewitnesses identified defendant and they stated that he pointed a handgun in their directions and fired several times. Ball v. State, 845 So. 2d 736, 2003 Miss. App. LEXIS 441 (Miss. Ct. App. 2003).

Where evidence showed that defendant and his father entered the victim's home armed with a sword, a knife, a baton, and a stun gun, and victim was cut with the sword or knife (he was not sure which) when he took it from the defendant, the evidence was sufficient to convict the defendant of assault with a deadly weapon. Al-Fatah v. State, 856 So. 2d 494, 2003 Miss. App. LEXIS 333 (Miss. Ct. App.), cert. denied, 860 So. 2d 315, 2003 Miss. LEXIS 714 (Miss. 2003).

Trial court properly denied defendant's motion for a directed verdict, as the evidence, viewed in the light most favorable to the verdict, was sufficient to show defendant fired multiple shots at the victim, that defendant's shots struck the victim's legs, and that the victim had to be treated

for the gunshot wounds at a hospital. Satcher v. State, 852 So. 2d 595, 2002 Miss. App. LEXIS 877 (Miss. Ct. App. 2002).

Evidence supported a conviction for aggravated assault upon a law enforcement officer where (1) the defendant inmate struck a corrections officer with a sharp object that broke the skin and caused bleeding, (2) a toothbrush was found nearby after the blow was struck, and (3) another officer testified from his training and experience as a law enforcement officer that the toothbrush had a sharpened end and could cause serious bodily injury. Spann v. State, 797 So. 2d 365, 2001 Miss. App. LEXIS 214 (Miss. Ct. App. 2001).

The defendant was not entitled to judgment notwithstanding the verdict or a new trial where, in the face of contradictory evidence, the jury determined that the defendant used unreasonable force in evicting trespassers from his property where he placed his hand on the victim and pointed a gun at him. Tate v. State, 784 So. 2d 208, 2001 Miss. LEXIS 123 (Miss. 2001).

Evidence was sufficient to support a conviction for aggravated assault where there was testimony that the defendant shot the victim in the foot after a conversation between the defendant and the victim's son; a contrary determination was not required by contradictory evidence as to whether the victim had a knife in his hand at the time of the incident. Moore v. State, 785 So. 2d 308, 2001 Miss. App. LEXIS 89 (Miss. Ct. App. 2001).

Evidence was sufficient to support a conviction for aggravated assault where the defendant shot the victim and, although the defendant claimed self-defense, every other witness to the incident testified that the defendant was unprovoked when he drew a gun and began shooting at the victim, and that he was the initial aggressor. Rice v. State, 782 So. 2d 171, 2001 Miss. App. LEXIS 10 (Miss. Ct. App. 2001).

Evidence was sufficient to establish aggravated assault where (1) the defendant entered a store under the false pretense of experiencing mechanical trouble with his vehicle, (2) as the store owner and his employees worked to assist the defendant,

he grabbed a store employee, wrapped one arm around her and used his other arm to place a butcher knife at her throat, (3) as he grabbed the employee, he announced he was “fooling” those inside the store and intended to rob the establishment, and (4) the defendant then released the employee and fled when the store owner produced a firearm and pointed it at him. *Genry v. State*, 767 So. 2d 302, 2000 Miss. App. LEXIS 426 (Miss. Ct. App. 2000).

Evidence was sufficient to support a conviction for aggravated assault where (1) the defendant lay in wait for the victim in the latter’s mobile home, (2) he kicked her in the back and shoulder and stomped her face, and (3) he then took a piece of a broken vase and inflicted a severe cut on her face. *Owens v. State*, 763 So. 2d 917, 2000 Miss. App. LEXIS 323 (Miss. Ct. App. 2000).

Evidence supported a conviction for aggravated assault where two eyewitnesses testified that the defendant, at a time when he was not threatened with any imminent physical harm, purposely discharged a firearm in the direction of the victim and that the bullets discharged from the weapon, and in fact came dangerously close to striking her; the defendant’s competing version of events, i.e., that he purposely avoided any attempt to injure the victim and was firing in self-defense merely to distract a third party in his preparations to fire his own weapon at the defendant offered a classic conflict in the evidence that the jury resolved against the defendant. *Brown v. State*, 763 So. 2d 207, 2000 Miss. App. LEXIS 318 (Miss. Ct. App. 2000).

Evidence was sufficient to establish a bodily injury and, thus, to support a conviction where the victim, who was a police officer, that he experienced pain due to the defendant’s hitting him in the back with his fists. *Jones v. State*, 756 So. 2d 852, 2000 Miss. App. LEXIS 76 (Miss. Ct. App. 2000).

Evidence was sufficient to support a conviction for simple assault where the victim testified that he experienced pain due to the defendant’s hitting him in the back with his fists. *Jones v. State*, 1999 Miss. App. LEXIS 613 (Miss. Ct. App. Nov. 9, 1999).

Evidence was sufficient to support a conviction for aggravated assault, notwithstanding the assertion of self-defense by the defendant, where it appeared that the defendant shot the victim without justification: (1) a neighbor at the scene who was 15 feet away from the victim when he was shot testified that the victim did not have a gun, (2) police officers testified that there was no physical evidence showing that the defendant’s car had been struck by bullets, (3) police officers testified that physical evidence showed that the shots in the defendant’s windshield were fired from the inside of the car, and (4) the defendant left the scene prior to the incident and returned with a gun. *Wooten v. State*, 752 So. 2d 1105, 1999 Miss. App. LEXIS 659 (Miss. Ct. App. 1999).

Evidence was sufficient to support a conviction for aggravated assault on a law enforcement officer where the officer testified that (1) he responded to a disturbance call regarding shots fired at an apartment complex, (2) he saw a vehicle leaving from that direction in a hurry as he approached the area and attempted to block the passage of the vehicle with his police cruiser, but that the vehicle went around his patrol car, (3) he then turned on his blue lights and siren and pursued the vehicle, (4) just as the vehicle turned a corner, it began pulling to the side just behind a parked car, and (5) the defendant rolled out of the back passenger side of the vehicle, pointed a gun, fired it, and ran away. *Norwood v. State*, 741 So. 2d 992, 1999 Miss. App. LEXIS 356 (Miss. Ct. App. 1999).

Evidence was sufficient to establish aggravated assault where (1) the victim testified that she was struck repeatedly on her buttocks, lower extremities, and arms with a pool stick and was choked about the neck, (2) such testimony was corroborated by the investigating officer, who testified that he saw bruises on the victim’s arms and legs and that, while taking her statement, he noted that the victim was in pain, (3) the registered nurse on duty at hospital at which the victim was treated testified that she had a red mark on the right side of her neck and bruises on her buttocks, legs, and arms, (4) an

x-ray of the victim's hand revealed a broken finger, and (5) a CAT scan was also performed due to the trauma to the victim's head and her statement that she had been in and out of consciousness. *Rushing v. State*, 1999 Miss. App. LEXIS 350 (Miss. Ct. App. June 22, 1999).

Evidence was sufficient to sustain a conviction for aggravated assault where the physician who treated the victim at the emergency room testified that the injuries were possibly "severe," in that there was a risk of intercranial injury, and the physician who ultimately performed surgery on the victim's broken nose stated that the swelling was so severe that surgery had to be postponed for one week. *Gayle v. State*, 743 So. 2d 392, 1999 Miss. App. LEXIS 197 (Miss. Ct. App. 1999).

In a prosecution for simple assault upon a law enforcement officer, the trial court did not err in finding that the victim was a "law enforcement officer" acting within the scope of his duties at the time of the offense, even though he had not attended the law enforcement training academy as required by § 45-6-3(c), since he was a "de jure deputy sheriff" where he was appointed by the sheriff pursuant to § 19-25-19 to act as a jailer, and he was wearing a signed identification card and a uniform at the time of the offense. *Amereson v. State*, 648 So. 2d 58, 1994 Miss. LEXIS 596 (Miss. 1994).

In a prosecution for rape, the evidence was sufficient to support an instruction on the charge of aggravated assault where the victim testified that the defendant had repeatedly punched her in the face and head during his attack on her, she further testified that she had spent about 4 days in the hospital and that she was told to see a neurologist because of a damaged nerve in her head, the emergency room physician testified that the victim had suffered significant facial trauma and that both of her eyes were swollen shut, the victim had fresh blood in both nostrils and significant bruising and bleeding into the skin of her face, and photographs of the victim taken after the attack illustrated the nature of her injuries. The evidence was also sufficient to support an instruction on the lesser included offense of simple assault where the defendant transported the vic-

tim to the hospital after the attack. *Taylor v. State*, 577 So. 2d 381, 1991 Miss. LEXIS 120 (Miss. 1991).

There was sufficient evidence to support a conviction for aggravated assault where the victim had been bitten on the face and had been stabbed several times in the neck and hand with a pen. *Simmons v. State*, 568 So. 2d 1192, 1990 Miss. LEXIS 605 (Miss. 1990).

Evidence was sufficient to prove aggravated assault where, during argument, defendant threw unidentified liquid into victim's face and attacked victim with knife, cutting him several times around face and neck. *Black v. State*, 506 So. 2d 264, 1987 Miss. LEXIS 2468 (Miss. 1987).

Jury's finding Vietnam War veteran, suffering from post-traumatic stress disorder, guilty of aggravated assault was not against the overwhelming weight of the evidence, in view of the conflicting opinions of 2 psychiatric experts as to whether he knew right from wrong at the time he stabbed victim, and lay testimony as to facts surrounding the incident. *Norris v. State*, 490 So. 2d 839, 1986 Miss. LEXIS 2477 (Miss. 1986).

Admission of aggravated assault defendant that defendant cut victim with knife having 5 to 6 inch blade, testimony by emergency room physician establishing that wound cut several major arteries and would have been life threatening if not treated, and testimony of victim that prior to assault, defendant threatened to kill victim is sufficient evidence to establish that defendant purposely caused serious bodily injury to victim with deadly weapon, which is all that is required for aggravated assault conviction. *Nobles v. State*, 464 So. 2d 1151, 1985 Miss. LEXIS 1919 (Miss. 1985).

Evidence was sufficient to support the conviction of defendant for aggravated assault on a policeman where officers had followed defendant after observing his reckless driving and their identity as policemen should have been clear since they were in a marked car, yet, when the officers overtook defendant and one asked for his license, defendant shot him and continued shooting him after he was knocked down by the first bullet. *Kinney v. State*, 336 So. 2d 493, 1976 Miss. LEXIS 1509 (Miss. 1976).

Where defendant armed himself with a deadly weapon, declared that he would not be brought to jail upon a warrant, and shot an arresting officer, he placed himself within the category of persons subject to the penalties prescribed in this section. *Maroone v. State*, 317 So. 2d 25, 1975 Miss. LEXIS 1722 (Miss. 1975).

Although conflicting in part, evidence that upon husband's unexpected return home, accused ran out of the back door, came around the house and shot the husband as he was standing on the front porch, unarmed, and was not threatening accused, supported conviction. *Shannon v. State*, 237 Miss. 550, 115 So. 2d 293, 1959 Miss. LEXIS 502 (Miss. 1959), overruled, *Ray v. State*, 381 So. 2d 1032, 1980 Miss. LEXIS 1930 (Miss. 1980).

Evidence, including the testimony of the victim, that immediately before the shooting he had seen the accused with a shotgun only a short distance away and that the accused had shot him, sustained a conviction of assault and battery with intent to kill. *Williams v. State*, 232 Miss. 613, 100 So. 2d 137, 1958 Miss. LEXIS 309 (Miss. 1958).

Although the evidence was conflicting, proof for the state that accused struck at the neck of another with a handsaw was sufficient to sustain conviction. *Wixon v. State*, 229 Miss. 430, 90 So. 2d 859, 1956 Miss. LEXIS 622 (Miss. 1956).

Evidence that the defendant pointed a pistol at the prosecuting witness to compel the latter to drop an axe which he had in his hand and which he had carried over to the car upon being called there, was sufficient to justify a conviction of an assault on a charge of assault and battery with intent to kill, where it did not appear that the pistol was aimed in self-defense, or that defendant was in any danger at the time. *Eaton v. State*, 186 Miss. 459, 191 So. 93, 1939 Miss. LEXIS 229 (Miss. 1939).

Evidence of threat to kill, unless certain papers signed, would support charge of assault. *Stroud v. State*, 131 Miss. 875, 95 So. 738, 1923 Miss. LEXIS 222 (Miss. 1923).

20. — — Charge or conviction unsupported.

Defendant was erroneously convicted of four counts of aggravated assault based

on the act of firing one shot into a vehicle when the evidence supported only one attempt, as defendant's attempt to discharge a gun one time did not support the inference that defendant intended to injure four individuals. *Foreman v. State*, 51 So. 3d 957, 2011 Miss. LEXIS 38 (Miss. 2011).

Police officer's action in turning onto road despite fact that view of oncoming traffic was blocked by row of hedges, while negligent, did not turn collision with motorist into crime of assault, so as to relieve motorist of having to comply with notice requirements in Tort Claims Act in subsequent personal injury claim against city and officer. *City of Jackson v. Lumpkin*, 697 So. 2d 1179, 1997 Miss. LEXIS 306 (Miss. 1997), overruled, *Carr v. Town of Shubuta*, 733 So. 2d 261, 1999 Miss. LEXIS 72 (Miss. 1999), overruled in part, *Stuart v. Univ. of Miss. Med. Ctr.*, 21 So. 3d 544, 2009 Miss. LEXIS 396 (Miss. 2009). But see *Carr v. Town of Shubuta*, 733 So. 2d 261, 1999 Miss. LEXIS 72 (Miss. 1999), overruled in part, *Stuart v. Univ. of Miss. Med. Ctr.*, 21 So. 3d 544, 2009 Miss. LEXIS 396 (Miss. 2009).

In a prosecution for simple assault upon a law enforcement officer, the evidence was insufficient to support a jury determination that the defendant caused "injury" where there was no testimony that the officer suffered pain, illness or impairment, and the circumstantial evidence concerning the defendant's actions, though sufficient to allow an inference that the officer suffered pain, was weak; circumstantial evidence should be supportive of, not in lieu of, direct testimony which is readily at hand, and therefore a new trial would be required so that the officer could be asked whether he suffered pain. *Murrell v. State*, 655 So. 2d 881, 1995 Miss. LEXIS 234 (Miss. 1995).

A conviction of aggravated assault of an 8-year-old child was not supported by the evidence where the defendant, while committing a rape of the child's mother, pointed a gun toward the child and told her to "shut up," but did not touch her or make any advances toward her; the defendant had the means and opportunity to cause the child great bodily harm but did not "attempt" to do so since there were no

extraneous events which prevented him from discharging the firearm. *Brown v. State*, 633 So. 2d 1042, 1994 Miss. LEXIS 122 (Miss. 1994).

Although defendant was charged with and convicted of aggravated assault, defendant was guilty of no more than simple assault where the victim's injuries were not serious and where there was insufficient evidence to prove that defendant intended to cause her serious bodily injury. *Brooks v. State*, 360 So. 2d 704, 1978 Miss. LEXIS 2306 (Miss. 1978).

One may not be convicted of assault with intent to kill where the evidence fails to show beyond a reasonable doubt that he used more force than was reasonably necessary to protect his employer's property from destruction. *Higgenbotham v. State*, 237 Miss. 841, 116 So. 2d 407, 1959 Miss. LEXIS 540 (Miss. 1959).

Testimony that defendant pointed pistol at deputy who was attempting to arrest him and said that he, defendant, would shoot deputy if he moved, and that deputy did not move and defendant did not shoot, does not support verdict and judgment of felonious intent to kill and murder. *Cradock v. State*, 204 Miss. 606, 37 So. 2d 778, 1948 Miss. LEXIS 393 (Miss. 1948).

Evidence which shows that the accused having an axe in his hands was not in striking distance of the state's witness nor sufficiency near to put the witness in fear of being struck, and accused was not restrained, is insufficient to justify a conviction of assault. *Grimes v. State*, 99 Miss. 232, 54 So. 839, 1911 Miss. LEXIS 197 (Miss. 1911).

21. —Variance between indictment and proof.

There was no variance between an indictment charging the defendant with assault and battery with intent to kill a particular person and testimony introduced by the prosecution showing that the defendant had no intention to shoot the person he actually shot but mistook that person he shot for another, and shot the victim thinking that he was shooting the other. *Brandon v. State*, 263 So. 2d 560, 1972 Miss. LEXIS 1336 (Miss. 1972).

In prosecution for assault and battery with intent to kill where evidence showed

that the accused had no ill will toward the person assaulted but made a mistake as to identity and the indictment charged that the accused intended to kill the person she assaulted, the variance between evidence and indictment was not fatal. *Garner v. State*, 227 Miss. 840, 87 So. 2d 80, 1956 Miss. LEXIS 761 (Miss. 1956).

There is no fatal variance between an indictment charging defendant with assault and battery with intent to kill and murder "Floyd Griffin," and proof that victim's name was "Floyd Griffie" since defendant could not have been misled thereby. *Hughes v. State*, 207 Miss. 594, 42 So. 2d 805, 1949 Miss. LEXIS 372 (Miss. 1949).

There is no fatal variance between an indictment charging defendant with shooting "John Horne," and proof that the name of the prosecuting witness was "John Horne, Jr." where throughout the trial such witness was referred to either by the name of John or John Horne, together with the mute evidence that such witness had suffered the loss of some fingers, which the evidence showed resulted from the shooting, all of which evidence sufficiently identified the witness as being the person named in the indictment as having been shot. *Foreman v. State*, 186 Miss. 529, 191 So. 657, 1939 Miss. LEXIS 267 (Miss. 1939).

22. Instructions; generally.

In an action for aggravated assault, the trial court did not err in instructing the jury because the challenged instruction contained the essential elements, including that defendant unlawfully, willfully, feloniously, purposely and knowingly caused bodily injury to the victim with a deadly weapon, a knife, by stabbing the victim with said knife, and without authority of law and not in necessary self-defense. *Cureton v. State*, — So. 3d —, 2020 Miss. App. LEXIS 87 (Miss. Ct. App. Mar. 24, 2020), cert. denied, — So. 3d —, 2020 Miss. LEXIS 374 (Miss. 2020).

In an aggravated assault case, in which defendant alleged that he inadvertently stabbed the victim, trial counsel was not ineffective for not offering what defendant called an "accident instruction" based on the excusable homicide statute because

the instruction might have confused the jury; and defendant failed to rebut the presumption that counsel's failure to offer the proffered instruction was trial strategy. *Greenleaf v. State*, 267 So. 3d 749, 2019 Miss. LEXIS 125 (Miss. 2019).

Circuit court did not fail to properly instruct the jury regarding the elements of the crime of aggravated assault because jury instruction S-1 was the only instruction that advised the jury of the essential elements of the crime, and it tracked the language of the indictment and the aggravated assault statute and accurately followed the requisite elements of the crime; the deadly weapon language at issue in jury instruction S-3 was not included in the elements instruction; and the unnecessary language in jury instruction S-3 did not prejudice defendant as the instruction did not direct the jury to a conclusion regarding any element of the crime and did not deprive him of his defense of accident. *Dennis v. State*, 271 So. 3d 661, 2018 Miss. App. LEXIS 589 (Miss. Ct. App. 2018).

Trial court did not err in instructing the jury at defendant's trial for aggravated assault that a person did not have to possess ill-will toward or even know the identity of a specific individual to commit an aggravated assault on that person. *Miskell v. State*, 230 So. 3d 345, 2017 Miss. App. LEXIS 633 (Miss. Ct. App. 2017).

Defendant was entitled to a new trial as to the aggravated-assault charges against defendant because, due to variances between the indictment and the jury instructions, the jury instructions did not fairly instruct the jury on the applicable law. The jury was not asked to decide whether the injuries inflicted upon the shooting victims were "serious" bodily injuries, which substantially altered the elements of proof for a conviction, and a deadly weapon was not an element of the crime as suggested by the jury instructions. *Brown v. State*, 225 So. 3d 1263, 2016 Miss. App. LEXIS 422 (Miss. Ct. App. 2016), rev'd, 222 So. 3d 302, 2017 Miss. LEXIS 169 (Miss. 2017).

Defendant was not erroneously convicted of aggravated assault because the evidence supported the giving by the trial

judge of an accomplice-liability jury instruction, given the conflicting testimony as to whether defendant or another person with defendant shot the victim, and the instruction did not constructively amend the indictment. Moreover, the trial judge did abuse the judge's discretion in additionally giving a cautionary instruction as to accomplice testimony. *Jones v. State*, 238 So. 3d 1235, 2016 Miss. App. LEXIS 408 (Miss. Ct. App. 2016), cert. denied, 237 So. 3d 1269, 2018 Miss. LEXIS 148 (Miss. 2018).

Defendant suffered no prejudice from the State's inclusion of the term "recklessly" in the jury instruction on aggravated assault, because the original indictment clearly provided that she was being charged under this section. *Towles v. State*, 193 So. 3d 688, 2016 Miss. App. LEXIS 382 (Miss. Ct. App. 2016).

Mississippi Supreme Court had held that an acquit first instruction, like the one in this case, was not prohibited by Mississippi law, and thus there was no error in connection with defendant's trial for attempted kidnapping and aggravated assault. *Burgess v. State*, 210 So. 3d 569, 2016 Miss. App. LEXIS 314 (Miss. Ct. App. 2016), cert. denied, 209 So. 3d 431, 2017 Miss. LEXIS 59 (Miss. 2017).

It was reversible error to deny defendant's request for a lesser-included offense instruction on simple assault, when he was charged with aggravated assault, because (1) the State solely asserted defendant committed the crime by using a bottle, and (2) a reasonable juror could conclude the bottle was not used or the bottle was not a dangerous weapon. *Franklin v. State*, 136 So. 3d 1021, 2014 Miss. LEXIS 123 (Miss. 2014).

Trial court did not err by refusing a proposed theory-of-the-case instruction because the instruction was redundant. *James v. State*, 146 So. 3d 985, 2014 Miss. App. LEXIS 66 (Miss. Ct. App.), cert. denied, 146 So. 3d 981, 2014 Miss. LEXIS 463 (Miss. 2014).

Because the record provided evidence corroborating an accomplice's testimony, the trial court was not required to instruct the jury to regard the accomplice's testimony with great caution and suspicion. *James v. State*, 146 So. 3d 985, 2014 Miss.

App. LEXIS 66 (Miss. Ct. App.), cert. denied, 146 So. 3d 981, 2014 Miss. LEXIS 463 (Miss. 2014).

Trial court properly refused a requested instruction because, reading all the given instructions together, the jury was fairly, fully, and accurately instructed regarding its duty to consider and weigh the credibility of witness testimony. *James v. State*, 146 So. 3d 985, 2014 Miss. App. LEXIS 66 (Miss. Ct. App.), cert. denied, 146 So. 3d 981, 2014 Miss. LEXIS 463 (Miss. 2014).

Trial court's aiding-and-abetting instruction, read together with its aggravated-assault instruction, adequately informed the jury that if one defendant was found guilty individually, his codefendant could not be found guilty individually without deliberately associating himself in some way with the crime and participating in it. *Jones v. State*, 95 So. 3d 641, 2012 Miss. LEXIS 410 (Miss. 2012).

Defendant's convictions for the simple assault of a peace officer in violation of Miss. Code Ann. § 97-3-7(1) were appropriate because even though a jury instruction erroneously allowed the jury to find "physical menace" from words alone, it was a harmless error since it was contradicted that defendant attacked the officers with kicks and punches. *Graham v. State*, 967 So. 2d 670, 2007 Miss. App. LEXIS 721 (Miss. Ct. App. 2007).

Simple assault on a law enforcement officer charge resulted from injuries the deputy sustained when attempting to arrest defendant, and the evidence was contradicted that defendant engaged in a violent physical struggle with the deputy which resulted in both men sustaining multiple injuries; the trial judge determined that there was a lack of evidence to support a jury instruction on an illegal arrest, and thus the trial judge did not abuse his discretion in denying defendant's jury instructions that he had the right to resist an unlawful arrest. *Keys v. State*, 963 So. 2d 1193, 2007 Miss. App. LEXIS 299 (Miss. Ct. App.), cert. denied, 973 So. 2d 245, 2007 Miss. LEXIS 703 (Miss. 2007).

In an aggravated assault case, proposed jury instructions on the "single juror," the presumption of innocence and the state's

burden of proof, and the elements of the offense were properly rejected because they were covered by instructions that had already been given; moreover, an accident instruction was rejected as not supported by the evidence since that doctrine did not apply to intentional acts. *Ellis v. State*, 956 So. 2d 1008, 2007 Miss. App. LEXIS 119 (Miss. Ct. App.), cert. dismissed, 973 So. 2d 244, 2007 Miss. LEXIS 687 (Miss. 2007).

Defendant's conviction for aggravated assault was appropriate under Miss. Code Ann. § 97-3-7 where his indictment sufficiently tracked § 97-3-7(2)(b). Further, a jury instruction was appropriate because it set forth the elements of the crime the jury was required to find in order to find him guilty of the assault. *Jenkins v. State*, 913 So. 2d 1044, 2005 Miss. App. LEXIS 330 (Miss. Ct. App. 2005).

Where defendant was tried and convicted for aggravated assault, there was no evidentiary basis warranting an instruction regarding his use of the weapon in a negligent manner, so as to have allowed for an instruction on simple assault. Moreover, the instruction was not a proper statement of the law, for it gave the impression that one could shoot another with a gun and only be guilty of simple assault; finally, the evidence presented by the State revealed that defendant had intentionally fired shots at the victim, and defendant never refuted the State's proof that the shooting was done in an intentional manner. *Acreman v. State*, 907 So. 2d 1005, 2005 Miss. App. LEXIS 276 (Miss. Ct. App. 2005).

In defendant's attempted aggravated assault case, a court properly rejected his proposed instructions where, characterizing his offense as domestic violence would neither have reduced his crime to a misdemeanor, nor reduced his sentence. The proposed jury instructions misstated the law and were therefore properly rejected. *Wilson v. State*, 904 So. 2d 987, 2004 Miss. LEXIS 1410 (Miss. 2004).

In a case where the indictment charged defendant with aggravated assault, a jury instruction mentioning attempt did not create plain error because attempted assault fell within the meaning of assault, and the indictment mentioned the statute

number of the crime for which defendant was to be prosecuted and tracked the language of the statute. *Lewis v. State*, 897 So. 2d 994, 2004 Miss. App. LEXIS 929 (Miss. Ct. App. 2004), cert. denied, 896 So. 2d 373, 2005 Miss. LEXIS 225 (Miss. 2005).

Although the trial court failed to instruct the jury of the elements of aggravated assault, it appeared beyond a reasonable doubt that the absence of the element instruction did not cause or contribute to the jury reaching the verdict that it reached. The evidence was overwhelming that defendant used his car in a manner that clearly indicated that he was attempting to cause serious bodily injury with a deadly weapon (the car), or under circumstances manifesting extreme indifference to the value of human life; consequently, the error was harmless. *Conerly v. State*, 879 So. 2d 1101, 2004 Miss. App. LEXIS 762 (Miss. Ct. App. 2004).

Defendant's aggravated assault conviction was upheld because the trial court had not erred in refusing to instruct the jury on self-defense, since there was no evidence that defendant was acting in self-defense when he shot two victims. Additionally, the jury was provided more than adequate instruction on the essential elements of aggravated assault. *McKinley v. State*, 873 So. 2d 1052, 2004 Miss. App. LEXIS 450 (Miss. Ct. App. 2004).

Court rejected defendant's argument that the trial court committed reversible error when it granted a particular instruction because the alleged error was not properly preserved for appellate review and was procedurally barred; even with the procedural bar in place, the court found no plain error because even though the instruction itself was an unhelpful, abstract statement of law, given that aggravated assault was not a specific intent crime, the submission of the instruction did not constitute reversible error. *Hogan v. State*, 854 So. 2d 497, 2003 Miss. App. LEXIS 852 (Miss. Ct. App. 2003).

Trial court properly denied defendant's motion for a directed verdict, as the evidence, viewed in the light most favorable to the verdict, was sufficient to show defendant fired multiple shots at the victim, that defendant's shots struck the victim's

legs, and that the victim had to be treated for the gunshot wounds at a hospital. *Satcher v. State*, 852 So. 2d 595, 2002 Miss. App. LEXIS 877 (Miss. Ct. App. 2002).

Where defendant was indicted only for four counts of simple assault, the trial court did not err in giving jury lesser offense instruction requested by defendant, allowing the jury to convict him of disorderly conduct as to one count; defendant argued that the most he could be convicted of was disorderly conduct, and that he was entitled to have the jury instructed as to his theory of defense. *Williams v. State*, 797 So. 2d 372, 2001 Miss. App. LEXIS 243 (Miss. Ct. App. 2001).

The defendant was entitled to a new trial on the ground that the jury was not instructed as to the essential elements of aggravated assault where the court instructed the jury that if they believed from the evidence in the case beyond a reasonable doubt that the defendant committed an aggravated assault in and upon the body of the victim with a shotgun, without provocation, or without threat of great bodily harm to himself, then it would be their sworn duty to find the defendant guilty as charged; the instruction failed to set out the essential elements of the crime of aggravated assault as it did not instruct the jury that it must find that the defendant attempted to cause or purposely or knowingly caused bodily injury to the victim. *Reddix v. State*, 731 So. 2d 591, 1999 Miss. LEXIS 21 (Miss. 1999).

In a prosecution for aggravated assault, the trial court erred in giving a "flight instruction" where there was an explanation for the defendant's flight implicit in the defense of the case—the defendant's claim of self-defense—and there was ample reason for the defendant to have left the scene of the hostilities based on threats from a third person and the alleged danger from the victim. *Banks v. State*, 631 So. 2d 748, 1994 Miss. LEXIS 9 (Miss. 1994).

Where an assault defendant is arguing self-defense, a flight instruction should be automatically ruled out and found to be of no probative value; a flight instruction would have particular prejudicial effect in

a case where self-defense is claimed because to suggest and highlight, through the sanction of a court-granted instruction, that the defendant's flight was possibly an indication of guilt suggests that the court does not accept the self-defense argument. *Banks v. State*, 631 So. 2d 748, 1994 Miss. LEXIS 9 (Miss. 1994).

In a prosecution for aggravated assault, the injuries inflicted upon the victim clearly constituted "serious bodily injury" within the meaning of subsection (2) of this section where a blow to the head knocked the victim unconscious and opened a flesh wound requiring sutures, the victim's jaw was broken in 2 places, an injury to the victim's arm required surgery under general anesthesia, a bone graft, and the insertion of a metal plate, and the victim was unable to use his arm or return to work for at least 4 weeks; thus, the trial court did not err in refusing the defendant's requested instruction defining serious bodily injury as "injuries involving great risk of death." *Fleming v. State*, 604 So. 2d 280, 1992 Miss. LEXIS 382 (Miss. 1992).

A defendant who was convicted of aggravated assault and sentenced to 15 years imprisonment was not entitled to a jury instruction on attempted murder which carries a maximum sentence of 10 years imprisonment, even though the evidence would have supported a conviction for either offense, since there was no view of the evidence under which the defendant might have been found guilty of attempted murder and not guilty of aggravated assault. *McGowan v. State*, 541 So. 2d 1027, 1989 Miss. LEXIS 180 (Miss. 1989).

Trial court committed reversible error when it instructed jury to completely disregard testimony of witness who testified that individual, not defendant, had told her that he had used boxcutter to cut "a boy", because issue concerning that individual was not whether he had character trait for being truthful, but whether he was telling truth about circumstances surrounding fight, cutting of victim, and his participation in those events; witness whose testimony was excluded contradicted testimony of individual that he did not cut anybody, and possibility that indi-

vidual cut victim was relevant factor to be considered by jury in its deliberations as to whether or not defendant was guilty of cutting victim, since issue at trial was identity of person who cut victim. *Clark v. State*, 514 So. 2d 1221, 1987 Miss. LEXIS 2866 (Miss. 1987).

In a prosecution for aggravated assault under § 97-3-7(2), the trial court properly instructed the jury if they believed beyond a reasonable doubt defendant drove his automobile in the manner enumerated in the instruction and that if they believed beyond a reasonable doubt such manner of driving manifested extreme indifference to the value of human life, then they should find defendant guilty. *Gray v. State*, 427 So. 2d 1363, 1983 Miss. LEXIS 2351 (Miss. 1983).

An instruction which required in order for the jury to find defendant guilty of assault, the jury must find from the evidence the defendant unlawfully, wilfully or feloniously caused bodily injury to the alleged victim recklessly under circumstances manifesting extreme indifference to the value of human life by driving into the alleged victim and striking him with an automobile, was an adequate instruction on assault. *Buchanan v. State*, 427 So. 2d 697, 1983 Miss. LEXIS 2464 (Miss. 1983).

In an action for aggravated assault with an automobile that arose when the victim, who had attempted to intervene in an altercation between defendant and a third party over an automobile collision, was struck by either an open door or the rear of defendant's car, the evidence was insufficient to support an instruction that required a guilty verdict if defendant knowingly or recklessly caused serious bodily injury by running into the complainant with his automobile under circumstances manifesting extreme indifference to the value of human life; giving such an instruction was reversible error, even though defendant did not move for a directed verdict of not guilty or ask for a peremptory instruction of not guilty. *McGee v. State*, 365 So. 2d 302, 1978 Miss. LEXIS 2417 (Miss. 1978).

State's instruction, in a prosecution for assault and battery with intent to kill, to the effect that voluntary drunkenness was

no excuse or justification for the commission of the crime in that one could not take advantage of a situation in which he had placed himself voluntarily by being drunk or drinking, and that if the jury believed beyond a reasonable doubt that defendant, with felonious intent and malice aforethought to kill, shot and wounded the victim, it should find defendant guilty even though they might believe that defendant had been drunk or drinking at the time, was not misleading as assuming that a crime had been committed, nor was it misleading in any other particular. *Cobb v. State*, 235 Miss. 57, 108 So. 2d 719, 1959 Miss. LEXIS 402 (Miss. 1959).

Instruction defining crime with which defendant is charged is sufficient if it sets forth all of the elements of crime, and state need not request instruction defining essential elements of crime of murder, though defendant may request such instruction if he desires. *Bone v. State*, 207 Miss. 20, 41 So. 2d 347, 1949 Miss. LEXIS 314 (Miss. 1949).

In prosecution for assault and battery with intent to kill and murder, even assuming that court erred in authorizing jury, if certain facts were found, to find defendant guilty of injuring another by committing an assault and battery on him with a shotgun, such error was not prejudicial where the jury did not act on such instruction but found the defendant guilty as charged as authorized by another instruction. *Hudson v. State*, 199 Miss. 406, 24 So. 2d 779, 1946 Miss. LEXIS 210 (Miss. 1946).

Alleged error in prosecution for assault with intent to murder of failure of instructions for state to define the term "murder" used therein, was not available to defendant where his instructions followed the language used by the state, some of which defined murder in the language of the statute. *Bridges v. State*, 197 Miss. 527, 19 So. 2d 738, 1944 Miss. LEXIS 317 (Miss. 1944).

Striking out the words "in attempt" from defendant's requested instruction defining murder, in prosecution for assault with intent to murder, to the effect that "the defendant acted feloniously without authority of law from his deliberate design and with his malice afore-

thought in attempt to kill and murder," was not error. *Bridges v. State*, 197 Miss. 527, 19 So. 2d 738, 1944 Miss. LEXIS 317 (Miss. 1944).

Instruction that if the jury believed from the evidence beyond a reasonable doubt that the defendant feloniously, wilfully, and of malice aforethought, hit and wounded the prosecuting witness with a pair of wire pliers, which they believed was a deadly weapon, at a time when defendant was in no danger of losing his own life or suffering great bodily harm at the hands of the prosecuting witness, they should find defendant guilty of assault and battery with intent to kill and murder, was defective as authorizing conviction upon proof of a simple assault. *Daniels v. State*, 196 Miss. 328, 17 So. 2d 793, 1944 Miss. LEXIS 196 (Miss. 1944).

Where evidence did not justify conviction under this section [Code 1942, § 2011], defective instruction authorizing conviction hereunder upon proof of a simple assault would not cause reversal of conviction for assault with intent to kill and murder, but conviction would be affirmed as a conviction for simple assault and battery and remanded for appropriate sentence. *Daniels v. State*, 196 Miss. 328, 17 So. 2d 793, 1944 Miss. LEXIS 196 (Miss. 1944).

Instruction authorizing conviction under the statute upon a finding that the defendant assaulted a police officer "with means or force likely to produce death," rather than a simple assault, where evidence showed that defendant committed battery on the officer with his hands and feet, was not erroneous, under the circumstances. *Blaine v. State*, 196 Miss. 603, 17 So. 2d 549, 1944 Miss. LEXIS 240 (Miss. 1944).

In prosecution for shooting another with intent to murder him, court properly included in instruction definition of murder. *Martin v. State*, 163 Miss. 454, 142 So. 15, 1932 Miss. LEXIS 62 (Miss. 1932).

In prosecution for assault with intent to murder, instruction setting forth elements of crime as stated in statute held sufficient without using word "felonious." *Martin v. State*, 163 Miss. 454, 142 So. 15, 1932 Miss. LEXIS 62 (Miss. 1932).

23. —Intent.

Aggravated assault instruction, which

used the term “willfully,” was not improper as the Supreme Court of Mississippi has made clear that the terms “willfully” and “purposely or knowingly” have substantially the same meanings. *Davis v. State*, 909 So. 2d 749, 2005 Miss. App. LEXIS 575 (Miss. Ct. App. 2005).

In an aggravated assault prosecution defended on M’Naghten insanity grounds, even though defendant requested no intoxication instruction, the giving of state’s instruction that voluntary intoxication was no defense was not error where, in view of defendant’s testimony, the jury could have inferred that, at the time of the offense, the defendant was too drunk to have the requisite intent to commit the crime. *Norris v. State*, 490 So. 2d 839, 1986 Miss. LEXIS 2477 (Miss. 1986).

In a prosecution for assault with intent to kill and murder, an instruction to the effect that the jury should convict the defendants if it should find that the defendants committed assault and battery upon the victim “by use of means or force likely to produce death, with the intent to maim or kill and murder” him, was prejudicial error, where the evidence as to intent was inconclusive, as was evidence of facial injuries sustained by the victim of the assault. *Johnson v. State*, 230 So. 2d 810, 1970 Miss. LEXIS 1572 (Miss. 1970).

An instruction that malice aforethought may be presumed from the unlawful and deliberate use of a deadly weapon should not have been granted. *Barnette v. State*, 252 Miss. 652, 173 So. 2d 904, 1965 Miss. LEXIS 1136 (Miss. 1965).

In absence of evidence to support it, it was not error for the lower court to refuse to charge the jury that the accused was entitled to an acquittal if he struck his victim in the heat of passion, and without deliberation. *Frierson v. State*, 250 Miss. 339, 165 So. 2d 342, 1964 Miss. LEXIS 467 (Miss. 1964).

Any error in an instruction which failed to include intent as an essential element of the offense to be proved was cured by an instruction, given at accused’s request, which charged the jury that intent to kill and slay is the essential ingredient of the offense charged in the indictment. *Frierson v. State*, 250 Miss. 339, 165 So. 2d 342, 1964 Miss. LEXIS 467 (Miss. 1964).

In a prosecution involving use of a deadly weapon, it was reversible error for the court to instruct for the state that it is reasonable to infer that a person ordinarily intends the natural and probable consequences of his acts knowingly done, and further that the jury might draw the inference that the defendant intended all the consequences which one standing in like circumstances and possessing like knowledge should reasonably have expected to result from his act knowingly done. *Hydrick v. State*, 246 Miss. 448, 150 So. 2d 423, 1963 Miss. LEXIS 463 (Miss. 1963).

An instruction that there is no particular time during which it is necessary that an intent to kill should have existed is inaccurate, since the intent must exist at the time injury was inflicted. *Lindley v. State*, 234 Miss. 423, 106 So. 2d 684, 1958 Miss. LEXIS 512 (Miss. 1958).

Even if an instruction to the effect that if the jury should find that the accused was intoxicated at the time of the difficulty it must be satisfied beyond a reasonable doubt that such intoxication did not incapacitate him from forming a deliberate design to kill the victim should be given where the evidence justifies it, it was properly refused where the accused’s testimony established that he was not drunk at the time of committing an assault and battery with intent to kill. *Wixon v. State*, 229 Miss. 430, 90 So. 2d 859, 1956 Miss. LEXIS 622 (Miss. 1956).

The court did not commit error in granting to the state an instruction on the question of malice aforethought. *Wixon v. State*, 229 Miss. 430, 90 So. 2d 859, 1956 Miss. LEXIS 622 (Miss. 1956).

Trial court’s refusal to instruct jury to find the defendant guilty of simple assault and battery was proper where proof showed that defendant was either guilty of assault and battery with intent to kill and murder or nothing. *Duckworth v. State*, 209 Miss. 318, 46 So. 2d 787, 1950 Miss. LEXIS 390 (Miss. 1950).

Instruction, that malice aforethought “may be presumed from unlawful and deliberate use of a deadly weapon,” was proper where jury was also charged that burden was upon state to prove malice aforethought beyond every reasonable

doubt, and that defendant intended to kill his victim. *Hughes v. State*, 207 Miss. 594, 42 So. 2d 805, 1949 Miss. LEXIS 372 (Miss. 1949).

Instruction, that malice aforethought “may be presumed from the unlawful and deliberate use of a deadly weapon,” was proper in absence of evidence showing justification or necessity for assault. *Hughes v. State*, 207 Miss. 594, 42 So. 2d 805, 1949 Miss. LEXIS 372 (Miss. 1949).

In prosecution for assault and battery with intent to kill and murder, instruction directing jury to take into consideration fact that defendant had another load in his gun and could have used it and killed his alleged victim, if he had so desired, but did not do so because he did not want to kill him, was properly refused as it amounts to a comment on weight of evidence as to whether or not defendant shot with intent to kill and murder. *Cearry v. State*, 204 Miss. 299, 37 So. 2d 316, 1948 Miss. LEXIS 366 (Miss. 1948).

Instruction in prosecution for assault with intent to murder, that malice is implied by law from the nature and character of the weapon used, and that the use of a deadly weapon in a difficulty and not necessarily in self-defense is evidence of malice, constituted error, for the reasons that the instruction failed to characterize the use of the weapon as “deliberate,” the court found peremptorily that the weapon was deadly, and there was no need or right to charge the jury upon a presumption. However, such error was not prejudicial to defendant whose guilt was overwhelming. *Bridges v. State*, 197 Miss. 527, 19 So. 2d 738, 1944 Miss. LEXIS 317 (Miss. 1944).

Omission from instruction of words, “with intent to kill and murder,” did not prejudice defendant convicted of assault and battery with intent to kill and murder, where, because evidence negated such intent, the supreme court affirmed conviction for constituent offense of assault and battery. *Griffin v. State*, 196 Miss. 528, 18 So. 2d 437, 1944 Miss. LEXIS 226 (Miss. 1944).

Instruction that “deliberate intent” and “deliberate design” and “malice aforethought” meant the same thing, held not erroneous. *Word v. State*, 180 Miss. 883, 178 So. 821, 1938 Miss. LEXIS 46 (Miss. 1938).

Instruction on assault with intent to kill eliminating felonious intent held erroneous. *Herring v. State*, 134 Miss. 505, 99 So. 270, 1924 Miss. LEXIS 298 (Miss. 1924).

Instruction omitting intent to kill on trial for assault with such intent is erroneous. *Lott v. State*, 130 Miss. 119, 93 So. 481, 1922 Miss. LEXIS 184 (Miss. 1922).

Erroneous instruction on assault with intent to kill held not cured by others stating the law correctly. *Lott v. State*, 130 Miss. 119, 93 So. 481, 1922 Miss. LEXIS 184 (Miss. 1922).

Instruction is erroneous which fails to state that, when defendant called upon his wife to shoot, he must have had the intent to kill with malice aforethought. *Smith v. State*, 91 So. 41 (Miss. 1922).

Where evidence showed that accused shot in to a wagon occupied by a designated person and several others it was error to instruct the jury that proof of a design to kill the designated person was unnecessary to a conviction under indictment for assault with intent to kill said person. *Gentry v. State*, 92 Miss. 141, 45 So. 721, 1907 Miss. LEXIS 26 (Miss. 1907).

24. —Deadly weapon.

In defendant's trial for kidnapping and the aggravated assault of his ex-girlfriend, the trial court's instruction to the jury that stun gun was a deadly weapon was peremptory and in error, necessitating reversal. *Russell v. State*, 832 So. 2d 551, 2002 Miss. App. LEXIS 251 (Miss. Ct. App.), cert. denied, 832 So. 2d 533, 2002 Miss. App. LEXIS 782 (Miss. Ct. App. 2002).

Where defendant used knife's metal butt to strike victim on the back of the head six or seven times with all the force he had, the knife could be called a deadly weapon for the purposes of aggravated assault under Miss. Code Ann. § 97-3-7. *Walls v. State*, 827 So. 2d 718, 2002 Miss. App. LEXIS 525 (Miss. Ct. App. 2002).

The trial court committed reversible error where the defendant was indicted for aggravated assault by causing or attempting to cause serious bodily injury in violation of subsection (2)(a), but the court instructed the jury with regard to aggravated assault with a deadly weapon in

violation of subsection (2)(b). *Rushing v. State*, 753 So. 2d 1136, 1999 Miss. App. LEXIS 717 (Miss. Ct. App. 1999).

In a prosecution for aggravated assault under subsection (2) of this section, the defendant may not have the jury instructed on the lesser offense of simple assault under subsection (1) of this section where the defendant wielded what was indisputably a deadly weapon and intentionally struck the victim, even if the injury inflicted was relatively slight. *Hutchinson v. State*, 594 So. 2d 17, 1992 Miss. LEXIS 45 (Miss. 1992).

In a prosecution for aggravated assault under subsection (2)(a) of this section, the defendant's use of a shot gun, which is a deadly weapon, during the alleged assault precluded his entitlement to an instruction authorizing a conviction of simple assault under subsection (1) of this section. *Hunt v. State*, 569 So. 2d 1200, 1990 Miss. LEXIS 671 (Miss. 1990).

By failing to attack the constitutionality of subsection (2) of this section, by proper motion in the trial court, defendant waived any error in this regard, and was precluded from raising the issue on appeal; moreover, where he failed to object to a jury instruction that the pocket knife used in the alleged crime was a deadly weapon, the issue was not preserved for appeal. *Colburn v. State*, 431 So. 2d 1111, 1983 Miss. LEXIS 2609 (Miss. 1983).

Whether the use of feet and fists constituted the use of a deadly weapon is a question for the jury to determine from the evidence, and the trial court committed reversible error when it instructed the jury that feet and fists were a deadly weapon. *Pulliam v. State*, 298 So. 2d 711, 1974 Miss. LEXIS 1571 (Miss. 1974).

Granting of an instruction, in a prosecution for assault and battery with intent to kill, that malice aforethought might be assumed from the unlawful and deliberate use of a deadly weapon, constituted reversible error since the instruction was on abstract principle of law, no mention was made of the specific facts of the case, and the two different versions of what had occurred and all of the facts surrounding the shooting were in evidence. *Allison v. State*, 274 So. 2d 678, 1973 Miss. LEXIS 1609 (Miss. 1973).

An instruction which plainly predicated guilt upon the assault being made with "a deadly weapon, to wit, a pistol or metal instrument," was not subject to the claimed infirmity that it did not require the jury to determine that a deadly weapon had been used but instead created an assumption that the metal instrument used was a deadly weapon. *Frierson v. State*, 250 Miss. 339, 165 So. 2d 342, 1964 Miss. LEXIS 467 (Miss. 1964).

An instruction under which the nature of the weapon, and the felonious assault were facts to be determined by the jury from the evidence in the case beyond a reasonable doubt, did not assume that a handsaw was a deadly weapon. *Cobb v. State*, 233 Miss. 54, 101 So. 2d 110, 1958 Miss. LEXIS 356 (Miss. 1958).

Instruction requiring only that the jury find that an assault was made "with some instrument capable of producing death or great bodily harm" was held error, since this section requires that the assault be made "with any deadly weapons or other means or force likely to produce death." *Williams v. State*, 205 Miss. 515, 39 So. 2d 3, 1949 Miss. LEXIS 448 (Miss. 1949).

25. —Self-defense.

In a case in which defendant appealed his conviction for violating Miss. Code Ann. § 97-3-7(2)(a), he unsuccessfully argued that his jury instruction on self-defense should have been included. Part of the instruction given to the jury already properly instructed it on defendant's theory of self-defense. *David v. State*, 29 So. 3d 129, 2010 Miss. App. LEXIS 112 (Miss. Ct. App. 2010).

In a case in which defendant appealed his conviction for violating Miss. Code Ann. § 97-3-7(2)(a), he unsuccessfully argued that a jury instruction on self-defense should have been included. Since defendant did not cite to any authority for his assertion that the jury instruction on self-defense should have been included based on the disparity in size between the victim and defendant the testimony at trial, the assignment of error was procedurally barred. *David v. State*, 29 So. 3d 129, 2010 Miss. App. LEXIS 112 (Miss. Ct. App. 2010).

In an aggravated assault case, three separate instructions given to the jury

were not error because they adequately informed the jury on the law of self-defense and that defendant was entitled to this defense if the evidence supported such. *Ellis v. State*, 956 So. 2d 1008, 2007 Miss. App. LEXIS 119 (Miss. Ct. App.), cert. dismissed, 973 So. 2d 244, 2007 Miss. LEXIS 687 (Miss. 2007).

Self-defense instruction was not improper because it unambiguously required the jury to find defendant not guilty if they concluded that she acted in self-defense. *Davis v. State*, 909 So. 2d 749, 2005 Miss. App. LEXIS 575 (Miss. Ct. App. 2005).

Trial court did not err in refusing jury instruction D-9, a self-defense instruction, because it was repetitious of instruction S-3 that was given by the trial court. *Clark v. State*, 2005 Miss. App. LEXIS 371 (Miss. Ct. App. June 7, 2005), sub. op., op. withdrawn, 928 So. 2d 192, 2006 Miss. App. LEXIS 135 (Miss. Ct. App. 2006).

Question was not whether the individual who was attacked was a victim, but whether he became a victim as a result of his own aggression or as a result of defendant's unjustified aggression against him. On that issue, the jury was properly instructed and defendant's request that the word "victim" be replaced with the individual's actual name in the self-defense instructions was properly rejected, as the jury was well aware that defendant had stabbed the "victim" and the use of that word did not prejudice defendant. *Roberts v. State*, 911 So. 2d 573, 2005 Miss. App. LEXIS 328 (Miss. Ct. App. 2005).

Trial court did not err in refusing defendant's proposed instruction in defendant's trial for simple assault on a law enforcement officer because the instruction was nothing more than an alternate method of stating the self-defense theory set out in another instruction already given. *Sheffield v. State*, 844 So. 2d 519, 2003 Miss. App. LEXIS 374 (Miss. Ct. App. 2003).

Jury instruction was proper where it paralleled statutory language of this section; therefore, jury could have believed all of defendants' story, but not found self-defense proper in this case where 3 people beat admittedly unarmed man. *Johnson v. State*, 512 So. 2d 1246, 1987 Miss. LEXIS 2703 (Miss.), cert. denied,

484 U.S. 968, 108 S. Ct. 462, 98 L. Ed. 2d 402, 1987 U.S. LEXIS 4990 (U.S. 1987), overruled in part, *Smith v. State*, 986 So. 2d 290, 2008 Miss. LEXIS 339 (Miss. 2008).

In an aggravated assault prosecution defended on M'Naghten insanity grounds, the giving of an instruction that voluntary intoxication was no defense could not have caused the jury to disregard defendant's insanity defense, where all of the instructions, when read together, clearly instructed the jury as to the state's burden in proving all elements of the crime and in proving defendant's sanity. *Norris v. State*, 490 So. 2d 839, 1986 Miss. LEXIS 2477 (Miss. 1986).

Reckless or negligent beliefs of defendant to charge of aggravated assault that defendant was acting in self defense in attacking and cutting victim at time when victim had back turned is not basis upon which defendant may be granted instruction on lesser included offense of simple assault. *Nobles v. State*, 464 So. 2d 1151, 1985 Miss. LEXIS 1919 (Miss. 1985).

The trial court properly refused defendant's instructions which contained inaccurate statements relative to the law of self-defense, and omitted the requirements that the defendant must have been in immediate danger, real or apparent, and that the intent to kill the defendant must have been manifested by some overt act on the part of the victim. *Yarber v. State*, 230 Miss. 746, 93 So. 2d 851, 1957 Miss. LEXIS 418 (Miss. 1957).

In a prosecution for murder, an instruction to the jury that even if the deceased attempted to have unnatural intercourse with the defendant, but the danger of accomplishment of the crime by the deceased was over and at a time when such danger was not imminent or impending the defendant tied and gagged the deceased, and if the jury finds robbery, then the crime was murder, was proper in presenting defendant's theory of self-defense and the state's theory of felony murder. *Burns v. State*, 228 Miss. 254, 87 So. 2d 681, 1956 Miss. LEXIS 510 (Miss. 1956).

Where accused, in prosecution for assault and battery, insulted other party who struck first blow, instruction of self-defense was error. *Wicker v. State*, 107

Miss. 690, 65 So. 885, 1914 Miss. LEXIS 133 (Miss. 1914).

An instruction on self-defense should not be modified by words “without fault in himself in bringing on the difficulty.” *Garner v. State*, 93 Miss. 843, 47 So. 500, 1908 Miss. LEXIS 148 (Miss. 1908).

26. — Lesser offense.

Defendant’s lesser-included offense instruction on simple domestic violence was properly rejected because there was evidence that the victim was strangled; and strangulation automatically fell under the offense of aggravated domestic violence. *Brown v. State*, 285 So. 3d 671, 2019 Miss. App. LEXIS 263 (Miss. Ct. App.), cert. denied, 284 So. 3d 753, 2019 Miss. LEXIS 438 (Miss. 2019), cert. denied, — So. 3d —, 2019 Miss. LEXIS 483 (Miss. 2019).

Circuit court did not err in refusing defendant’s lesser-included offense of simple assault instruction because no reasonable jury could conclude that the victim’s injuries were less than serious; the aftermath of the altercation between defendant and the victim left the victim confined to a wheelchair and unable to walk, eat on his own, or communicate. *Torrey v. State*, 229 So. 3d 156, 2017 Miss. App. LEXIS 107 (Miss. Ct. App. 2017).

Trial court properly denied defendant’s simple assault lesser-included-offense jury instruction because the evidence did not demonstrate negligence as defendant testified and argued at trial that defendant intentionally shot at the victim in self-defense because the victim had a gun and pointed it at defendant. *Taylor v. State*, 137 So. 3d 283, 2014 Miss. LEXIS 225 (Miss. 2014).

In a felonious child abuse case, because the child’s burns were not caused by a child exploring her environment, the doctor who treated her unequivocal opined that the burns were nonaccidental, the burns came from a hot, solid object, and no reasonable juror could find the child’s second-degree burns on nondominant fingers were not considered serious bodily harm, the trial court did not err in refusing to instruct the jury on the lesser-offense of simple assault. *Harris v. State*, 123 So. 3d 925, 2013 Miss. App. LEXIS 607 (Miss. Ct. App. 2013).

Trial court’s refusal to give a jury instruction on simple assault as a lesser included offense of aggravated assault was proper since: (1) defendant did not present sufficient evidence of negligence since if all of the shots that hit the victim were fired as a result of a struggle, then defendant acted in self-defense, which was inconsistent with negligence; (2) defendant’s testimony that he squeezed the trigger once but did not know if he shot the victim was too tenuous for a negligence finding; and (3) squeezing the trigger and hitting the victim caused serious bodily harm, which meant that the case was definitely an aggravated assault case. *Gilmore v. State*, 119 So. 3d 278, 2013 Miss. LEXIS 361 (Miss. 2013).

Because, in attempting to prove assault, the State introduced evidence that defendant began swinging at an officer while he was being arrested, and it would have been impossible for defendant to have committed simple assault on a law-enforcement officer without committing the crime of resisting arrest, the offense of resisting arrest was a lesser-included offense of the charged crime of simple assault, and the trial judge was authorized to grant the State’s request for a resisting-arrest instruction. *Edwards v. State*, 124 So. 3d 105, 2013 Miss. App. LEXIS 700 (Miss. Ct. App. 2013).

When defendant was charged with aggravated assault, pursuant to Miss. Code Ann. § 97-3-7(2)(b), a circuit court properly refused defendant’s request for a jury instruction on the lesser-included offense of simple assault, § 97-3-7(1)(a), because there was no evidentiary basis justifying an instruction on simple assault given the severity of the victim’s injuries and the extensive treatment required to repair those injuries; the fractures to the victim’s face required the insertion of 5 plates and 22 screws, and the victim’s broken jaw had to be wired shut for 2 weeks. *Jones v. State*, 64 So. 3d 1033, 2011 Miss. App. LEXIS 346 (Miss. Ct. App. 2011).

Had defendant presented testimony or any evidence that the victim’s injuries were not serious, then a simple assault instruction may have been warranted; however, defendant presented no such evidence, and the circuit court did not err in

determining that the severity of the victim's injuries would not have supported a conviction of simple assault. *Ames v. State*, 17 So. 3d 130, 2009 Miss. App. LEXIS 144 (Miss. Ct. App.), cert. denied, 17 So. 3d 99, 2009 Miss. LEXIS 433 (Miss. 2009).

Jury instruction as to simple assault was not warranted where no reasonable juror could find defendant guilty of simple assault against the law enforcement officer or that the incident was an accident; nothing in the record suggested that defendant did not knowingly or purposely pull a knife on the deputies. *Babb v. State*, 17 So. 3d 100, 2009 Miss. App. LEXIS 70 (Miss. Ct. App.), cert. denied, 17 So. 3d 99, 2009 Miss. LEXIS 440 (Miss. 2009).

In a case in which defendant was convicted of violating Miss. Code Ann. § 97-3-7(2)(b), the trial judge did not err by refusing to grant a simple assault jury instruction. Defendant contended that a lesser-included-offense instruction should have been given for the jury to consider simple assault, but the trial judge found that the evidence did not support simple assault. *Carter v. State*, 995 So. 2d 847, 2008 Miss. App. LEXIS 700 (Miss. Ct. App. 2008).

In an aggravated assault case, the trial court did not err in refusing a jury instruction on the lesser-included offense of simple assault as it was undisputed that defendant intentionally stabbed the victim, and there was no evidence that defendant acted negligently. *Ford v. State*, 975 So. 2d 859, 2008 Miss. LEXIS 102 (Miss. 2008).

Circuit court erred when it declined to instruct the jury on the lesser-included offense of simple assault where, pursuant to Miss. Code Ann. § 97-3-7(1)(a), viewing the testimony in a light most favorable to defendant, it was clear that, given the option, reasonable jurors could find defendant guilty of simple assault and not guilty of aggravated assault under Miss. Code Ann. § 97-3-7(2)(b). *Booze v. State*, 964 So. 2d 1218, 2007 Miss. App. LEXIS 624 (Miss. Ct. App. 2007).

Because defendant's actions clearly arose to an aggravated assault, the evidence did not support the giving of a lesser-included offense instruction on

simple assault; the evidence showed that defendant caused serious bodily injury under such circumstances manifesting extreme indifference to the value of human life. *Downs v. State*, 962 So. 2d 1255, 2007 Miss. LEXIS 444 (Miss. 2007).

In a case where defendant was charged with aggravated assault after he stabbed several victims during a drunken fight, he was not entitled to an instruction on simple assault because he yielded a dangerous weapon and intentionally struck at the victims; the case was distinguished from others where mere negligent use of a weapon was shown. *Lackie v. State*, 971 So. 2d 601, 2007 Miss. App. LEXIS 293 (Miss. Ct. App.), cert. denied, 973 So. 2d 244, 2007 Miss. LEXIS 683 (Miss. 2007).

In an aggravated assault case, a trial court did not err by failing to instruct the jury on several lesser included offenses, which included simple assault, simple domestic violence assault, and aggravated domestic violence, because they were not requested. *Ellis v. State*, 956 So. 2d 1008, 2007 Miss. App. LEXIS 119 (Miss. Ct. App.), cert. dismissed, 973 So. 2d 244, 2007 Miss. LEXIS 687 (Miss. 2007).

Lesser-included offense instruction was not warranted where the record contained no evidence which supported simple assault as no evidence was presented that showed the victim's injuries to be less than serious; given the severity and the extensive treatment necessary to repair the injuries, and the fact that the injuries were serious, a lesser-included offense instruction was not required. *Brown v. State*, 934 So. 2d 1039, 2006 Miss. App. LEXIS 540 (Miss. Ct. App. 2006).

Under simple assault under Miss. Code Ann. § 97-3-7(1)(b), defendant had to have acted negligently, but there was no evidence in the record that defendant acted negligently as the victim was stabbed six times, and defendant admitted that he swung at the victim with a knife; defendant claimed that he was acting in self-defense and a self-defense jury instruction was given, but defendant was not entitled to a lesser-included offense jury instruction on simple assault. *Grubbs v. State*, 956 So. 2d 932, 2006 Miss. App. LEXIS 379 (Miss. Ct. App. 2006), cert. denied, 957 So. 2d 1004, 2007 Miss. LEXIS 313 (Miss. 2007).

In an aggravated assault with a weapon case, Miss. Code Ann. § 97-3-7(2)(b), no reasonable juror could have believed that defendant was only guilty of simple assault under § 97-3-7(1)(a); thus, because the uncontradicted physical facts so overwhelmingly supported a finding of aggravated assault and rendered so unreasonable the suggestion that defendant might have been guilty only of simple assault, the trial court did not err in not instructing the jury on the lesser-included offense of simple assault. *Grubbs v. State*, 956 So. 2d 932, 2006 Miss. App. LEXIS 379 (Miss. Ct. App. 2006), cert. denied, 957 So. 2d 1004, 2007 Miss. LEXIS 313 (Miss. 2007).

Lesser-included simple assault instruction was proper because the record offered evidence in support of the defendant's theory that she had not wilfully caused bodily injury to the victim with a deadly weapon and the instruction clearly reflected the definition of simple assault as found in Miss. Code Ann. § 97-3-7(1). *Davis v. State*, 909 So. 2d 749, 2005 Miss. App. LEXIS 575 (Miss. Ct. App. 2005).

Evidence showed the assault to be intentional, not careless or negligent and defendant and his cohorts had purposefully inflicted serious injury to the victim by means of a tire tool and then proceeded to rob his business. Thus, the trial court did not err in denying defendant's request for a simple assault jury instruction. *Williams v. State*, 909 So. 2d 1233, 2005 Miss. App. LEXIS 89 (Miss. Ct. App. 2005).

Trial court did not err in refusing to instruct the jury on simple assault as the victim testified that defendant fondled her breast while on a three-wheeler, and defendant could not point to evidence in the record from which a jury could reasonably find him not guilty of sexual assault, and find him guilty of simple assault. *Ladnier v. State*, 878 So. 2d 926, 2004 Miss. LEXIS 623 (Miss. 2004).

In a sexual battery case, a trial court did not err in failing to instruct the jury on simple assault which was not a lesser-included offense; the element of "bodily injury" was missing from the sexual battery statute, Miss. Code Ann. § 97-3-95. *Seigfried v. State*, 869 So. 2d 1040, 2003 Miss. App. LEXIS 958 (Miss. Ct. App. 2003), cert. denied, 870 So. 2d 666, 2004 Miss. LEXIS 352 (Miss. 2004).

Defendant was not entitled to an instruction under Miss. Code Ann. § 97-3-7(1)(b), as the evidence indicated that defendant intentionally struck the victim; moreover defendant did not request the instruction at trial and the court was not required to offer it sua sponte. *Armstrong v. State*, 828 So. 2d 239, 2002 Miss. App. LEXIS 523 (Miss. Ct. App. 2002).

In a prosecution for aggravated assault, the court properly instructed the jury with regard to simple assault as a lesser included offense where the state presented a witness claiming there was serious bodily injury and the defense brought forth a witness that the injuries were not serious. *Odom v. State*, 767 So. 2d 242, 2000 Miss. App. LEXIS 151 (Miss. Ct. App. 2000).

In a prosecution for aggravated assault, the court properly refused to instruct the jury with regard to simple assault based upon negligent injury where the testimony was that the defendant intentionally shot the victim and the only issue was whether he or the victim shot first. *Reddix v. State*, 731 So. 2d 591, 1999 Miss. LEXIS 21 (Miss. 1999).

Even though victims' wounds were not very serious, defendant was not entitled to instruction on simple assault, as lesser included offense of aggravated assault, where defendant used gun during assault. *Hoops v. State*, 681 So. 2d 521, 1996 Miss. LEXIS 433 (Miss. 1996).

In prosecution for aggravated assault, defendant is entitled to a lesser included offense jury instruction for mayhem as long as there is some proof that shows him to be innocent of aggravated assault, but at same time only guilty of mayhem. *Hoops v. State*, 681 So. 2d 521, 1996 Miss. LEXIS 433 (Miss. 1996).

Defendant was not entitled to instruction on mayhem, as lesser included offense of aggravated assault, since same proof that established aggravated assault also established mayhem. *Hoops v. State*, 681 So. 2d 521, 1996 Miss. LEXIS 433 (Miss. 1996).

Aggravated assault defendant was not entitled to lesser included offense instruction on simple assault given that multiple stab wounds suffered by both victims were serious and life-threatening, and in light of absence of evidence that defendant was

merely negligent in handling knife; evidence precluded finding that injuries were negligently inflicted. *Jackson v. State*, 672 So. 2d 468, 1996 Miss. LEXIS 718 (Miss. 1996).

In a prosecution for simple assault upon a law enforcement officer, the trial court erred in failing to give an instruction on the lesser included offense of resisting arrest where a reasonable fact-finder could have concluded, based on the evidence presented, that the defendant resisted arrest, but had a reasonable doubt as to whether he "injured" the officer within the meaning of this section. *Murrell v. State*, 655 So. 2d 881, 1995 Miss. LEXIS 234 (Miss. 1995).

In a prosecution for felony child abuse arising from an infant's ingestion of glass slivers in her food, the evidence was insufficient to support an instruction on the lesser included offense of simple assault, since no reasonable juror could find that the glass slivers were not used in "such a manner as to cause serious bodily harm," and there was no evidence from which a juror could conclude that the infant accidentally ingested the glass. *Payton v. State*, 642 So. 2d 1328, 1994 Miss. LEXIS 442 (Miss. 1994).

In a prosecution for burglary of an inhabited dwelling, the defendant was not entitled to a lesser included offense instruction on the charge of simple assault where the evidence sufficiently supported a jury determination of the burglary charge, since simple assault is not a constituent offense of burglary of a dwelling. *Ross v. State*, 603 So. 2d 857, 1992 Miss. LEXIS 381 (Miss. 1992).

In a prosecution for aggravated assault under subsection (2) of this section, the defendant may not have the jury instructed on the lesser offense of simple assault under § 97-3-7(1) where the defendant wielded what was indisputably a deadly weapon and intentionally struck the victim, even if the injury inflicted was relatively slight. *Hutchinson v. State*, 594 So. 2d 17, 1992 Miss. LEXIS 45 (Miss. 1992).

In an assault prosecution, in which the defendant slashed the victim across the neck with a knife or a box cutter, the defendant was entitled to an instruction

on self-defense where there was evidence that the victim had struck the defendant with an ice pick. *Anderson v. State*, 571 So. 2d 961, 1990 Miss. LEXIS 717 (Miss. 1990).

In a prosecution for aggravated assault, the trial court erred in refusing to give a lesser included offense instruction on simple assault where the evidence could have brought the case within the statutory definition of simple assault, even though some of the evidence was contradicted and the jury was not required to believe any of the testimony presented; as long as the evidence "muddies the water enough," the defendant is entitled to the lesser included offense instruction. *Robinson v. State*, 571 So. 2d 275, 1990 Miss. LEXIS 720 (Miss. 1990).

In a prosecution for aggravated assault under subsection (2)(a) of this section, the defendant's use of a shot gun, which is a deadly weapon, during the alleged assault precluded his entitlement to an instruction authorizing a conviction of simple assault under subsection (1) of this section. *Hunt v. State*, 569 So. 2d 1200, 1990 Miss. LEXIS 671 (Miss. 1990).

In deciding whether lesser included offense instructions are to be given, trial courts must be mindful of the disparity in maximum punishments. However, even where there is a great disparity in maximum punishments between the offenses, the trial judge cannot indiscriminately give a lesser included offense instruction, nor can the trial judge give such an instruction on the basis of pure speculation; there must be some evidence regarding the lesser included offense. Thus, a rape defendant was entitled to instructions on the lesser included offenses of simple and aggravated assault where the defendant's side of the story warranted the instructions, particularly since the maximum penalty for simple assault carries a 6-month jail term in the county jail and a \$500 fine and the maximum penalty for aggravated assault carries a 20-year prison term in the penitentiary, while the defendant would be faced with the possibility of serving a prison term for the remainder of his life if convicted for rape. *Boyd v. State*, 557 So. 2d 1178, 1989 Miss. LEXIS 461 (Miss. 1989).

Aggravated assault defendant is not entitled to have instruction given on lesser included offense of simple assault where uncontradicted evidence has been introduced showing victim suffered serious bodily injuries and evidence shows beyond reasonable doubt that injuries were inflicted under circumstances manifesting extreme indifference to value of human life. *Harbin v. State*, 478 So. 2d 796, 1985 Miss. LEXIS 2261 (Miss. 1985).

Prisoner charged with aggravated assault arising from incident in which prisoner holds jail guard hostage while attempting to escape is entitled to instruction on lesser included offense of simple assault by physical menace. *Lee v. State*, 469 So. 2d 1225, 1985 Miss. LEXIS 1900 (Miss. 1985).

A conviction for aggravated assault on a fireman while acting within the scope of his duty would be reduced to a conviction for simple assault where evidence established that the defendant did not know that the victim of the assault was a fireman. *Morgan v. State*, 388 So. 2d 495, 1980 Miss. LEXIS 2114 (Miss. 1980).

27. —Defendant as witness.

In a prosecution where the defendant was the only witness in his defense on the facts of the case, any error in the court's instruction that the jury in determining what weight should be given to the testimony of any witness had the right to consider what interest the witness had in the results of the trial, was cured by an instruction for the defense directing the jury to consider defendant's testimony as that of any other witness, and not to arbitrarily ignore him, simply because he was a defendant in the case. *Reed v. State*, 237 Miss. 23, 112 So. 2d 533, 1959 Miss. LEXIS 445 (Miss. 1959).

In a prosecution for assault and battery with intent to kill, where the defendant was the only witness in his behalf on the facts of the case, instruction that if the jury had no other reason to disbelieve the defendant than the fact he was a defendant in the case, it was the jury's sworn duty to believe him, was more than the defendant was entitled to and has been condemned. *Reed v. State*, 237 Miss. 23, 112 So. 2d 533, 1959 Miss. LEXIS 445 (Miss. 1959).

Instruction that defendant is a competent witness in her own behalf, that her testimony is entitled to the same consideration as that of any other witness, and that it is jury's duty to believe every word she said while so testifying if the jury had no other reason to disbelieve her than that she is the defendant in the case, is improper as being confusing and on the weight of the testimony. *Coleman v. State*, 22 So. 2d 410 (Miss. 1945), overruled, *Flowers v. State*, 473 So. 2d 164, 1985 Miss. LEXIS 2140 (Miss. 1985).

28. Conviction of lesser crime.

Although the circuit court erred in finding defendant guilty of aggravated assault, because the jury inherently found defendant guilty of simple assault, and defendant conceded that he was guilty of simple assault, the matter was remanded to the circuit court so it could sentence defendant accordingly. *Snowden v. State*, 131 So. 3d 1251, 2014 Miss. App. LEXIS 59 (Miss. Ct. App. 2014).

When a jury found defendant guilty of resisting arrest, but acquitted him of the charge of aggravated assault on a police officer, the verdict was not necessarily inconsistent because, among other things, the record showed that defendant struck an officer in the chest when the officer tried to arrest defendant. *Chambers v. State*, 2007 Miss. App. LEXIS 108 (Miss. Ct. App. Feb. 27, 2007), op. withdrawn, sub. op., 973 So. 2d 266, 2007 Miss. App. LEXIS 692 (Miss. Ct. App. 2007).

Where appellant was charged with sexual battery, his defense attorney was not ineffective for allowing him to plead guilty of aggravated assault. Aggravated assault is a lesser crime than sexual battery and carries a lower maximum sentence. *Pearson v. State*, 906 So. 2d 788, 2004 Miss. App. LEXIS 1139 (Miss. Ct. App. 2004).

Assault with intent to rape under former § 2361 is sufficiently a lesser included constituent offense of forcible rape such that a plea-bargain-induced guilty plea thereto under an indictment charging forcible rape will withstand subsequent post-conviction attack. *Grayer v. State*, 519 So. 2d 438, 1988 Miss. LEXIS 52 (Miss. 1988).

Since the doctrine of collateral estoppel contemplates a prior adjudication of an issue by the trier of the facts, the doctrine did not require the court to decline a verdict of guilty of aggravated assault, returned along with a verdict of not guilty of attempted kidnapping, both charges arising from the same facts, since the 2 indictments had been consolidated and simultaneously submitted to the jury, and there had been no prior adjudication of any issue. *Johnson v. State*, 491 So. 2d 834, 1986 Miss. LEXIS 2510 (Miss. 1986).

The trial court did not err in refusing defendant's suggested instruction on simple assault, where there was no evidence that the wounds inflicted upon the victim were anything but serious, involving great risk of death. *Colburn v. State*, 431 So. 2d 1111, 1983 Miss. LEXIS 2609 (Miss. 1983).

Where there was ample evidence that the accused deliberately shot his victim for no apparent reason, and on trial the accused vigorously denied that he either pointed or aimed a gun at the victim, accused was correctly charged with, and convicted of, assault and battery with intent to kill, notwithstanding his contention that the conviction should have been for pointing and aiming a gun. *Wixon v. State*, 229 Miss. 430, 90 So. 2d 859, 1956 Miss. LEXIS 622 (Miss. 1956).

In a prosecution for assault with a deadly weapon with intent to kill and murder, evidence showing that defendant placed the shotgun on his lap pointing at another person was insufficient to sustain conviction for felony but was sufficient to support conviction for simple assault. *Washington v. State*, 222 Miss. 782, 77 So. 2d 260, 1955 Miss. LEXIS 663 (Miss. 1955).

When state's evidence is not sufficient to sustain conviction under this section [Code 1942, § 2011], but is sufficient to sustain charge of assault, supreme court is not authorized to discharge defendant, and judgment will be reversed and case remanded. *Craddock v. State*, 204 Miss. 606, 37 So. 2d 778, 1948 Miss. LEXIS 393 (Miss. 1948).

Where intent to murder was not shown, conviction for assault with intent to murder was remanded for sentence as in

simple assault. *Edgar v. State*, 202 Miss. 505, 32 So. 2d 441, 1947 Miss. LEXIS 307 (Miss. 1947).

Sentence of accused after indictment, trial, and conviction under the statute (Code 1942, § 2361) providing for punishment of one convicted of an assault with intent to forcibly ravish any female of previous chaste character, was not improper because accused could have been prosecuted and sentenced under this section [Code 1942, § 2011]. *Lee v. State*, 201 Miss. 423, 29 So. 2d 211, 1947 Miss. LEXIS 402 (Miss. 1947), rev'd, 332 U.S. 742, 68 S. Ct. 300, 92 L. Ed. 330, 1948 U.S. LEXIS 2619 (U.S. 1948).

Where evidence did not justify conviction under this section [Code 1942, § 2011], defective instruction authorizing conviction hereunder upon proof of a simple assault would not cause reversal of conviction for assault with intent to kill and murder, but conviction would be affirmed as a conviction for simple assault and battery and remanded for appropriate sentence. *Daniels v. State*, 196 Miss. 328, 17 So. 2d 793, 1944 Miss. LEXIS 196 (Miss. 1944); *Hamilton v. Federal Land Bank*, 175 Miss. 462, 167 So. 642, 1936 Miss. LEXIS 68 (Miss. 1936).

Conviction of assault and battery of defendant indicted for assault and battery with intent to kill whom the evidence proves to be guilty as charged, or innocent altogether, will be reversed. *Bailey v. State*, 93 Miss. 79, 46 So. 137, 1908 Miss. LEXIS 63 (Miss. 1908).

29. Sentence.

Attempted-murder statute does not violate the Eight Amendment; the difference in sentencing between the attempted-murder statute and the attempted aggravated assault statute does not violate the Eighth Amendment. *Pickett v. State*, 252 So. 3d 40, 2018 Miss. App. LEXIS 54 (Miss. Ct. App.), cert. denied, 250 So. 3d 1271, 2018 Miss. LEXIS 374 (Miss. 2018), cert. denied, — So. 3d —, 2018 Miss. LEXIS 376 (Miss. 2018).

Vacating of defendant's sentence and remand for resentencing was appropriate because defendant was improperly sentenced under a subsection not properly charged in the indictment. Defendant was

not on notice that defendant would be convicted and sentenced for simple assault on emergency medical personnel, an aggravating circumstance, but was on notice that defendant was being tried for simple assault on medical personnel. *Hawkins v. State*, 255 So. 3d 1264, 2018 Miss. LEXIS 431 (Miss. 2018).

Circuit court properly sentenced defendant to twenty years with five years suspended, followed by five years of post-release supervision, because it did not exceed the statutory maximum for aggravated assault, and the sentence was not grossly disproportionate to defendant's crime; *Darnell v. State*, 202 So. 3d 281, 2016 Miss. App. LEXIS 565 (Miss. Ct. App. 2016).

Applicant's third postconviction relief (PCR) motion based on the right to a sentencing jury was procedurally barred because it was capable of determination at the time of his sentencing; moreover, the claim was barred because it was raised in a second or successive PCR motion. The applicant was not exempt from the procedural bars because the sentence imposed was not illegal; even if the trial court did not specifically confirm on the record that the applicant did not want a sentencing jury, the sentence did not exceed the maximum statutory penalty for the crime of aggravated assault on an elderly victim. *Williams v. State*, 218 So. 3d 1190, 2016 Miss. App. LEXIS 148 (Miss. Ct. App. 2016), *aff'd*, 222 So. 3d 265, 2017 Miss. LEXIS 178 (Miss. 2017).

Defendant's sentence of six months in the custody of the Mississippi Department of Corrections (MDOC) for his simple-domestic-violence conviction was a clerical error. Defendant's sentence for this misdemeanor should have reflected that his imprisonment would be in the county jail and not under MDOC supervision. *Brown v. State*, 166 So. 3d 565, 2015 Miss. App. LEXIS 332 (Miss. Ct. App. 2015).

Inmate's ineffective assistance claim failed as: (1) the claim was time-barred under Miss. Code Ann. § 99-39-5(2); (2) the inmate had entered a best interests plea and did not show that but for counsel's errors, he would have insisted on going to trial; (3) the inmate did not deny that he was the driver of the vehicle or

that he injured the three victims; (4) with his attorney's help, he was able to enter a best interest plea to one of three aggravated assault charges, and his possible 60-year sentence under Miss. Code Ann. § 97-3-7(2)(a) was reduced to a possible 20-year sentence, of which 18 years and 10 months were post-release supervision; and (5) the inmate was ordered to serve the time he had served while awaiting sentencing, and the sentence effectively released him from prison immediately to start his post-release supervision. *Sims v. State*, 134 So. 3d 317, 2013 Miss. App. LEXIS 102 (Miss. Ct. App. 2013), *aff'd*, 134 So. 3d 300, 2014 Miss. LEXIS 161 (Miss. 2014).

In a case in which defendant appealed his conviction for violating Miss. Code Ann. § 97-3-7(2)(a), he unsuccessfully argued that his 15-year sentence was unreasonable. Since his sentence was within the statutory range of one year to 20 years provided for in § 97-3-7(2)(a), there was no basis for finding that it was excessive. *David v. State*, 29 So. 3d 129, 2010 Miss. App. LEXIS 112 (Miss. Ct. App. 2010).

Trial court did not err in dismissing an inmate's petition alleging that the Mississippi Department of Corrections improperly computed his discharge date and that he had to be released from prison because the inmate was not entitled to any earned-time credit, and his time had been properly computed; because Miss. Code Ann. § 99-19-81 clearly stated that a habitual offender's sentence would not be reduced, the inmate was required to serve the maximum term of imprisonment for his crime of aggravated assault of a law enforcement officer, which was thirty years' imprisonment, Miss. Code Ann. § 97-3-7(2), and was the sentence that the inmate received. *Lee v. Kelly*, 34 So. 3d 1203, 2010 Miss. App. LEXIS 75 (Miss. Ct. App. 2010).

Where a defendant pleaded guilty to aggravated assault under Miss. Code Ann. § 97-3-7(2) and armed robbery under Miss. Code Ann. § 97-3-79 and was sentenced to consecutive incarcerations of 30 years for the robbery and 10 years for the assault, the trial court properly (1) summarily dismissed the defendant's petition for postconviction relief from the sentence

without holding an evidentiary hearing because the defendant was aware that the trial court was not required to follow the State's recommended sentence, and the sentence imposed by the trial court was within statutory guidelines; or (2) finding that the defendant's plea was voluntary because the defendant had read and understood his guilty plea petition, which stated that the trial judge was not required to follow the State's sentencing recommendation. *Owens v. State*, 996 So. 2d 85, 2008 Miss. App. LEXIS 206 (Miss. Ct. App.), cert. denied, 999 So. 2d 374, 2008 Miss. LEXIS 685 (Miss. 2008), cert. denied, 556 U.S. 1212, 129 S. Ct. 2060, 173 L. Ed. 2d 1140, 2009 U.S. LEXIS 3181 (U.S. 2009).

Where defendant was convicted of aggravated assault after he and a cohort approached a home, shot two victims, and fled the scene, his sentence of twenty years' was within the statutory limitations set forth in Miss. Code Ann. § 97-3-7(2)(b). Defendant failed to prove that the sentence was unconstitutional, because it did not punish him for exercising his right to trial nor was the sentence disproportionate to his role in the crime. *Hughes v. State*, 983 So. 2d 270, 2008 Miss. LEXIS 153 (Miss.), cert. denied, 555 U.S. 1052, 129 S. Ct. 633, 172 L. Ed. 2d 620, 2008 U.S. LEXIS 8544 (U.S. 2008).

In an aggravated assault case, defendant's 17-year sentence did not violate her right to a trial by jury because it was not beyond the prescribed statutory maximum. Although 17 years was a severe sentence, it did not lead to an inference of "gross disproportionality"; aggravated assault with a deadly weapon was a serious, violent crime, and a sentence of 17 years did not meet the threshold requirement for Solem proportionality review. *Ford v. State*, 975 So. 2d 859, 2008 Miss. LEXIS 102 (Miss. 2008).

Defendant's sentence after she was convicted of aggravated assault was appropriate because it was not grossly disproportionate to the crime committed and the sentence of 15 years, with 10 to serve and five years of post-release supervision was well within the statutory guidelines set forth in Miss. Code Ann. § 97-3-7(2); additionally, the trial court noted that aggra-

vated assault was a serious crime and the trial court considered the fact that defendant had a relatively clean record and had been consistently employed. *White v. State*, 958 So. 2d 290, 2007 Miss. App. LEXIS 412 (Miss. Ct. App. 2007).

Motion for post-conviction relief was summarily dismissed since defendant, who was 65 years old and had no prior record, was unable to show that his sentences for burglary and aggravated assault, which were within the ranges in Miss. Code Ann. § 97-17-23 and Miss. Code Ann. § 97-3-7 were grossly disproportionate; he could have received 45 years if the maximum terms had been run consecutively, and the facts showed that he broke into a house wielding a pistol and beat a victim. *Denton v. State*, 955 So. 2d 398, 2007 Miss. App. LEXIS 283 (Miss. Ct. App. 2007).

Where appellant entered a plea of guilty to aggravated assault in violation of Miss. Code Ann. § 97-3-7(2), he was sentenced to 17 years in the custody of the Mississippi Department of Corrections, with 12 years to serve and five years suspended; as part of his sentence, he was also placed on five years of supervised probation upon his release. *Barnes v. State*, 949 So. 2d 879, 2007 Miss. App. LEXIS 70 (Miss. Ct. App. 2007).

Defendant's conviction for aggravated assault was affirmed as the evidence indicated that defendant went to his estranged wife's boyfriend's apartment, shot and killed the boyfriend, and shot the wife in the neck; the trial court did not err in admitting photographs of the crime scene as the evidence was relevant to the circumstances surrounding the crime. The two twenty-year consecutive sentences that were imposed for defendant's convictions for manslaughter and aggravated assault did not constitute cruel and unusual punishment. *Lewis v. State*, 905 So. 2d 729, 2004 Miss. App. LEXIS 1188 (Miss. Ct. App. 2004).

Probation under Miss. Code Ann. § 47-7-33 was a conditional term that was not part of the prison sentence and was therefore not subject to the totality of sentence concept found in Miss. Code Ann. § 47-7-34; defendant's five-year probation period would not be added to her original twenty-

year sentence for aggravated assault when calculating time to be served, and reinstating the full original sentence therefore would not violate the statutory maximum for her crime as set forth in Miss. Code Ann. § 97-3-7. *Miller v. State*, 879 So. 2d 1050, 2004 Miss. App. LEXIS 546 (Miss. Ct. App.), cert. denied, 887 So. 2d 183, 2004 Miss. LEXIS 1347 (Miss. 2004).

Where the statute did not give a minimum penalty for aggravated assault, the trial judge did not err in not telling the inmate what the minimum sentence was. *Dennis v. State*, 873 So. 2d 1045, 2004 Miss. App. LEXIS 452 (Miss. Ct. App. 2004).

Twenty-year maximum sentence imposed on 63-year-old defendant for aggravated assault was not cruel and unusual punishment; trial court was not required to impose a lesser sentence on the theory that the sentence amounted to a life sentence because that rule applied only to cases where the maximum sentence was a life sentence as imposed by a jury or a lesser term as imposed by a trial court and not where legislature has set a specific term of years as a possible sentence and allowed the trial court to impose that term. *Ray v. State*, 844 So. 2d 483, 2002 Miss. App. LEXIS 690 (Miss. Ct. App. 2002), cert. denied, 846 So. 2d 229, 2003 Miss. App. LEXIS 485 (Miss. Ct. App. 2003).

Statute specified no minimum sentence, where the statute specified no minimum number of years of imprisonment, the judge was not obliged to inform the defendant that no minimum sentence was provided, or that the minimum penalty he faced was zero. *Vance v. State*, 803 So. 2d 1265, 2002 Miss. App. LEXIS 14 (Miss. Ct. App. 2002).

There was no indication in the record that the trial judge enhanced the sentence of one defendant over the other, and the sentences were all well within the statutory limits for armed robbery, aggravated assault and accessory after the fact. *Birkley v. State*, 750 So. 2d 1245, 1999 Miss. LEXIS 370 (Miss. 1999).

Thirty-year sentence was not grossly disproportionate to crime consisting of two counts of aggravated assault; jury

found defendant guilty of shooting two people, apparently for no other reason than they were in rival street gang, and trial judge was statutorily empowered to sentence defendant to 20 years on each count. *Hoops v. State*, 681 So. 2d 521, 1996 Miss. LEXIS 433 (Miss. 1996).

The sentencing of a defendant under § 99-19-81, the habitual offender statute, to the 20-year maximum term for aggravated assault as set forth in subsection (2) of this section was not disproportionate to the crime charged and did not violate the Eighth Amendment where the defendant was convicted of severely bludgeoning the victim with an iron pipe; the statutory maximum penalty for aggravated assault is not grossly out of line with the maximum terms allowed for the commission of other violent crimes in Mississippi, and the maximum penalties imposed for aggravated assault in neighboring states are not profoundly different from those in Mississippi. *Fleming v. State*, 604 So. 2d 280, 1992 Miss. LEXIS 382 (Miss. 1992).

The trial court properly sentenced defendant for a felony following conviction for aggravated assault, notwithstanding the discretion given the court by this section for imprisonment in the county jail or penitentiary; the indictment charging defendant with having knowingly and purposely caused bodily injury to another "with a deadly weapon" clearly categorized the assault as an aggravated assault rather than a simple assault, even though the indictment did not use the word "feloniously". *Anthony v. State*, 349 So. 2d 1066, 1977 Miss. LEXIS 2203 (Miss. 1977).

In prosecution for felonious assault by cutting with knife, when jury finds defendant guilty, trial judge is justified in imposing maximum sentence when there are no mitigating circumstances, since jury has found by its verdict that state's testimony is true. *Ferrell v. State*, 208 Miss. 539, 45 So. 2d 127, 1950 Miss. LEXIS 272 (Miss. 1950).

30. — Excessive fine.

While the trial court properly convicted defendant of simple domestic violence against his daughter by throwing her down, it erred in imposing a fine of \$1,000

because the fine was double the amount allotted by the statute. *Lindley v. State*, 143 So. 3d 654, 2014 Miss. App. LEXIS 414 (Miss. Ct. App. 2014).

31. Domestic violence aggravated assault.

Evidence that defendant attacked his girlfriend with a box cutter was sufficient to support a charge of domestic violence aggravated assault, and the trial court did not err in denying defendant's motion for judgment notwithstanding the verdict. *Gainwell v. State*, 843 So. 2d 107, 2003 Miss. App. LEXIS 329 (Miss. Ct. App. 2003).

32. Miscellaneous.

A district court did not err by denying an inmate's 28 U.S.C.S. § 2255 motion since his conviction for aggravated assault under Miss. Code Ann. § 97-3-7(2) was an aggravated felony under the Armed Career Criminal Act in the aftermath of the *Johnson* decision. *United States v. Griffin*, 946 F.3d 759, 2020 U.S. App. LEXIS 480 (5th Cir. Miss.), cert. denied, — U.S. —, 208 L. Ed. 2d 55, 2020 U.S. LEXIS 4001 (U.S. 2020).

There was a factual basis for the aggravated assault charge, and therefore defendant's guilty plea was knowingly and voluntarily made, because the State alleged that defendant struck the victim with his vehicle and pinned her to the wall. *East-erling v. State*, 281 So. 3d 243, 2019 Miss. App. LEXIS 116 (Miss. Ct. App. 2019).

Indictment charging defendant of knowingly possessing firearm after having previously been convicted in court of misdemeanor crime of domestic violence was dismissed because use or attempted use or threatened use of physical force was not facially evident element of defendant's prior Mississippi domestic violence convictions. *United States v. Smith*, 41 F. Supp. 3d 530, 2014 U.S. Dist. LEXIS 114344 (N.D. Miss. 2014).

Defendants were properly convicted of aggravated assault because defendants did not fail to receive a fair and impartial trial due to juror misconduct. *James v. State*, 146 So. 3d 985, 2014 Miss. App. LEXIS 66 (Miss. Ct. App.), cert. denied, 146 So. 3d 981, 2014 Miss. LEXIS 463 (Miss. 2014).

Defendants were properly convicted of aggravated assault because the form of the verdict constituted an intelligent answer to the issues submitted to the jury and allowed the jury's intent to be understood in a reasonably clear manner. *James v. State*, 146 So. 3d 985, 2014 Miss. App. LEXIS 66 (Miss. Ct. App.), cert. denied, 146 So. 3d 981, 2014 Miss. LEXIS 463 (Miss. 2014).

Appellate counsel properly found that there were no arguable issues for appeal because defendant received proper notice of the aggravated-assault charge, he exercised his right to testify in his defense, he was granted a jury instruction on his theory of self-defense, his 12-year sentence was within the statutory minimum and maximum, and the jury's guilty verdict was not against the overwhelming weight of the evidence and was supported by sufficient evidence. *Moore v. State*, 119 So. 3d 1116, 2013 Miss. App. LEXIS 459 (Miss. Ct. App. 2013).

Defendant was not entitled to a new trial on an aggravated assault charge as, despite defendant's account to the contrary, the jury was entitled to believe the victim's detailed account to find that defendant purposely and knowingly shot the victim, that defendant was the aggressor, and that he did not act in self-defense, and certain facts in defendant's testimony were contradicted by two officers' testimonies. *Gilmore v. State*, 119 So. 3d 278, 2013 Miss. LEXIS 361 (Miss. 2013).

Defendant's constitutional right to confront his accusers and be present and sentencing were not violated when defendant was convicted and sentenced in absentia of felony third-offense domestic violence, Miss. Code Ann. § 97-3-7(3), because defendant voluntarily waived his sentence at trial and sentencing, pursuant to Miss. Code Ann. § 99-17-9, by willfully failing to attend; defendant spoke with his attorney the morning of trial and indicated he was attending but defendant never showed up. *Robinson v. State*, 66 So. 3d 198, 2011 Miss. App. LEXIS 396 (Miss. Ct. App. 2011).

Trial court did not err in denying an inmate's motion for post-conviction relief because the record contained sufficient evidence that the inmate pleaded guilty to

culpable-negligence manslaughter, Miss. Code Ann. § 97-3-47, and aggravated assault, Miss. Code Ann. § 97-3-7, with knowledge and understanding of the elements of each crime when the prosecutor's on-the-record statement reiterated the charging language in the indictment and evinced an accurate showing that the inmate was informed of the essential elements of the crimes; factual bases existed for the pleas because there was substantial evidence that the inmate committed the crimes, and through his plea petitions, the inmate was specifically informed of the statutory maximum and minimum punishment that each crime carried. *Williams v. State*, 31 So. 3d 69, 2010 Miss. App. LEXIS 46 (Miss. Ct. App. 2010).

In a divorce action, the chancellor's award of two pistols to the wife was improper because it appeared that 18 U.S.C.S. § 922(g)(9) made the wife's possession of a firearm under particular circumstances illegal, Miss. Code Ann. § 97-3-7(3). Thus, a remand to the chancellor was necessary for the reconsideration of the distribution of the firearms owned by the parties in light of 18 U.S.C.S. § 922(g)(9). *Smith v. Smith*, 994 So. 2d 882, 2008 Miss. App. LEXIS 680 (Miss. Ct. App. 2008).

Trial court did to err in denying a motion for a directed verdict, for a judgment notwithstanding the verdict, or for a new trial because while defendant may have offered evidence and testimony tending to show that the shooting was accidental, the State clearly presented evidence demonstrating that the shooting amounted to aggravated assault under Miss. Code Ann. § 97-3-7(2)(b). The State presented a 911 transcript showing that defendant was the aggressor and testimony showing that the victim was injured by a gunshot wound to the head. *Christian v. State*, 998 So. 2d 1019, 2008 Miss. App. LEXIS 516 (Miss. Ct. App. 2008).

Fact that a debtor was convicted of simple assault under Miss. Code Ann. § 97-3-7 did not preclude the debtor from challenging the claim of non-dischargeability under 11 U.S.C.S. § 523(a)(3) in a bankruptcy court proceeding. *Berry v. Vollbracht* (In re Vollbracht), 2008 Bankr. LEXIS 1044 (Bankr. N.D. Miss. Mar. 20, 2008).

Even if a verdict finding defendant guilty of resisting arrest was inconsistent with a verdict of not guilty of simple assault on a police officer, that inconsistency was not grounds for reversal as the evidence was sufficient to sustain the resisting arrest conviction; an officer testified that after defendant struck another officer in the chest, a "fierce struggle" ensued while officers attempted to place defendant in handcuffs. *Chambers v. State*, 973 So. 2d 266, 2007 Miss. App. LEXIS 692 (Miss. Ct. App.), cert. denied, 973 So. 2d 244, 2007 Miss. LEXIS 699 (Miss. 2007).

In an aggravated assault case, a motion for a new trial was not warranted because the guilty verdict was not against the overwhelming weight of the evidence where the jury heard the two versions of events relating to a shooting, including witnesses who helped the victim and defendant's alibi witness. *Ellison v. Landry*, 199 Miss. 161, 24 So. 2d 319, 1946 Miss. LEXIS 182 (Miss. 1946).

The concept of "self-help" in resisting an arrest should be limited to those situations where the arrest is in fact illegal and the arrestee and arrestee have reason to know that it is, or where the arrest is accompanied by excessive force; there is no right to resist an arrest based upon good faith reliance on a duly issued arrest warrant where the arrestee has no reasonable basis to conclude that the warrant was issued in bad faith. *Murrell v. State*, 655 So. 2d 881, 1995 Miss. LEXIS 234 (Miss. 1995).

A defendant did not have the right to resist an unlawful arrest where the arresting officers were acting in good faith on an unlawful warrant erroneously issued by a judge. *Murrell v. State*, 655 So. 2d 881, 1995 Miss. LEXIS 234 (Miss. 1995).

Section 45-6-3(c), which establishes the requirements for training of law enforcement officers who have been given traditional law enforcement duties, was not applicable in a prosecution for simple assault upon a law enforcement officer in which the defendant contended that the victim was not a "law enforcement officer" within the meaning of this section because he had not attended the training academy

as required by § 45-6-3(c). *Amerson v. State*, 648 So. 2d 58, 1994 Miss. LEXIS 596 (Miss. 1994).

A conviction for simple assault upon a law enforcement officer would stand even if the victim was not a "de jure officer" but was merely a "de facto officer" acting within the scope of his duties and under the color of appointment at the time of the offense. *Amerson v. State*, 648 So. 2d 58, 1994 Miss. LEXIS 596 (Miss. 1994).

A simple assault involving the shearing of the victim's hair was not a lesser included offense of an aggravated assault involving biting of the victim and stabbing her with a pen, since the offenses were separate and distinct even though they arose out of the same sequence of events, where the stabbing and biting took place while the defendant and the victim were on an interstate highway and the shearing took place after they returned to town to get scissors, so that there was a sufficient gap in time between the assaults to constitute separate offenses. *Simmons v. State*, 568 So. 2d 1192, 1990 Miss. LEXIS 605 (Miss. 1990).

The offenses of aggravated assault under this section and shooting into a dwelling house under § 97-37-29 did not constitute the "same offense" for double jeopardy purposes where at least 18 shots were fired into the house and the victim was not struck with all 18 shots; the 2 statutes require proof of different facts in that shooting into a dwelling house is not required to establish an aggravated assault, and neither injury nor attempt to injure is required to prove the offense of shooting into a dwelling house. *Shook v. State*, 552 So. 2d 841, 1989 Miss. LEXIS 449 (Miss. 1989).

Defendant was not denied right to a speedy trial where, although almost 7 years elapsed between his indictment on charges of murder and aggravated assault and his arraignment, substantially all of the delay was due to defendant's confinement in a state mental institution pursuant to court order, issued shortly after the indictment, finding defendant insane and not competent to stand trial, and trial was set in less than 6 weeks after the court was notified by institution's staff of defendant's competence to stand trial. *Smith v.*

State, 489 So. 2d 1389, 1986 Miss. LEXIS 2482 (Miss. 1986).

In a prosecution for aggravated assault under subsection (2) of this section, the district attorney's statements in his closing argument to the effect that the State did not have a burden to prove defendant guilty beyond all reasonable doubt and every reasonable doubt, as distinguished from beyond a doubt, did not constitute reversible error on the facts of the case. *Gray v. State*, 427 So. 2d 1363, 1983 Miss. LEXIS 2351 (Miss. 1983).

That accused in prosecution for felonious assault by cutting with knife was arraigned under indictment before he had employed counsel is not ground for reversal of case when accused did not ask court to delay arraignment until he could employ counsel nor claim that he would be unable to employ counsel and ask court to appoint one for him and defendant was well represented throughout trial by attorneys. *Ferrell v. State*, 208 Miss. 539, 45 So. 2d 127, 1950 Miss. LEXIS 272 (Miss. 1950).

Fact that judgment of conviction in prosecution for assault and battery with intent to kill and murder erroneously recites that case was tried by jury of twelve consisting of named juror and eleven others, named juror being member of regular jury panel for term but not in fact on this jury, will not be considered by supreme court on appeal when affidavits setting forth facts were filed long after motion for new trial had been overruled and after court term had adjourned, and matter was not presented to trial court for correction. *Craig v. State*, 208 Miss. 528, 44 So. 2d 860, 1950 Miss. LEXIS 270 (Miss. 1950).

Where jury returned verdict finding defendant guilty as charged but recommended the mercy of the court, trial court had the right to discard as surplusage that portion which said "but recommend the mercy of the court." *Craig v. State*, 208 Miss. 528, 44 So. 2d 860, 1950 Miss. LEXIS 270 (Miss. 1950).

Verdict of guilty of assault and battery "with intent to commit manslaughter" is a conviction of assault and battery only. *Ex parte Burden*, 92 Miss. 14, 45 So. 1, 1907 Miss. LEXIS 5 (Miss. 1907).

33. Plea.

Defendant was not entitled to post-con-

viction relief as to a guilty plea to aggravated assault of defendant's father-in-law because defendant's admission to intentionally shooting the victim established a sufficient factual basis. *Barton v. State*, — So. 3d —, 2020 Miss. App. LEXIS 59 (Miss. Ct. App. Feb. 25, 2020), cert. denied, — So. 3d —, 2020 Miss. LEXIS 421 (Miss. 2020).

Defendant was entitled to post-convic-

tion relief as to a guilty plea to aggravated assault of defendant's mother-in-law because the record did not reflect defendant's knowing, voluntary, or intelligent plea or a factual basis for the plea. *Barton v. State*, — So. 3d —, 2020 Miss. App. LEXIS 59 (Miss. Ct. App. Feb. 25, 2020), cert. denied, — So. 3d —, 2020 Miss. LEXIS 421 (Miss. 2020).

OPINIONS OF THE ATTORNEY GENERAL

Based on subsection (2) of this section, person convicted of crime of aggravated assault on law enforcement officer is disqualified from holding public office; therefore, if election officials find, as matter of fact, that potential candidate has been convicted of such crime, they could not legally allow person's name to be placed on ballot; in order for person with such conviction to again become eligible to hold public office, person must obtain full pardon from Governor. *Chaney*, Mar. 9, 1993, A.G. Op. #93-0119.

Violations of this section that are misdemeanors would be handled by justice, county or circuit courts, and offenders would be sentenced to county jail; legislature is speaking to those courts in Miss. Code Section 97-3-71. *Evans*, June 9, 1993, A.G. Op. #93-0296.

Argument has been advanced that this section, which is simple assault statute, by stating that offender may be punished by imprisonment in "county jail"; did not intend this language to mandate county jail when offender is convicted in municipal court of simple assault, which is offense against municipality not state; reading statute as a whole it appears that legislature was using phrase "county jail" as opposed to penitentiary to help distinguish misdemeanor punishments from felony punishments. *Evans*, June 9, 1993, A.G. Op. #93-0296.

"Family or household member", as that term is used in Sections 97-3-7 and 99-3-7, includes individuals who are married, were married, or who live together in a relationship, although not married; further, it is not limited to a blood relationship and can relate to an in-law relationship or other relatives of one spouse living

in the household; however, "boyfriend-girlfriend" (or any other variation of this) relationships are not included in the definition of "family or household member", unless the persons reside or resided together as spouses; finally, although not falling into the definition of "family or household member", if the individuals have a biological or legally adopted child between them, the relationship is also protected. *Carrubba*, Oct. 6, 2000, A.G. Op. #2000-0588.

Simple domestic violence as defined in subsection (3) of this section, is a crime against the person. Municipal courts may not utilize the provisions of § 99-15-26 (1) to non-adjudicate criminal defendants charged with and pleading guilty to the offense of simple assault or simple domestic violence. *Dawson*, Jan. 23, 2004, A.G. Op. 04-0019.

If an individual has two convictions for simple domestic violence, and within the five year time frame, commits an offense which would be an aggravated domestic, it is within the discretion of the prosecutor whether to seek prosecution for a third simple domestic or for a first aggravated domestic. *Garber*, Apr. 29, 2005, A.G. Op. 05-0205.

Under Section 97-3-7(4), any conviction of aggravated domestic violence is a felony, and as such is punishable in the same manner as a non-domestic aggravated assault conviction pursuant to Section 97-3-7(2). *Garber*, Apr. 29, 2005, A.G. Op. 05-0205.

There is no requirement that an individual be convicted of a "first" or "second" simple domestic violence before being charged with a felony third. It is sufficient that the offender have been convicted

twice of simple domestic violence within the five year time frame of when the third offense is charged. Garber, Apr. 29, 2005, A.G. Op. 05-0205.

If a person is granted bail by a municipal court on a charge of aggravated assault and while out on bail a justice court finds probable cause that the person has committed commercial burglary, the justice court should revoke bail for the aggravated assault charge and shall order the person detained, without bail, on the commercial burglary charge, pending trial on the aggravated assault charge. Turnage, June 26, 2006, A.G. Op. 06-0246.

The Court hearing a domestic violence charge could prohibit the defendant from possessing a handgun if, pursuant to Miss. Code Ann. § 93-21-11, the Court deems it necessary to protect the victim(s). Where a handgun was stolen from the defendant, recovered by a Police Department, and its return was requested by the defendant, the Department may ask the Court for such an order and if granted, may refuse to return the handgun to the defendant. Dawson, Jr., March 9, 2007, A.G. Op. #07-00101, 2007 Miss. AG LEXIS 89.

RESEARCH REFERENCES

ALR.

Acquittal on homicide charge as bar to subsequent prosecution for assault and battery or vice versa. 37 A.L.R.2d 1068.

Effect of failure or refusal of court, in robbery prosecution, to instruct on assault and battery. 58 A.L.R.2d 808.

Attempt to commit assault as criminal offense. 79 A.L.R.2d 597.

Fact that gun was unloaded as affecting criminal responsibility. 79 A.L.R.2d 1412.

Admissibility, in prosecution for assault or similar offense involving physical violence, of extent or effect of victim's injuries. 87 A.L.R.2d 926.

Intent to do physical harm as essential element of crime of assault with deadly or dangerous weapon. 92 A.L.R.2d 635.

Kicking as aggravated assault, or assault with dangerous or deadly weapon. 33 A.L.R.3d 922.

Use of set gun, trap, or similar device on defendant's own property. 47 A.L.R.3d 646.

Consent as defense to charge of criminal assault and battery. 58 A.L.R.3d 662.

Assault and battery: sexual nature of physical contact as aggravating offense. 63 A.L.R.3d 225.

Right to resist excessive force used in accomplishing lawful arrest. 77 A.L.R.3d 281.

Automobile as dangerous or deadly weapon within meaning of assault or battery statute. 89 A.L.R.3d 1026.

Assault: criminal liability as barring or mitigating recovery of punitive damages. 98 A.L.R.3d 870.

Criminal responsibility for physical measures undertaken in connection with treatment of mentally disordered patient. 99 A.L.R.3d 854.

Pocket or clasp knife as deadly or dangerous weapon for purposes of statute aggravating offenses such as assault, robbery, or homicide. 100 A.L.R.3d 287.

Constitutionality of assault and battery laws limited to protection of females only or which provide greater penalties for males than for females. 5 A.L.R.4th 708.

Dog as deadly or dangerous weapon for purposes of statutes aggravating offenses such as assault and robbery. 7 A.L.R.4th 607.

Walking cane as deadly or dangerous weapon for purpose of statutes aggravating offenses such as assault and robbery. 8 A.L.R.4th 842.

Single act affecting multiple victims as constituting multiple assaults or homicides. 8 A.L.R.4th 960.

Parts of the human body, other than feet, as deadly or dangerous weapons for purposes of statutes aggravating offenses such as assault and robbery. 8 A.L.R.4th 1268.

Sufficiency of evidence to establish criminal participation by individual involved in gang fight or assault. 24 A.L.R.4th 243.

Liability of hotel or motel operator for injury to guest resulting from assault by third party. 28 A.L.R.4th 80.

Fact that gun was unloaded as affecting criminal responsibility. 68 A.L.R.4th 507.

Criminal assault or battery statutes making attack on elderly person a special or aggravated offense. 73 A.L.R.4th 1123.

Double jeopardy: various acts of weapons violations as separate or continuing offense. 80 A.L.R.4th 631.

Fact that gun was broken, dismantled, or inoperable as affecting criminal responsibility under weapons statute. 81 A.L.R.4th 745.

Sufficiency of bodily injury to support charge of aggravated assault. 5 A.L.R.5th 243.

Validity and construction of "extreme indifference" murder statute. 7 A.L.R.5th 758.

Stationary object or attached fixture as deadly or dangerous weapon for purposes of statute aggravating offenses such as assault, robbery, or homicide. 8 A.L.R.5th 775.

Kicking as aggravated assault, or assault with dangerous or deadly weapon. 19 A.L.R.5th 823.

Excessiveness or adequacy of damages awarded for injuries to head or brain. 50 A.L.R.5th 1.

Attempt to commit assault as criminal offense. 93 A.L.R.5th 683.

Dog as deadly or dangerous weapon for purposes of statutes aggravating offenses such as assault and robbery. 124 A.L.R.5th 657.

Cigarette Lighter as Deadly or Dangerous Weapon. 22 A.L.R. 6th 533.

Parts of Human Body, other than Feet, as Deadly or Dangerous Weapons or Instrumentalities for Purposes of Statutes Aggravating Offenses such as Assault and Robbery. 67 A.L.R.6th 103.

What constitutes assault "resulting in serious bodily injury" within the special

maritime or territorial jurisdiction of the United States for purposes of 18 USCS § 113(f), providing punishment for such act. 55 A.L.R. Fed. 895.

Am. Jur.

6 Am. Jur. 2d, Assault and Battery §§ 1 et seq.

2A Am. Jur. Pl & Pr Forms (Rev), Assault and Battery, Forms 1 et seq. (complaint, petition, or declaration – allegation – guilty plea in prior criminal action for same assault); Form 31 et seq. (complaint, petition, or declaration – assault and battery – attack on pregnant woman – prenatal injury to child); Form 79.1 (complaint, petition, or declaration – assault and battery – attack with knife or other sharp object).

2A Am. Jur. Pl & Pr Forms, Rev, Arrest, Form 81.

3 Am. Jur. Trials, Preparing and Using Photographs in Criminal Cases § 12 (assault scene).

36 Am. Jur. Trials 241, Defending Assault and Battery Cases.

2 Am. Jur. Proof of Facts, Assault and Battery, Proofs 1-8.

1 Am. Jur. Proof of Facts 3d 613, Assault and Battery.

CJS.

6A C.J.S., Assault and Battery §§ 69 et seq.

Law Reviews.

1983 Mississippi Supreme Court Review: Reckless driving as aggravated assault. 54 Miss. L. J. 130, March, 1984.

Practice References.

Ronald L. Schoenberg, Criminal Law Deskbook (Matthew Bender).

§§ 97-3-9 and 97-3-11. Repealed.

Repealed by Laws, 1974, ch. 458, § 2, eff from and after July 1, 1974.

§ 97-3-9. [Codes, 1880, § 2983; 1892, § 968; 1906, § 1044; Hemingway's 1917, § 772; 1930, § 788; 1942, § 2012]

§ 97-3-11. [Codes, 1880, § 2984; 1892, § 969; 1906, § 1045; Hemingway's 1917, § 773; 1930, § 789; 1942, § 2013]

Editor's Notes — The substance of the above sections, as repealed by Section 2 of Chapter 458, Laws of 1974, has been incorporated in general terms in § 97-3-7, as

amended by Section 1 of Chapter 458, Laws of 1974.

Former § 97-3-9 was entitled: Assault and battery; while in possession of deadly weapons.

Former § 97-3-11 was entitled: Assault and battery; pointing, aiming, discharging a gun.

§ 97-3-13. False confinement; sending sane person to psychiatric hospital or institution.

Every person or officer who maliciously sends to or confines in a psychiatric hospital or institution or other place, any sane person as a person with mental illness, knowing the person to be sane, shall be guilty of a felony, and, on conviction, shall be punished by a fine of not more than Five Hundred Dollars (\$500.00), or by imprisonment in the Penitentiary not more than one (1) year, or in the county jail not more than six (6) months.

HISTORY: Codes, 1892, § 1316; 1906, § 1390; Hemingway's 1917, § 1133; 1930, § 1164; 1942, § 2407; Laws, 2008, ch. 442, § 32, eff from and after July 1, 2008.

Cross References — Criminal sanctions for unlawfully conspiring to commit an individual to a treatment facility, see § 41-21-107.

Imposition of standard state assessment in addition to all court imposed fines or other penalties for any felony violation, see § 99-19-73.

RESEARCH REFERENCES

ALR.

Validity of statutory provision for commitment to mental institution of one acquitted of crime on ground of insanity without formal determination of mental condition at time of acquittal. 50 A.L.R.3d 144.

Am. Jur.

40 Am. Jur. Proof of Facts 2d 81, False Imprisonment in Connection with Confinement in Nursing Home or Hospital.

§ 97-3-15. Homicide; justifiable homicide; use of defensive force; duty to retreat.

(1) The killing of a human being by the act, procurement or omission of another shall be justifiable in the following cases:

(a) When committed by public officers, or those acting by their aid and assistance, in obedience to any judgment of a competent court;

(b) When necessarily committed by public officers, or those acting by their command in their aid and assistance, in overcoming actual resistance to the execution of some legal process, or to the discharge of any other legal duty;

(c) When necessarily committed by public officers, or those acting by their command in their aid and assistance, in retaking any felon who has been rescued or has escaped;

(d) When necessarily committed by public officers, or those acting by their command in their aid and assistance, in arresting any felon fleeing from justice;

(e) When committed by any person in resisting any attempt unlawfully to kill such person or to commit any felony upon him, or upon or in any dwelling, in any occupied vehicle, in any place of business, in any place of employment or in the immediate premises thereof in which such person shall be;

(f) When committed in the lawful defense of one's own person or any other human being, where there shall be reasonable ground to apprehend a design to commit a felony or to do some great personal injury, and there shall be imminent danger of such design being accomplished;

(g) When necessarily committed in attempting by lawful ways and means to apprehend any person for any felony committed;

(h) When necessarily committed in lawfully suppressing any riot or in lawfully keeping and preserving the peace; and

(i) When necessarily committed in the performance of duty as a member of a church or place of worship security program as described in Section 45-9-171.

(2)(a) As used in subsection (1)(c) and (d) of this section, the term "when necessarily committed" means that a public officer or a person acting by or at the officer's command, aid or assistance is authorized to use such force as necessary in securing and detaining the felon offender, overcoming the offender's resistance, preventing the offender's escape, recapturing the offender if the offender escapes or in protecting himself or others from bodily harm; but such officer or person shall not be authorized to resort to deadly or dangerous means when to do so would be unreasonable under the circumstances. The public officer or person acting by or at the officer's command may act upon a reasonable apprehension of the surrounding circumstances; however, such officer or person shall not use excessive force or force that is greater than reasonably necessary in securing and detaining the offender, overcoming the offender's resistance, preventing the offender's escape, recapturing the offender if the offender escapes or in protecting himself or others from bodily harm.

(b) As used in subsection (1)(c) and (d) of this section the term "felon" shall include an offender who has been convicted of a felony and shall also include an offender who is in custody, or whose custody is being sought, on a charge or for an offense which is punishable, upon conviction, by death or confinement in the Penitentiary.

(c) As used in subsections (1)(e) and (3) of this section, "dwelling" means a building or conveyance of any kind that has a roof over it, whether the building or conveyance is temporary or permanent, mobile or immobile, including a tent, that is designed to be occupied by people lodging therein at night, including any attached porch.

(3) A person who uses defensive force shall be presumed to have reasonably feared imminent death or great bodily harm, or the commission of a felony upon him or another or upon his dwelling, or against a vehicle which he was occupying, or against his business or place of employment or the immediate premises of such business or place of employment, if the person against whom

the defensive force was used, was in the process of unlawfully and forcibly entering, or had unlawfully and forcibly entered, a dwelling, occupied vehicle, business, place of employment or the immediate premises thereof or if that person had unlawfully removed or was attempting to unlawfully remove another against the other person's will from that dwelling, occupied vehicle, business, place of employment or the immediate premises thereof and the person who used defensive force knew or had reason to believe that the forcible entry or unlawful and forcible act was occurring or had occurred. This presumption shall not apply if the person against whom defensive force was used has a right to be in or is a lawful resident or owner of the dwelling, vehicle, business, place of employment or the immediate premises thereof or is the lawful resident or owner of the dwelling, vehicle, business, place of employment or the immediate premises thereof or if the person who uses defensive force is engaged in unlawful activity or if the person is a law enforcement officer engaged in the performance of his official duties.

(4) A person who is not the initial aggressor and is not engaged in unlawful activity shall have no duty to retreat before using deadly force under subsection (1)(c) or (f) of this section if the person is in a place where the person has a right to be, and no finder of fact shall be permitted to consider the person's failure to retreat as evidence that the person's use of force was unnecessary, excessive or unreasonable.

(5)(a) The presumptions contained in subsection (3) of this section shall apply in civil cases in which self-defense or defense of another is claimed as a defense.

(b) The court shall award reasonable attorney's fees, court costs, compensation for loss of income, and all expenses incurred by the defendant in defense of any civil action brought by a plaintiff if the court finds that the defendant acted in accordance with subsection (1)(e) or (f) of this section. A defendant who has previously been adjudicated "not guilty" of any crime by reason of subsection (1)(e) or (f) of this section shall be immune from any civil action for damages arising from the same conduct.

HISTORY: Codes, Hutchinson's 1848, ch. 64, art. 12, Title 3 (2); 1857, ch. 64, art. 168; 1871, § 2631; 1880, § 2878; 1892, § 1152; 1906, § 1230; Hemingway's 1917, § 960; 1930, § 988; 1942, § 2218; Laws, 1983, ch. 382; Laws, 2006, ch. 492, § 1; Laws, 2016, ch. 421, § 4, eff from and after passage (approved Apr. 15, 2016).

Cross References — Excusable homicide, see § 97-3-17.

JUDICIAL DECISIONS

ANALYSIS

- | | |
|---------------------------------------|-----------------------------|
| 1. In general. | 5. —Evidence. |
| 2. Killing in seeking to arrest. | 6. —Question for jury. |
| 3. Killing in resisting unlawful act. | 7. Instructions; generally. |
| 4. Self-defense; generally. | 8. —Self-defense. |
| | 9. —Defense of others. |
| | 10. —Defense of property. |

11. —Justification.

1. In general.

Defendant believed the victim, her fiancée, slept with her daughter, but unfortunately for defendant, “needed killing” is not one of the legal justifications for homicide as set forth in the statute. *Wilson v. State*, 149 So. 3d 544, 2014 Miss. App. LEXIS 354 (Miss. Ct. App. 2014).

Where husband shot wife’s paramour and there was no claim of self-defense and evidence did not show that the deceased was about to commit a felony, this section [Code 1942, § 2218] was not applicable. *Carter v. State*, 221 Miss. 111, 72 So. 2d 231, 1954 Miss. LEXIS 518 (Miss. 1954).

2. Killing in seeking to arrest.

The killing of a person who is fleeing from arrest for felony is not justifiable, even when the arrest is under warrant, except when the arrest could not otherwise be made and in cases of arrest of desperate and dangerous criminals of a vicious type. *Hubbard v. State*, 202 Miss. 229, 30 So. 2d 901, 1947 Miss. LEXIS 263 (Miss. 1947).

A sheriff having reliable information that a felony had been committed at a house was not justified in concluding that there was probable cause to believe that the negroes who ran from the house when the sheriff and his posse approached the next morning, because they ran, had participated in the felony, or in pursuing such cause to the extreme of shooting, or shooting at, the fleeing negroes. *Hubbard v. State*, 202 Miss. 229, 30 So. 2d 901, 1947 Miss. LEXIS 263 (Miss. 1947).

Officer attempting to make unlawful arrest may plead self-defense. *Wilkinson v. State*, 143 Miss. 324, 108 So. 711, 1926 Miss. LEXIS 270 (Miss. 1926).

3. Killing in resisting unlawful act.

In his trial for murder of a police officer, defendant’s contention that the homicide was justifiable because he was resisting an unlawful arrest and reasonably believed himself to be in imminent danger of great bodily harm was not supported by the evidence, where the law officers had sufficient grounds to believe that fugitives for whom they had arrest warrants were

located in the house in which defendant was staying and fired gas into the house only after a reasonable time had elapsed following the announcements requesting the occupants to vacate the house; failure of the occupants to exit as requested demonstrated their refusal to cooperate with the arresting officers who had identified themselves and stated their purpose, and the officers were warranted in using reasonable force and means to execute the arrest warrants. *Norman v. State*, 302 So. 2d 254, 1974 Miss. LEXIS 1416 (Miss. 1974), cert. denied, 421 U.S. 966, 95 S. Ct. 1956, 44 L. Ed. 2d 453, 1975 U.S. LEXIS 1588 (U.S. 1975).

A girl’s escort had a right to intervene for the purpose of preventing further injury to his girl friend but he had no right to kill the assailant. *Fortenberry v. State*, 213 Miss. 116, 56 So. 2d 56, 1952 Miss. LEXIS 338 (Miss. 1952).

While malice aforethought is a necessary element in the crime of murder, it does not always follow therefrom that the existence of actual malice at the time of the slaying would necessarily have the effect of rendering a particular homicide a case of murder, since a person may be guilty only of manslaughter or justifiable homicide when slaying another even though the accused is mad and is bearing ill will toward his adversary at the time of the killing, if the act is done while resisting an attempt of the latter “to do any unlawful act, or after such attempt shall have failed,” if such anger or ill will is engendered by the particular circumstances of the unlawful act then being attempted, or the commission of which is then thwarted, and is nonexistent prior thereto, each case depending upon its own facts and circumstances. *Bangren v. State*, 196 Miss. 887, 17 So. 2d 599, 1944 Miss. LEXIS 264 (Miss. 1944), overruled, *Ferrell v. State*, 733 So. 2d 788, 1999 Miss. LEXIS 87 (Miss. 1999).

To constitute murder, the malice must precede the unlawful act which is being attempted or committed by the person killed, where the killing is done in resisting his attempt to do an unlawful act. *Bangren v. State*, 196 Miss. 887, 17 So. 2d 599, 1944 Miss. LEXIS 264 (Miss. 1944), overruled, *Ferrell v. State*, 733 So. 2d 788, 1999 Miss. LEXIS 87 (Miss. 1999).

Where killing took place while accused was allegedly ejecting decedent from her home after forbidden him to re-enter, the fact that the law was being violated in accused's habitation did not deny her the right to defend or protect it from unwarranted intrusions or trespasses as a home. *Bangren v. State*, 196 Miss. 887, 17 So. 2d 599, 1944 Miss. LEXIS 264 (Miss. 1944), overruled, *Ferrell v. State*, 733 So. 2d 788, 1999 Miss. LEXIS 87 (Miss. 1999).

Where the evidence showed that the decedent was shot and killed by accused in ejecting him from her home, while decedent was committing an unlawful act, a wilful and forbidden trespass, and accused did not shoot him pursuant to her alleged threat that if he came back to the house she would kill him, but because of what transpired after he re-entered the house, the trial court erred in not limiting the issue for the jury to the question of manslaughter or justifiable homicide, and conviction of murder must be reversed and case remanded for new trial. *Bangren v. State*, 196 Miss. 887, 17 So. 2d 599, 1944 Miss. LEXIS 264 (Miss. 1944), overruled, *Ferrell v. State*, 733 So. 2d 788, 1999 Miss. LEXIS 87 (Miss. 1999).

Evidence of killing of constable, when constable, armed with void search warrant, after search had been made, forcibly entered defendant's house without permission and without stating his purpose, held not to authorize conviction for crime higher than manslaughter. *Jones v. State*, 170 Miss. 581, 155 So. 430, 1934 Miss. LEXIS 176 (Miss. 1934).

Married woman's killing of deceased to prevent his re-entering her home and committing assault upon her held not to constitute murder. *Bowen v. State*, 164 Miss. 225, 144 So. 230, 1932 Miss. LEXIS 235 (Miss. 1932).

Person is entitled to defend home with force against unlawful entries and to prevent crimes from being committed therein. *Bowen v. State*, 164 Miss. 225, 144 So. 230, 1932 Miss. LEXIS 235 (Miss. 1932).

Defendant, who killed deceased while he was breaking into home to kill or injure defendant, not guilty of manslaughter. *Williams v. State*, 98 So. 242 (Miss. 1923).

4. Self-defense; generally.

Because the record reflected that suffi-

cient evidence was presented for a competent jury to find beyond a reasonable doubt that defendant was guilty of manslaughter and failed to act in reasonable self-defense, defense of others, or defense of his home, the circuit court did not err in denying defendant's motion for judgment notwithstanding the verdict. *Howell v. State*, 144 So. 3d 211, 2014 Miss. App. LEXIS 424 (Miss. Ct. App. 2014).

In a simple assault case, there was no error in a refusal to apply the Castle Doctrine because a grandmother was within her right to retrieve a child from defendant's car after a scheduled visitation. *Matthews v. City of Madison*, 143 So. 3d 571, 2014 Miss. LEXIS 373 (Miss. 2014).

Application of the presumption for the Castle Doctrine does not depend on the existence of reasonable fear in the defendant; rather, the presumption applies if one of the circumstances is met. *Matthews v. City of Madison*, 143 So. 3d 571, 2014 Miss. LEXIS 373 (Miss. 2014).

Court rejected defendant's claim of ineffective assistance of counsel; because the defense was that defendant killed the victim in self-defense, counsel's statement conceding that defendant killed the victim was a tactical decision. *Ray v. State*, 27 So. 3d 416, 2009 Miss. App. LEXIS 496 (Miss. Ct. App. 2009), cert. denied, 27 So. 3d 404, 2010 Miss. LEXIS 61 (Miss. 2010).

Where defendant was convicted for killing his former girlfriend, given his testimony that her male friend had previously threatened him with a gun, whether or not the male friend owned a gun at the time of the alleged threats was relevant because it tended to increase or decrease, however minimally, the probability of the truth of defendant's testimony supporting his defense of self-defense. Therefore, the trial court abused its discretion when it prohibited the question on the male friend's prior gun ownership, even though same was ultimately found to constitute harmless error in the case at bar. *Raiford v. State*, 907 So. 2d 998, 2005 Miss. App. LEXIS 279 (Miss. Ct. App. 2005).

Where individual is unjustifiably attacked by larger and unarmed person, is incapable of coping with that person in physical confrontation, and reasonably

perceives that she will receive serious and great bodily injuries as result, that individual is justified in killing her attacker with a deadly weapon. *Manuel v. State*, 667 So. 2d 590, 1995 Miss. LEXIS 591 (Miss. 1995).

Trial court properly refuses self defense instruction in homicide case in which uncontroverted testimony is that victim was asleep and had been asleep approximately 30 minutes at time victim was shot and killed. *Merrill v. State*, 482 So. 2d 1147, 1986 Miss. LEXIS 2369 (Miss. 1986).

Failure of district attorney to produce statement of homicide defendant for inspection and use by defendant and defendant's counsel does not prejudice defendant where statement, made to deputy sheriff, admitting killing of deceased, is not admission of guilt or inconsistent with defendant's plea of self defense, and circumstances surrounding statement do not indicate that defendant was fleeing or acting in manner inconsistent with defense. *Buckhalter v. State*, 480 So. 2d 1128, 1985 Miss. LEXIS 2395 (Miss. 1985).

In an action for damages which arose when the decedent was shot and killed by a deputy sheriff, the killing would be justifiable under the provisions of the justifiable homicide statute where it was done in self-defense; the shooting was also necessary under the circumstances in order to preserve the peace and to apprehend the decedent, who had fired two rifles at the officers while resisting arrest. *Coghlan v. Phillips*, 447 F. Supp. 21, 1977 U.S. Dist. LEXIS 16951 (S.D. Miss. 1977), *aff'd*, 567 F.2d 652, 1978 U.S. App. LEXIS 12668 (5th Cir. Miss. 1978).

In a homicide prosecution, in order to justify a contention of self-defense, the record must disclose that the defendant had a reasonable apprehension of a design or plan on the part of the deceased to kill him or to do great bodily harm, and further that there was imminent danger of such design being accomplished; the mere apprehension that some minor battery might be committed upon the defendant is not sufficient. *Stennis v. State*, 234 So. 2d 611, 1970 Miss. LEXIS 1411 (Miss. 1970).

Where the defendant turned himself over to a constable immediately after

shooting the decedent, and was found at the time to be suffering from numerous injuries including a broken jaw, and where the defendant was smaller and older than the decedent and had long been afflicted with a disabling heart disease, slight variances in the defendant's story as told to officers and as given on the witness stand, and the fact that the room where the shooting occurred showed few signs of a violent scuffle, were insufficient to overcome the presumption of innocence, and the defendant was entitled to a peremptory instruction of acquittal. *Cassidy v. State*, 233 So. 2d 122, 1970 Miss. LEXIS 1650 (Miss. 1970).

One may be found guilty of murder notwithstanding his plea of self-defense, where he was the aggressor in the fatal encounter. *Spearman v. State*, 237 Miss. 853, 116 So. 2d 823, 1960 Miss. LEXIS 255 (Miss. 1960).

In order to justify or excuse the taking of human life in self-defense, the danger of peril, loss of life or the infliction of serious bodily harm must be, or appear to be, impending and imminent so urgent and pressing that it is necessary for him to kill in order to save himself. *Pitts v. State*, 211 Miss. 268, 51 So. 2d 448, 1951 Miss. LEXIS 354 (Miss. 1951), *overruled*, *Hudson v. State*, 295 So. 2d 766, 1974 Miss. LEXIS 1521 (Miss. 1974).

To justify a killing in self-defense the defendant must have believed, and had good reason to believe, that at the time he was in danger of the loss of his life, or great bodily harm at the hands of the deceased. *Spivey v. State*, 47 So. 2d 855 (Miss. 1950).

The phrase "reasonable ground to apprehend," as used in this section [Code 1942, § 2218], implies apparent danger. *Bell v. State*, 207 Miss. 518, 42 So. 2d 728, 1949 Miss. LEXIS 360 (Miss. 1949).

To justify a homicide as self-defense, the danger need not be actual, but only reasonably apparent and imminent so as to raise a reasonable doubt of guilt; the defendant is not required to prove that he acted in justifiable self-defense. *Scott v. State*, 203 Miss. 349, 34 So. 2d 718, 1948 Miss. LEXIS 276 (Miss. 1948).

The phrase "reasonable ground to apprehend" implies apparent danger, fear or

anticipation. *Dillon v. State*, 196 Miss. 625, 18 So. 2d 454, 1944 Miss. LEXIS 243 (Miss. 1944).

In homicide prosecution for inflicting fatal wound while undertaking to arrest victim, wherein defendant invoked defense that he acted in necessary self-defense, nature of the instrument employed, whether a pistol or blackjack, both of which defendant had, was immaterial, since the important issue was the justification of the means employed. *Howard v. State*, 18 So. 2d 148 (Miss. 1944).

Homicide not justified by mere knowledge of threat. *James v. State*, 139 Miss. 521, 104 So. 301, 1925 Miss. LEXIS 169 (Miss. 1925).

There is little practical difference in the meaning of the statutory words "reasonable ground to apprehend" and the words "good reason to believe." *Matthews v. State*, 108 Miss. 72, 66 So. 325, 1914 Miss. LEXIS 170 (Miss. 1914).

Great bodily harm justifying killing of human being does not mean mere bruises inflicted by hands and fists, though the party inflicting is the stronger of the two persons. *Waldrop v. State*, 98 Miss. 567, 54 So. 66, 1910 Miss. LEXIS 95 (Miss. 1910).

Defendant held justified in using a deadly weapon to protect himself, where deceased was a much larger and stronger man and defendant was liable to receive great bodily injury at his hands, although deceased was unarmed. *Hill v. State*, 94 Miss. 391, 49 So. 145, 1908 Miss. LEXIS 59 (Miss. 1908).

Defendant may plead self-defense although following a fight he armed himself and sought his former adversary intending to kill him, where the latter fired first. *Garner v. State*, 93 Miss. 843, 47 So. 500, 1908 Miss. LEXIS 148 (Miss. 1908).

5. —Evidence.

Circuit court properly denied defendant's motions for a judgment notwithstanding the verdict and for a new trial because it gave all the instructions defendant proposed, defendant made no objection to any of the instructions the State proposed, and there was evidence directly contradicting defendant's claim of self-defense where the evidence showed that when the victim arrived at defendant's

house, defendant came out holding his shotgun, which he pointed at the unarmed victim, defendant did not tell the victim to leave, the victim had not threatened defendant either before arriving or at the time of the shooting, and defendant's testimony was contradicted by the evidence. *Ashmore v. State*, — So. 3d —, 2020 Miss. App. LEXIS 528 (Miss. Ct. App. Sept. 15, 2020).

Defendant was entitled to a new trial because counsel provided ineffective assistance by failing to so move as (1) there was no strategic reason for failing to so move, and (2) it was reasonably probable the motion would have been granted, since defendant had a right to be where defendant was, the victim was an immediate aggressor by forcibly entering a dwelling, and defendant engaged in no unlawful activity, so defendant had no duty to retreat. *Woods v. State*, 242 So. 3d 47, 2018 Miss. LEXIS 85 (Miss. 2018).

State's motions in limine were properly granted as self defense or defense of another was not available to defendant as a defense because defendant approached the unarmed victim from behind, began yelling at him, and shot him while he had his arms in the air; there was no overt act at the time defendant shot the victim that could indicate danger of death or great bodily harm at the moment; and defendant's mother was not even on the premises; thus, when defendant shot the victim, neither he nor his mother was in any imminent danger. *Wells v. State*, 233 So. 3d 279, 2017 Miss. LEXIS 409 (Miss. 2017).

Defendant was properly convicted of depraved-heart murder because the evidence was sufficient for a rational jury to find beyond a reasonable doubt that she shot the victim with a depraved heart to kill him and not in self-defense; the victim was unarmed at the time defendant shot and killed him, and defendant admitted she shot the victim at least three times. *Swanagan v. State*, 229 So. 3d 698, 2017 Miss. LEXIS 191 (Miss. 2017).

Defendant was not entitled to a new trial because the jury did not find that defendant acted in self-defense or that the Castle Doctrine applied in that, although defendant did not have a duty to retreat

before using defensive force, as defendant was in defendant's auto shop and was not the immediate provoker and aggressor, the victim, did not enter the garage unlawfully or forcibly. Furthermore, it was for the jury to determine whether the victim unlawfully or forcibly entered defendant's inner office, where the shooting occurred. *Flynt v. State*, 183 So. 3d 1, 2015 Miss. LEXIS 532 (Miss. 2015).

Evidence supported defendant's conviction for deliberate-design murder because defendant initiated an altercation when an employee of a power utility company came to defendant's home to turn off the power, used a deadly weapon to shoot and kill the employee, and hid the employee's body. Defendant failed to show that defendant acted in self-defense as defendant acted without any threat or provocation from the unarmed employee. *Davis v. State*, 165 So. 3d 537, 2015 Miss. App. LEXIS 297 (Miss. Ct. App. 2015).

Evidence was sufficient to support a conviction for deliberate design murder where the State put on evidence that placed a reasonable doubt regarding defendant's self-defense claim; there were no signs of a struggle or altercation, other than the shooting, and defendant shot the victim four times in the back. *Davis v. State*, 158 So. 3d 1190, 2015 Miss. App. LEXIS 63 (Miss. Ct. App. 2015).

Circuit court properly denied defendant's motion for a judgment notwithstanding the verdict based on justifiable homicide where various witnesses for the State testified that the victim was not known to carry a gun, that they saw no weapon with him at the Texaco, and that the victim appeared to be the one defending himself during the altercation, and the jury further heard testimony from the State's witnesses that defendant behaved aggressively toward the victim, hitting him and eventually firing two shots at him. *Tillis v. State*, 176 So. 3d 37, 2014 Miss. App. LEXIS 446 (Miss. Ct. App. 2014), cert. denied, 178 So. 3d 333, 2015 Miss. LEXIS 528 (Miss. 2015).

Defendant was not entitled to the castle-doctrine presumption on his claim of self-defense in a prosecution in which he was convicted of manslaughter because there was conflicting evidence as to

whether the victim's daughter allowed the victim into her home or not. *Hammond v. State*, 119 So. 3d 1074, 2013 Miss. App. LEXIS 29 (Miss. Ct. App.), cert. denied, 119 So. 3d 328, 2013 Miss. LEXIS 430 (Miss. 2013).

Evidence was sufficient to convict defendant of simple assault and the verdict was not against the weight of the evidence because defendant presented no evidence that he feared imminent death or great bodily harm to himself or to his daughter justifying the use of force; defendant pinned the victim in the door of his vehicle; and the victim testified that she called out in pain several times and had bruises as a result of the incident. *Matthews v. City of Madison*, 143 So. 3d 579, 2013 Miss. App. LEXIS 611 (Miss. Ct. App. 2013), aff'd, 143 So. 3d 571, 2014 Miss. LEXIS 373 (Miss. 2014).

There was sufficient evidence to convict defendant of manslaughter in violation of Miss. Code Ann. § 97-3-35 because the State put on evidence tending to show that defendant had a deliberate design to kill the victim, and there was corroborated testimony that the victim was neither confronting nor threatening defendant at the time he was shot. *Vaughn v. State*, 111 So. 3d 1289, 2013 Miss. App. LEXIS 225 (Miss. Ct. App. 2013).

Evidence supported defendant's convictions for two counts of murder, under Miss. Code Ann. § 97-3-19, including that defendant was not acting in necessary self-defense, because two eyewitnesses testified that defendant shot the victims in a bar and a forensic pathologist testified as to the nature of the victims' wounds. *Copple v. State*, 117 So. 3d 651, 2013 Miss. App. LEXIS 421 (Miss. Ct. App. 2013).

Defendant's manslaughter conviction, pursuant to Miss. Code Ann. § 97-3-35, was supported by sufficient evidence because both versions of the shooting in evidence at trial supported the conclusion that defendant's use of deadly force was either unnecessary or premature and was not exercised in necessary self-defense, as defined in Miss. Code Ann. § 97-3-15(f). *Pruitt v. State*, 28 So. 3d 585, 2010 Miss. LEXIS 44 (Miss. 2010).

Verdict of murder under Miss. Code Ann. § 97-3-19 was not against the over-

whelming weight of the evidence as the testimony presented a factual dispute for the jury's resolution and the jury found certain testimony to be credible and defendant's attempts to establish a self-defense theory to be contradictory; although defendant cited to Miss. Code Ann. § 97-3-31, which provided for a manslaughter conviction when one killed another while resisting a felony, there was conflicting testimony as to whether the victim was attempting to commit a felony, and although defendant also cited to Miss. Code Ann. § 97-3-35 and claimed the evidence supported a heat of passion manslaughter conviction, there was no evidence that defendant was acting in a state of violent and uncontrollable rage and he only attempted to show that he was afraid of the victim and acted in self-defense. *Ray v. State*, 27 So. 3d 416, 2009 Miss. App. LEXIS 496 (Miss. Ct. App. 2009), cert. denied, 27 So. 3d 404, 2010 Miss. LEXIS 61 (Miss. 2010).

Defendant's conviction for manslaughter was proper because it was up to the jury to determine whether defendant acted reasonably in necessary self-defense when he shot the victim in the head. The jury could have determined that defendant did not act in necessary self-defense because, at that time, the victim was on the floor and did not present a reasonable threat to defendant's life. *Rogers v. State*, 994 So. 2d 792, 2008 Miss. App. LEXIS 170 (Miss. Ct. App.), cert. denied, 998 So. 2d 1010, 2008 Miss. LEXIS 668 (Miss. 2008).

Two defendants' convictions for depraved-heart murder were appropriate because there was sufficient evidence that the first defendant acted without authority of law since there was testimony that the victim made no physical or verbal threats against the second defendant, Miss. Code Ann. § 97-3-15(1)(f); witnesses also did not see the victim brandish his knife against that defendant. *McDowell v. State*, 984 So. 2d 1003, 2007 Miss. App. LEXIS 669 (Miss. Ct. App. 2007), cert. denied, 984 So. 2d 277, 2008 Miss. LEXIS 328 (Miss. 2008).

Sufficient evidence was adduced at trial to support a finding that defendant's murder of the victim was not done in self-

defense, even though defendant testified that the victim had previously choked defendant, to the point that defendant felt that he was going to die; the evidence was sufficient for a reasonable jury to find defendant guilty of manslaughter. *Harris v. State*, 937 So. 2d 474, 2006 Miss. App. LEXIS 644 (Miss. Ct. App. 2006).

Defendant's murder conviction was proper where defendant's argument that a reasonable jury could only have found that he acted in self-defense was without merit because the evidence was uncontradicted that the victim was in fact unarmed, and no one other than defendant saw the victim reach for a weapon before defendant shot him. *Ables v. State*, 850 So. 2d 172, 2003 Miss. App. LEXIS 635 (Miss. Ct. App. 2003).

Evidence supported the jury's finding of insufficient evidence of self-defense, notwithstanding that the victim had very recently beaten the defendant (his girlfriend) and that he was advancing on her at the time she shot him, where the defendant had left the scene of the altercation, armed herself, and then returned to confront the victim. *Wade v. State*, 724 So. 2d 1007, 1998 Miss. App. LEXIS 1043 (Miss. Ct. App. 1998), aff'd, 748 So. 2d 771, 1999 Miss. LEXIS 328 (Miss. 1999).

During a murder prosecution arising from the shooting death of the defendant's wife, the trial erred when it excluded evidence of the wife's prior threats with a butcher knife which she had made toward the defendant 2 weeks before her death, where the defendant claimed self-defense, since the evidence was relevant on the issue of the defendant's state of mind at the time of the shooting and on the issue of whether the victim may have been the initial aggressor. *Heidel v. State*, 587 So. 2d 835, 1991 Miss. LEXIS 646 (Miss. 1991).

Prosecuting examination may examine defendant in manslaughter prosecution who raises defenses of justifiable homicide by reason of self-defense as well as excusable homicide by reason of accident or misfortune regarding why defendant did not back off or flee when deceased pulled knife on defendant where jury is specifically instructed that defendant is under no duty to flee but rather has right to

stand ground. *Burge v. State*, 472 So. 2d 392, 1985 Miss. LEXIS 2129 (Miss. 1985).

Defendant's testimony on events at scene of killing is not such persuasive evidence of self-defense as to preclude jury verdict of anything but not guilty where evidence shows that defendant entered scene of crime with loaded gun, no weapon was found on deceased, and defendant's version of events is disputed by other witnesses and photographs. *Kelly v. State*, 463 So. 2d 1070, 1985 Miss. LEXIS 1878 (Miss. 1985).

Even if the deceased had been physically capable of inflicting serious bodily injuries upon the defendant with his hands and his feet, such fact alone was inadequate to justify the defendant's use of a deadly weapon in a homicide case. *Stennis v. State*, 234 So. 2d 611, 1970 Miss. LEXIS 1411 (Miss. 1970).

Accused's uncontradicted testimony that after he was awakened in the early morning hours by the noise of someone breaking into his home, he seized his gun and went to the back of the house where he saw the form of a man, and upon inquiring who it was, the man cursed him and continued to advance, so that accused, apprehending that the man was about to do him some great bodily harm, then fired in defense of his own life, being reasonable, under the circumstances, it must be accepted as true, and accused was entitled to a peremptory instruction. *Lee v. State*, 232 Miss. 717, 100 So. 2d 358, 1958 Miss. LEXIS 320 (Miss. 1958).

Evidence that, at the time the accused shot and killed the deceased, the deceased was pursuing the accused with pistol in hand and threatening to kill him, failed to sustain a manslaughter conviction. *Pickens v. State*, 229 Miss. 409, 90 So. 2d 852, 1956 Miss. LEXIS 619 (Miss. 1956).

Defendant is not required to prove that he acted in justifiable self-defense, but only that he raise a reasonable doubt of his guilt of the charge against him. *Bell v. State*, 207 Miss. 518, 42 So. 2d 728, 1949 Miss. LEXIS 360 (Miss. 1949).

In homicide prosecution defendant's explanation that he acted in self-defense, not contradicted directly, or by fair inference, must be accepted as true. *Bell v. State*, 207 Miss. 518, 42 So. 2d 728, 1949 Miss. LEXIS 360 (Miss. 1949).

Evidence that accused left his employment because of threats of plantation manager against his life and because of his terror of such manager who habitually carried a pistol, that accused thereafter kept out of manager's way until the day preceding the homicide, when manager was chasing and searching for accused during that day and night, finally coming upon accused in a house where accused had sought refuge, and accused, finding he could not escape, shot and killed the manager, although manager had not drawn his pistol, constituted circumstances justifying accused in reasonably believing he actually had no mode of escape except to take the life of the manager and substantiated his plea of self-defense. *Bell v. State*, 207 Miss. 518, 42 So. 2d 728, 1949 Miss. LEXIS 360 (Miss. 1949).

When defendant is the only eyewitness to homicide, her version, if reasonable, must be accepted as true, unless substantially contradicted in material particulars by creditable witnesses for state, or by physical facts or by facts of common knowledge, and when such evidence shows that the defendant acted upon what then reasonably appeared to be necessary for protection of her life, verdict should be directed in favor of defendant. *Lomax v. State*, 205 Miss. 635, 39 So. 2d 267, 1949 Miss. LEXIS 453 (Miss. 1949).

Accused in homicide case, in order to establish that she acted as reasonably appeared to be necessary for protection of her life, need not show that deceased had weapon in her hand, or in sight, or said anything, at time shot was fired, where deceased had previously threatened to shoot defendant, had displayed pistol in her pocketbook, had threatened to beat defendant up with broom handle, and, immediately prior to shooting, deceased had been driving with defendant's husband, and on getting out of car approached defendant as defendant backed away, deceased trying to open her purse as she advanced. *Lomax v. State*, 205 Miss. 635, 39 So. 2d 267, 1949 Miss. LEXIS 453 (Miss. 1949).

Testimony that deceased had the reputation of being dangerous, quarrelsome, and abusive when intoxicated was properly excluded in murder prosecution,

where self-defense is not pleaded and neither the confession of defendant nor his testimony made the issue relevant. *Pinter v. State*, 203 Miss. 344, 34 So. 2d 723, 1948 Miss. LEXIS 275 (Miss. 1948).

The jury had the right in a murder prosecution to reject defendant's testimony that he killed deceased in self-defense, where the proof of the state and the evidence of the only witness for the defendant, except that given by himself, showed that the killing was deliberate murder. *Flowers v. State*, 29 So. 2d 653 (Miss. 1947).

Where a defendant is claiming self-defense and is the only eyewitness to the homicide, the jury may consider all facts and circumstances bearing on the manner in which the homicide occurred and need not accept the defendant's version as true. *Herrin v. State*, 201 Miss. 595, 29 So. 2d 452, 1947 Miss. LEXIS 424 (Miss. 1947).

Exclusion of corroboratory and cumulative evidence indicative of reasonable apprehension of imminent danger and the practical admission of evidence only as to things done at the time and scene of the homicide was reversible error. *Eaton v. State*, 200 Miss. 729, 28 So. 2d 230, 1946 Miss. LEXIS 341 (Miss. 1946).

Facts must be sufficient to justify belief that killing is reasonably necessary to prevent felonious killing of another before killing justified. *McGehee v. State*, 138 Miss. 822, 104 So. 150, 1925 Miss. LEXIS 100 (Miss. 1925).

Aggression is doubtful where evidence thereon is conflicting. *Mott v. State*, 123 Miss. 729, 86 So. 514, 1920 Miss. LEXIS 75 (Miss. 1920).

6. —Question for jury.

Although defendant argued that defendant shot the victim in self-defense, the jury rejected defendant's defense theories—including the castle doctrine—because while defendant testified that the victim was in the doorway to defendant's home and threatening defendant when defendant shot the victim, and that the victim went backwards and eventually fell down outside on the opposite side of the sidewalk, another witness testified and there was other evidence that defendant shot the victim while the victim was lying

wounded on the ground. *Bryant v. State*, 232 So. 3d 174, 2017 Miss. App. LEXIS 738 (Miss. Ct. App. 2017).

State did not present insufficient evidence to overcome defendant's theory of self-defense because the jury rejected the self-defense theory and found that the State's account of the events was more credible, as was its prerogative; allowing the jury's verdict to stand would not sanction an unconscionable injustice. *Newell v. State*, 175 So. 3d 1260, 2015 Miss. LEXIS 505 (Miss. 2015).

Murder conviction was not against the overwhelming weight of the evidence because the evidence against defendant included his admission to shooting the victim, the gunshots striking the victim from behind, the evidence conveying a scene without a struggle, and the statements from the victim naming defendant as the shooter. The question of a self-defense claim fell under the purview of the jury as fact-finders. *Davis v. State*, 158 So. 3d 1190, 2015 Miss. App. LEXIS 63 (Miss. Ct. App. 2015).

It is for jury to decide whether slaying constitutes manslaughter or justifiable homicide by reason of self-defense or excusable homicide by reason of accident or misfortune where evidence shows that during course of argument, deceased displayed knife, defendant pulled gun, pointed it at deceased and cocked it, and during ensuing scuffle, gun discharged, striking deceased. *Burge v. State*, 472 So. 2d 392, 1985 Miss. LEXIS 2129 (Miss. 1985).

If to be sodomized unwillingly is to "suffer great bodily harm" so as to bring a subsequent killing of the assailant within the meaning of the justifiable homicide statute, the question of the reasonableness of the force used to repel the sexual attack would then become a jury issue. *Johnson v. State*, 346 So. 2d 927, 1977 Miss. LEXIS 2552 (Miss. 1977), but see *Douglas v. State*, 525 So. 2d 1312, 1988 Miss. LEXIS 216 (Miss. 1988).

Where a number of extenuating circumstances in favor of the accused, who was convicted of manslaughter, was disclosed by the record, the ends of justice would be better served by reversing and remanding the case and permitting another jury to

pass on the issue as to whether or not the accused had good cause to believe, and did believe, in view of the disparity in size of the two men, that he was in either real or apparent danger of great bodily harm at the hands of the deceased at the time he shot him. *Folks v. State*, 230 Miss. 217, 92 So. 2d 461, 1957 Miss. LEXIS 361 (Miss. 1957).

Where three witnesses declared that the deceased had no knife and four witnesses affirmed that he did have a knife with which he was chasing the defendant's brother, it was for the jury to determine the veracity of witnesses. *Crawford v. State*, 54 So. 2d 230 (Miss. 1951).

In murder prosecution the question whether defendant shot the deceased in self-defense was for the jury. *Goff v. State*, 49 So. 2d 238 (Miss. 1950).

Question whether defendant killed victim in self-defense is one of fact for the jury to determine. *Spivey v. State*, 47 So. 2d 855 (Miss. 1950).

Issues in homicide prosecution of justification as well as of extent of force employed were for the jury, where the fatal wound was inflicted while defendant was undertaking to arrest the victim and defendant sought to justify the act as in necessary self-defense. *Howard v. State*, 18 So. 2d 148 (Miss. 1944).

Whether accused, killing a visitor at her home in ejecting him therefrom after forbidding him to re-enter, used more force than reasonably appeared to be necessary for that purpose, or whether she killed decedent in what reasonably appeared to be in her necessary self-defense, were questions for the jury to determine. *Bangren v. State*, 196 Miss. 887, 17 So. 2d 599, 1944 Miss. LEXIS 264 (Miss. 1944), overruled, *Ferrell v. State*, 733 So. 2d 788, 1999 Miss. LEXIS 87 (Miss. 1999).

7. Instructions; generally.

Defendant's challenge to the castle doctrine jury instruction failed because the judge gave the instruction defendant asked for and the instruction he sought was unsupported by the evidence that did not show the victim ever reached for the back door of the car where the children allegedly were. *Bernard v. State*, 288 So. 3d 301, 2019 Miss. LEXIS 403 (Miss. 2019).

In a manslaughter case, the trial court committed reversible error in giving a castle-doctrine jury instruction favoring the victim because a castle-doctrine instruction had never been given to a victim regarding the mandatory rebuttable presumption that a person was entitled to use whatever force was necessary to meet or repel an attack from another person, and such an instruction was patently inappropriate as the statute clearly indicated that the rebuttable presumption was granted to defendant, not the victim; and a reasonable juror could have interpreted the challenged instruction to create a presumption that lessened the State's burden of proof and required rebuttal evidence from defendant to overcome the presumption. *Husband v. State*, 204 So. 3d 353, 2016 Miss. App. LEXIS 472 (Miss. Ct. App. 2016).

In murder prosecution, state is entitled, upon request, to instruction submitting lessor included offense of manslaughter committed in heat of passion to jury even though heat of passion is affirmative element of manslaughter not present in murder. *Cook v. State*, 467 So. 2d 203, 1985 Miss. LEXIS 1974 (Miss. 1985).

While a manslaughter instruction should not be given in a case of murder or complete justification, such instruction is not reversible error. *Vassar v. State*, 200 Miss. 412, 27 So. 2d 541, 1946 Miss. LEXIS 303 (Miss. 1946).

Instruction that every killing of a human being without authority of law is either murder or manslaughter, murder when done with deliberate design to effect death, and manslaughter when done in heat of passion without malice and without any premeditation, did not constitute error, either as not correctly stating the law or as depriving defendant of her plea of necessary self-defense. *Wiggins v. State*, 199 Miss. 114, 23 So. 2d 691, 1945 Miss. LEXIS 274 (Miss. 1945).

Concluding an instruction in murder prosecution authorizing conviction if defendant was in no real or apparent danger of losing his own life or suffering great bodily injury, with the phrase "this is true regardless of every other fact or circumstance in the case," did not constitute reversible error, where considerable irrel-

evant testimony concerning the so-called “unwritten law” was admitted prejudicial to the prosecution, and the concluding phrase probably disabused the minds of the jurors of its influence. *Kilgore v. State*, 198 Miss. 816, 23 So. 2d 690, 1945 Miss. LEXIS 252 (Miss. 1945).

Instruction in manslaughter prosecution that the jury should not give the defendant the benefit of mere timidity or needless fear, but that she must reasonably have believed herself in danger of death or great bodily harm, satisfactorily contracted capricious or groundless fear with reasonable apprehension, and was not prejudicial. *Bangren v. State*, 198 Miss. 359, 22 So. 2d 360, 1945 Miss. LEXIS 206 (Miss. 1945).

Instruction authorizing jury to disregard testimony, which did not consider whether such testimony was immaterial, collateral, incompetent, or irrelevant, was error. *Boykin v. State*, 86 Miss. 481, 38 So. 725, 1905 Miss. LEXIS 76 (Miss. 1905).

Error to grant instructions for state without first submitting them to defendant's attorney. *Boykin v. State*, 86 Miss. 481, 38 So. 725, 1905 Miss. LEXIS 76 (Miss. 1905).

Error for court to charge that if defendant was cutting witness with a knife, which was a deadly weapon, not in his necessary self-defense, then deceased was entitled to attack defendant while he was so cutting witness with a knife, even to taking his life. *Boykin v. State*, 86 Miss. 481, 38 So. 725, 1905 Miss. LEXIS 76 (Miss. 1905).

8. —Self-defense.

Defense counsel was not ineffective for failing to request a castle doctrine jury instruction because although defendant owned the home, she had allowed the victim to live with her for over a year and it was his residence as much as hers. Defendant had not sought shelter in her home and was not fighting off an assault by an intruder, but rather she had a dispute there with someone she had allowed to live with her. *Byrd v. State*, 294 So. 3d 86, 2019 Miss. App. LEXIS 269 (Miss. Ct. App. 2019).

Trial court did not err in refusing defendant's castle doctrine jury instruction be-

cause there was no evidence that the victim unlawfully tried to enter defendant's hotel room, and thus the castle doctrine did not apply. *Reid v. State*, — So. 3d —, 2019 Miss. App. LEXIS 613 (Miss. Ct. App. Dec. 17, 2019), cert. denied, — So. 3d —, 2020 Miss. LEXIS 323 (Miss. 2020).

Trial court did not abuse its discretion in responding to the jury's question as to the definition of depraved heart because the instructions it provided demonstrated the proper rules of law and were not erroneous, and the supplemental instruction was a proper statement of the law. the jury received three separate instructions on self-defense. *Swanagan v. State*, 229 So. 3d 698, 2017 Miss. LEXIS 191 (Miss. 2017).

Trial court did not abuse its discretion by denying defendant's proffered “stand your ground” instruction because the evidence in the record did not point to an opportunity to retreat, and other instructions adequately covered the general rules of law pertaining to self-defense. *Shaheed v. State*, 205 So. 3d 1105, 2016 Miss. App. LEXIS 806 (Miss. Ct. App. 2016).

There was sufficient evidence to support a conviction for manslaughter; the jury was given instructions on self-defense, the duty to retreat, and manslaughter. Defendant's assertion of self-defense did not occur until after her arrest, and no other party heard the threats that the victim allegedly made prior to the shooting. *Knight v. State*, 157 So. 3d 839, 2015 Miss. App. LEXIS 35 (Miss. Ct. App. 2015).

Because defendant was engaged in unlawful activities, including the carrying of a gun by a person under 18, the purchase of tobacco by a person under 18, and, possibly, stealing gas from the victim's store, the castle doctrine was inapplicable and counsel could be ineffective for failing to request a castle-doctrine instruction. *Beal v. State*, 225 So. 3d 1276, 2016 Miss. App. LEXIS 462 (Miss. Ct. App. 2016), cert. denied, 222 So. 3d 311, 2017 Miss. LEXIS 285 (Miss. 2017).

Defendant was denied her right to have the jury properly instructed on her self-defense claim because enough evidence was presented at defendant's trial to at least raise a question as to whether she was entitled to the “Castle Doctrine”

statutory presumption; a question arose to whether the victim was trespassing when she crossed the street, came onto the property surrounding defendant's residence, and prevented defendant from leaving by blocking her access to her vehicle. *White v. State*, 127 So. 3d 170, 2013 Miss. LEXIS 577 (Miss. 2013).

Defendant's murder conviction was appropriate because the trial court did not err in refusing to give a self-defense instruction under Miss. Code Ann. § 97-3-15(1)(f) since there was no testimony introduced that defendant thought that he was in imminent danger. *Whittington v. State*, 49 So. 3d 107, 2010 Miss. App. LEXIS 182 (Miss. Ct. App.), cert. denied, 49 So. 3d 1139, 2010 Miss. LEXIS 636 (Miss. 2010).

Court rejected as without merit defendant's claim that the trial court erred in failing to grant his motion for a judgment notwithstanding the verdict, given that the jury was instructed to consider whether the victim's killing was murder, manslaughter, or committed in self-defense and the jury had sufficient evidence to convict defendant of murder; although defendant argued that the facts supported either excusable or justifiable homicide, the facts were conflicting and created a jury question, as testimony and physical evidence contradicted defendant's testimony that the victim backed him up steps and defendant having left the scene immediately after the stabbing created the impression that he knew the victim was no longer a threat. *Ray v. State*, 27 So. 3d 416, 2009 Miss. App. LEXIS 496 (Miss. Ct. App. 2009), cert. denied, 27 So. 3d 404, 2010 Miss. LEXIS 61 (Miss. 2010).

Court committed reversible error in instructing the jury to find the defendant guilty of manslaughter if it found that he killed the victim while resisting the victim's unlawful trespass; this instruction prevented the jury from returning a finding of justifiable homicide and left it with the choice of either murder or manslaughter. *Ferrell v. State*, 733 So. 2d 788, 1999 Miss. LEXIS 87 (Miss. 1999).

In absence of any other instruction that presented defendant's theory of defense to jury, trial court improperly failed to place defendant's proffered instruction, on self-

defense by use of deadly weapon against larger, unarmed person, in proper form, in light of evidence which supported claim of justification. *Manuel v. State*, 667 So. 2d 590, 1995 Miss. LEXIS 591 (Miss. 1995).

Trial court properly refuses self defense instruction in homicide case in which uncontroverted testimony is that victim was asleep and had been asleep approximately 30 minutes at time victim was shot and killed. *Merrill v. State*, 482 So. 2d 1147, 1986 Miss. LEXIS 2369 (Miss. 1986).

Murder defendant is not entitled to have jury instructed peremptorily that he should be found not guilty where, although evidence shows that person shot by defendant struck him in head with beer bottle before defendant lifted so much as finger, following receipt of beer bottle blow, defendant did nothing but just stood at bar for 5 or 10 minutes, person shot went to cash register and started counting money, and at point when person had ceased to be aggressor, defendant shot and killed person. *Gavin v. State*, 473 So. 2d 952, 1985 Miss. LEXIS 2163 (Miss. 1985).

Self-defense instruction which states that party acting upon mere fear, apprehension or belief, however sincerely entertained acts at own peril in taking life is improper and constitutes reversible prejudicial error where case is close factually and instruction has previously been condemned by Supreme Court of Mississippi number of times. *Flowers v. State*, 473 So. 2d 164, 1985 Miss. LEXIS 2140 (Miss. 1985).

Defendant pleading self defense to murder charge is entitled to instruction which in substance advises jury that so long as defendant was in place where he had right to be and was neither immediate provoker or aggressor, he was not required to flee on pain of forfeiting defense of self defense. *Cook v. State*, 467 So. 2d 203, 1985 Miss. LEXIS 1974 (Miss. 1985).

The trial court's instruction in a murder prosecution resulting in a conviction of manslaughter, that defendant had a right to kill the deceased if it reasonably appeared that he was undertaking to force entrance into defendant's house with the design to do defendant great personal injury, adequately set forth defendant's right under this section to protect her

domicile from unlawful entry. *Hull v. State*, 350 So. 2d 60, 1977 Miss. LEXIS 2213 (Miss. 1977).

In a prosecution for murder, the instruction to the jury was erroneous where it failed to inform the jury that there are instances in which a deliberate design to kill may exist at the moment the fatal blow was struck and yet the homicide may be justifiable or excusable, and therefore required the jury to convict the defendant of murder if it found premeditation or deliberate design to kill even though the killing might have been justifiable by reason of self-defense. *Pittman v. State*, 297 So. 2d 888, 1974 Miss. LEXIS 1544 (Miss. 1974).

In a prosecution for murder, an instruction to the jury that even if the deceased attempted to have unnatural intercourse with the defendant, but the danger of accomplishment of the crime by the deceased was over and at a time when such danger was not imminent or impending the defendant tied and gagged the deceased, and if the jury finds robbery, then the crime was murder, was proper in presenting defendant's theory of self-defense and the state's theory of felony murder. *Burns v. State*, 228 Miss. 254, 87 So. 2d 681, 1956 Miss. LEXIS 510 (Miss. 1956).

Instruction that if jury believed beyond a reasonable doubt that defendant killed victim at a time when he was in no immediate danger, real or apparent, of losing his life or suffering some great bodily harm at the hands of victim, then defendant is guilty, etc., was not erroneous as excluding from consideration of jury that if defendant reasonably believed or had reasonable cause to believe that he was in danger of losing his life or suffering some great bodily harm at the hands of deceased he had a right to take deceased's life in defending himself even though he might have been in no actual danger whatever, especially in view of other instructions embodying the principal contended for by defendant. *Johnson v. State*, 46 So. 2d 924 (Miss. 1950).

It is not error to grant to state manslaughter instruction, it being contended by defense that accused was either guilty of murder or was justified in committing homicide in necessary self-defense, when

under all of evidence accused cannot be properly convicted of greater offense than manslaughter and even that offense is not satisfactorily proved beyond every reasonable doubt. *Leflore v. State*, 44 So. 2d 393 (Miss. 1950).

Refusal of court to grant peremptory instruction to find defendant not guilty is not error where defendant's testimony that he was in danger of death or great bodily harm at hands of deceased and that it was necessary for him to strike in self-defense was contradicted by undisputed evidence that killing occurred at crap table, with table and crowd of people between accused and deceased, and defendant advanced on deceased around table and struck at him by reaching around another person. *Robinson v. State*, 205 Miss. 281, 38 So. 2d 723, 1949 Miss. LEXIS 430 (Miss. 1949).

That an elderly father in ill health who claimed to have shot his robust son as he threateningly advanced upon the father in his bed was denied his defense of self-defense by an instruction that the homicide could not be excused by the mere fact that the defendant was a smaller man than the deceased, of less powerful build and proportions and of greater years, and was assaulted by the deceased with his fists at the time of the slaying, constituted reversible error. *Bailey v. State*, 202 Miss. 221, 31 So. 2d 123, 1947 Miss. LEXIS 262 (Miss. 1947).

The burden of proof is not shifted to the defendant by an instruction that in order to justify a homicide on the plea of self-defense there must be something shown in the conduct of the deceased indicating a present intention to kill or to do some great personal injury to the slayer, and imminent danger of such intention being accomplished. *Dobbs v. State*, 200 Miss. 595, 27 So. 2d 551, 29 So. 2d 84, 1946 Miss. LEXIS 330, 1947 Miss. LEXIS 354 (Miss. 1946), cert. denied, 331 U.S. 787, 67 S. Ct. 1318, 91 L. Ed. 1817, 1947 U.S. LEXIS 2295 (U.S. 1947), overruled in part, *Flowers v. State*, 473 So. 2d 164, 1985 Miss. LEXIS 2140 (Miss. 1985).

Omission from state's instruction defining justifiable self-defense that danger of death or great bodily harm may be either real or reasonably apparent, constituted

reversible error where under state's proof defendant was guilty of murder whereas under her proof jury could have found that defendant acted in justifiable self-defense, since in such a situation it is important that the state's instruction be technically correct. *Gooch v. State*, 199 Miss. 280, 24 So. 2d 736, 1946 Miss. LEXIS 194 (Miss. 1946).

Instruction that "to justify a homicide on the plea of self-defense there must be something shown in the conduct of the deceased indicating a present intention to kill, or to do some great personal injury to the slayer, and immediate danger of such intention being accomplished," was not erroneous, either on the ground that the word "apparent" should have preceded the word "danger," even though such would have been technically correct, where rest of instruction informed jury that this danger might be actual or apparent, or on ground that the word "imminent" should have been used instead of the word "immediate," although the former word, which is used in this section [Code 1942, § 2218], would have been preferable. *Holmes v. State*, 199 Miss. 137, 24 So. 2d 90, 1945 Miss. LEXIS 277 (Miss. 1945), overruled, *Flowers v. State*, 473 So. 2d 164, 1985 Miss. LEXIS 2140 (Miss. 1985).

In a prosecution for homicide, in which the defendant testified that the acts resulting in the death of the decedent had been done at a time when the decedent was attempting to impose his attentions upon the defendant, over her protest and against her will, in such manner as to commit a statutory offense against her person, an instruction to the jury, which would seem to require that the jury should believe that the defendant entertained a reasonable apprehension that he intended to take her life, or to do her great bodily harm, in the sense of endangering her life, before the jury would be warranted in acquitting her, entirely leaving out of consideration the right to protect her person against the commission of the threatened felony testified to, was erroneous. *Hodges v. State*, 192 Miss. 322, 6 So. 2d 123 (Miss. 1942).

Instruction on law of self-defense held erroneous as shifting burden of proof. *Reddix v. State*, 134 Miss. 393, 98 So. 850, 1924 Miss. LEXIS 270 (Miss. 1924).

9. —Defense of others.

Failure to give defendant's jury instruction on self-defense that included a defense-of-others rationale was reversible error as the instruction correctly stated the law regarding how a jury should have interpreted his actions and would have extended defendant's claim to defense of his infant daughter. The self-defense instructions given did not cover those points. *Maye v. State*, 49 So. 3d 1124, 2010 Miss. LEXIS 622 (Miss. 2010).

Defendant's manslaughter conviction was reversed for failure to instruct the jury that it should presume defendant used defensive force despite exiting his vehicle before shooting the victim. Threats from the victim that led to the shooting that occurred while defendant was occupying his vehicle satisfied Miss. Code Ann. § 97-3-15(3) (Rev. 2006) requirements. *Newell v. State*, 49 So. 3d 66, 2010 Miss. LEXIS 633 (Miss. 2010).

An instruction regarding defense of another was sufficient, notwithstanding that the instruction did not precisely follow the language of subsection (1)(f), as there was no evidence regarding a felony other than an aggravated assault and, therefore, it was not error to eliminate the alternative felony language of the statute. *Moore v. State*, 776 So. 2d 717, 2000 Miss. App. LEXIS 428 (Miss. Ct. App. 2000).

Though the statute casts the killing of a man in the necessary defense of another in terms of justification, this license does not justify shooting wildly and blindly into a crowd of people, some of whom are mere bystanders; such indiscriminate use of deadly force cannot be thought to be a reasonable use. *Moore v. State*, 776 So. 2d 717, 2000 Miss. App. LEXIS 428 (Miss. Ct. App. 2000).

Evidence was insufficient in a murder prosecution to justify an instruction to the jury with regard to defense of others where there was no evidence that the defendant drew his gun in an attempt to break up the fight between the defendant and another. *Robinson v. State*, 758 So. 2d 480, 2000 Miss. App. LEXIS 162 (Miss. Ct. App. 2000).

In a prosecution for murder arising out of the killing of a man who was allegedly attacking the defendant's wife, the trial

court properly refused the defendant's request for a directed verdict of acquittal under this section where the evidence was in conflict as to whether the victim had actually been attacking the defendant's wife; however, where the evidence did not rise to that high degree which would justify a jury in finding the defendant guilty of murder beyond a reasonable doubt, his motion for a directed verdict as to the charge of murder should have been sustained, leaving only the charge of manslaughter under § 97-3-31 to be considered by the jury. *Edge v. State*, 393 So. 2d 1337, 1981 Miss. LEXIS 1926 (Miss. 1981).

The trial court did not commit reversible error in refusing to instruct that if accused shot deceased in the lawful defense of his sister-in-law, wife of deceased, the jury should acquit him, in view of insufficient evidence showing that the sister-in-law was in any real or apparent danger of losing her life or sustaining great bodily harm at the hands of the deceased at the time of the killing. *Folks v. State*, 230 Miss. 217, 92 So. 2d 461, 1957 Miss. LEXIS 361 (Miss. 1957).

Where the accused shot the deceased who was shooting at accused's unarmed brother, while the latter was seated at a booth in a dining room of a cafe and it appeared that the brother had made no hostile demonstration at the decedent, the court should have given a peremptory instruction as requested by the defendant. *Newman v. State*, 222 Miss. 660, 77 So. 2d 282, 1955 Miss. LEXIS 651 (Miss. 1955).

10. —Defense of property.

Trial court did not abuse its discretion in refusing a jury instruction based on the "castle doctrine" because defendant was not in the immediate premises of a dwelling when he shot his girlfriend's ex-boyfriend; there was no evidence that the ex-boyfriend unlawfully and forcibly entered the girlfriend's dwelling or its immediate premises because the girlfriend voluntarily went outside to speak with him, and he voluntarily went with her. *Sha-*

heed v. State, 205 So. 3d 1105, 2016 Miss. App. LEXIS 806 (Miss. Ct. App. 2016).

Evidence established the elements of murder beyond a reasonable doubt; appellant armed himself with a baseball bat with the intent to cause serious bodily injury or death to the victim and struck an unarmed victim in the head three times with the baseball bat, the first of which would have knocked him unconscious and defenseless. These actions resulted in the victim's death; the victim was not in the process of unlawfully and forcibly entering, or had unlawfully and forcibly entered the business when appellant began attacking the victim. *Westbrook v. State*, 29 So. 3d 828, 2009 Miss. App. LEXIS 648 (Miss. Ct. App. 2009), cert. denied, 29 So. 3d 774, 2010 Miss. LEXIS 124 (Miss. 2010), cert. denied, 562 U.S. 849, 131 S. Ct. 98, 178 L. Ed. 2d 62, 2010 U.S. LEXIS 5934 (U.S. 2010).

Giving instruction upon murder charge, where defendant's explanation of killing as in defense of home was uncontradicted, held error. *Bowen v. State*, 164 Miss. 225, 144 So. 230, 1932 Miss. LEXIS 235 (Miss. 1932).

Where defendant sought to justify killing as in defense of home, instruction killing could not be justified unless to save defendant's life, or prevent great bodily harm, or unless defendant was in immediate danger, held erroneous as ignoring defense of habitation. *Bowen v. State*, 164 Miss. 225, 144 So. 230, 1932 Miss. LEXIS 235 (Miss. 1932).

11. —Justification.

In defendant's prosecution on a charge of manslaughter, the trial court improperly refused defendant's instruction on justification that included a right to use deadly force: (1) to resist commission of a felony; (2) to protect his son; and (3) to protect himself from a group of men surrounding his car. The instruction correctly stated the law, had a foundation in evidence, and was not otherwise covered. *Ford v. State*, 52 So. 3d 1245, 2011 Miss. App. LEXIS 53 (Miss. Ct. App. 2011).

RESEARCH REFERENCES

ALR.

Homicide: Extent of premises which may be defended without retreat under right of self-defense. 52 A.L.R.2d 1458.

Admissibility on behalf of accused in homicide case of evidence that killing was at victim's request. 71 A.L.R.2d 617.

Relationship with assailant's wife as provocation depriving defendant of right of self-defense. 9 A.L.R.3d 933.

Homicide: duty to retreat where assailant and assailed share the same living quarters. 26 A.L.R.3d 1296.

Private person's authority, in making arrest for felony, to shoot or kill alleged felon. 32 A.L.R.3d 1078.

Homicide: duty to retreat as condition of self-defense when one is attacked at his office, or place of business or employment. 41 A.L.R.3d 584.

Homicide: modern status of rules as to burden and quantum of proof to show self-defense. 43 A.L.R.3d 221.

Unintentional killing of or injury to third person during attempted self-defense. 55 A.L.R.3d 620.

Withdrawal, after provocation of conflict, as reviving right of self-defense. 55 A.L.R.3d 1000.

What constitutes "imminently dangerous" act within homicide statute. 67 A.L.R.3d 900.

Modern Status: right of peace officer to use deadly force in attempting to arrest fleeing felon. 83 A.L.R.3d 174.

Homicide: duty to retreat where assailant is social guest on premises. 100 A.L.R.3d 532.

Accused's right, in homicide case, to have jury instructed as to both unintentional shooting and self-defense. 15 A.L.R.4th 983.

Homicide: physician's withdrawal of life supports from comatose patient. 47 A.L.R.4th 18.

Standard for determination of reasonableness of criminal defendant's belief, for purposes of self-defense claim, that physical force is necessary-modern cases. 73 A.L.R.4th 993.

Homicide: Liability where death immediately results from treatment or mistreatment of injury inflicted by defendant. 50 A.L.R.5th 467.

Am. Jur.

40 Am. Jur. 2d, Homicide §§ 104 et seq.

5A Am. Jur. Pl & Pr Forms (Rev), Civil Rights, Forms 3.1, 5.1, 5.2 (pleadings in federal civil rights case involving use of deadly force in preventing escape of suspected felon).

2 Am. Jur. Trials, Investigating Particular Crimes §§ 40-57 (homicide).

7 Am. Jur. Trials, Homicide §§ 1 et seq.

40 Am. Jur. Trials 501, Forensic Pathology in Homicide Cases.

3 Am. Jur. Proof of Facts 2d, Withdrawal by Aggressor Reviving Right of Self-defense, §§ 9 et seq. (proof of withdrawal by aggressor – subsequent homicide committed in self-defense).

33 Am. Jur. Proof of Facts 2d 211, Privileged Use of Force in Self-Defense.

34 Am. Jur. Proof of Facts 2d 1, Criminal Law: The Battered Woman Defense.

38 Am. Jur. Proof of Facts 2d 731, Justified Use of Force in Defense of Private Property.

CJS.

40 C.J.S., Homicide §§ 150-152.

Law Reviews.

1983 Mississippi Supreme Court Review: Instruction on self-defense. 54 Miss L. J. 133, March, 1984.

Practice References.

Ronald L. Schoenberg, Criminal Law Deskbook (Matthew Bender).

§ 97-3-17. Homicide; excusable homicide.

The killing of any human being by the act, procurement, or omission of another shall be excusable:

(a) When committed by accident and misfortune in doing any lawful act

by lawful means, with usual and ordinary caution, and without any unlawful intent;

(b) When committed by accident and misfortune, in the heat of passion, upon any sudden and sufficient provocation;

(c) When committed upon any sudden combat, without undue advantage being taken, and without any dangerous weapon being used, and not done in a cruel or unusual manner.

HISTORY: Codes, *Hutchinson's* 1848, ch. 64, art. 12, Title 3 (3); 1857, ch. 64, art. 169; 1871, § 2632; 1880, § 2879; 1892, § 1153; 1906, § 1231; *Hemingway's* 1917, § 961; 1930, § 989; 1942, § 2219; Laws, 1985, ch. 380, eff from and after July 1, 1985.

Cross References — Justifiable homicide, see § 97-3-15.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Killing by accident or misfortune.
3. Killing in sudden combat.
4. Instructions to jury.
5. Applicability to assault.
6. Illustrative cases.

1. In general.

According to Miss. Code Ann. § 97-3-17(a), a homicide may be excused when committed by accident and misfortune in doing any lawful act by lawful means, with usual and ordinary caution, and without any unlawful intent. By extension, it follows that the same principles should apply to make an assault that does not result in death excusable under the same circumstances. *Rogers v. State*, 994 So. 2d 792, 2008 Miss. App. LEXIS 170 (Miss. Ct. App.), cert. denied, 998 So. 2d 1010, 2008 Miss. LEXIS 668 (Miss. 2008).

This section was inapplicable in a murder prosecution arising from the shooting death of a game warden where, at the time of the homicide, the defendant was in the process of headlighting deer, an unlawful activity under subsection (a) of this section, and was in possession of a firearm, a dangerous weapon under subsection (c) of this section, and a "heat of passion" defense was not argued by the defendant. *Thibodeaux v. State*, 652 So. 2d 153, 1995 Miss. LEXIS 134 (Miss. 1995).

A jury instruction in a murder prosecution, which listed sudden combat, as

stated in subsection (c) of this section, as the only excuse for killing, but which completely failed to mention accident, misfortune, the heat of passion, or any sudden and sufficient provocation, as set out in (a) and (b) of that section, was reversible error, notwithstanding another instruction that was given, which did mention those factors, but which was in hopeless conflict with the first instruction. *Scott v. State*, 446 So. 2d 580, 1984 Miss. LEXIS 1627 (Miss. 1984).

Statute defining excusable homicide does not extend to homicide committed in the course of an unlawful act nor to homicide committed with a deadly weapon. *Hailes v. State*, 315 So. 2d 917, 1975 Miss. LEXIS 1701 (Miss. 1975).

This section [Code 1942 § 2219] does not excuse an offense in the commission of which a deadly weapon is used nor does it excuse the killing of a human being when done in the course of an unlawful act. *Powell v. State*, 279 So. 2d 161, 1973 Miss. LEXIS 1462 (Miss. 1973).

One may not repel the attack of an unarmed man, not his superior in physical power, by slaying him; for such attack does not furnish sufficient evidence to one of ordinary strength and courage to anticipate either that his life will be taken, or great bodily harm done, such as justifies the killing of his adversary. *Reed v. State*, 197 So. 2d 811, 1967 Miss. LEXIS 1544 (Miss. 1967).

Insulting words can never justify a homicide, unless they are of such nature as

to cause defendant to believe he is threatened with grave, impending danger. *Reed v. State*, 197 So. 2d 811, 1967 Miss. LEXIS 1544 (Miss. 1967).

2. Killing by accident or misfortune.

Defendant's manslaughter conviction was proper because the circuit court did not err when it refused a proffered instruction since, whether the victim was the initial aggressor was a question of fact for the jury to resolve; moreover, there was no evidence that the victim died as a result of a "tragic accident." Defendant deliberately grabbed the victim's wrist, intentionally struck the victim in the face three times, and it was only the victim's subsequent death that defendant did not intend; such an intentional act followed by an unintended consequence could not serve as a basis for excusable homicide, accident, and misfortune. *Booker v. State*, 64 So. 3d 988, 2010 Miss. App. LEXIS 329 (Miss. Ct. App. 2010), *aff'd*, 64 So. 3d 965, 2011 Miss. LEXIS 316 (Miss. 2011).

Court rejected as without merit defendant's claim that the trial court erred in failing to grant his motion for a judgment notwithstanding the verdict, given that the jury was instructed to consider whether the victim's killing was murder, manslaughter, or committed in self-defense and the jury had sufficient evidence to convict defendant of murder; although defendant argued that the facts supported either excusable or justifiable homicide, the facts were conflicting and created a jury question, as testimony and physical evidence contradicted defendant's testimony that the victim backed him up steps and defendant having left the scene immediately after the stabbing created the impression that he knew the victim was no longer a threat. *Ray v. State*, 27 So. 3d 416, 2009 Miss. App. LEXIS 496 (Miss. Ct. App. 2009), *cert. denied*, 27 So. 3d 404, 2010 Miss. LEXIS 61 (Miss. 2010).

Defendant's motion for a judgment notwithstanding the verdict pursuant to the Weathersby rule was properly overruled by the trial court because the physical evidence and collective testimony of a police officer, a former friend of defendant, and a forensic pathologist, substantially contradicted defendant's version of

events. Testimony that the victim sat in a chair and faced away from defendant and that defendant stepped back and shot the victim created a jury issue as to whether defendant shot the victim by accident. *Gilbert v. State*, 934 So. 2d 330, 2006 Miss. App. LEXIS 241 (Miss. Ct. App. 2006).

Since defendant presented no evidence to support a defense of killing by accident or misfortune, the trial court did not err in not instructing the jury on that defense in his murder case. *Montana v. State*, 822 So. 2d 954, 2002 Miss. LEXIS 220 (Miss. 2002).

Trial court did not err in not giving defendant's requested instruction on killing by accident or misfortune as that defense was precluded by the fact that defendant intentionally fired defendant's gun within the city limits, which was an unlawful act, as commission of an unlawful act prevented a defendant from asserting such a defense. *Montana v. State*, 822 So. 2d 954, 2002 Miss. LEXIS 220 (Miss. 2002).

Since an intentional act could not fit within the doctrine of killing by accident or misfortune, and because all evidence showed defendant fired defendant's gun intentionally, defendant could not assert the defense of killing by accident or misfortune in defendant's murder case where the victim was struck in the head as the victim was driving away in a minivan and defendant fired his gun at the minivan. *Montana v. State*, 822 So. 2d 954, 2002 Miss. LEXIS 220 (Miss. 2002).

In a murder prosecution arising from events surrounding an altercation between the defendant and others at a bar, the court properly instructed the jury with regard to accident where the defendant claimed that he did not think that he shot the victim, but that if he did, he did not intend to shoot her and it happened while he was preparing to shoot his gun in the air to scare off attacking bar patrons. *Evans v. State*, 797 So. 2d 811, 2000 Miss. LEXIS 186 (Miss. 2000).

The court properly instructed the jury with regard to the defense of accident where the defendant asserted that he did not think that he shot the victim, but that if he did, he did not intend to do so, and it happened as he was preparing to fire his

gun in the air to scare off patrons in a bar who were attacking him. *Evans v. State*, 797 So. 2d 811, 2000 Miss. LEXIS 186 (Miss. 2000).

Under the circumstances presented, there was no evidentiary basis capable of supporting a factual finding that defendant had accidentally stabbed the victim, and the requested jury instruction for excusable homicide was properly denied. *Webster v. State*, 754 So. 2d 1232, 2000 Miss. LEXIS 19 (Miss. 2000).

In the prosecution of a 14 year old for manslaughter arising from an incident in which he shot another child after teasing her, he was not entitled to have the jury instructed in regard to "accident and misfortune in doing any lawful act by lawful means, with usual and ordinary caution, and without any unlawful intent," where the defendant admitted to unlawfully carrying a concealed weapon. *Towner v. State*, 726 So. 2d 251, 1998 Miss. App. LEXIS 1106 (Miss. Ct. App. 1998).

Whether killing was result of accident or misfortune is question for jury to decide after proper instruction. *Miller v. State*, 677 So. 2d 726, 1996 Miss. LEXIS 331 (Miss. 1996).

Refusal to grant murder defendant's request for jury instruction on accident or misfortune was reversible error; under defendant's version of events, he and victim were struggling over gun when it discharged, and thus, it was not sudden combat situation, nor did shooting happen during commission of unlawful act. *Miller v. State*, 677 So. 2d 726, 1996 Miss. LEXIS 331 (Miss. 1996).

In context of determining whether defendant committed excusable homicide, which arises when committed by accident and misfortune in doing any lawful act by lawful means, "unlawful acts" are crimes or misdemeanors. *Nicholson ex rel. Gollott v. State*, 672 So. 2d 744, 1996 Miss. LEXIS 146 (Miss. 1996).

Defendant's display of pistol and his heated request for victim to shoot him, following his repeated threats against victim, constituted violation of stalking statute and was an unlawful act which would preclude defendant's use of accident as a defense to homicide charge. *Nicholson ex rel. Gollott v. State*, 672 So. 2d 744, 1996 Miss. LEXIS 146 (Miss. 1996).

Defense of accident to homicide charge was inapplicable if defendant, as he alleged, fatally shot victim while attempting to commit suicide, an unlawful act, and thus defendant was not entitled to requested instruction on accident. *Nicholson ex rel. Gollott v. State*, 672 So. 2d 744, 1996 Miss. LEXIS 146 (Miss. 1996).

In a homicide prosecution under this section, it was error to exclude evidence of prior threats made by the victim to the defendant, even though the defendant took the position that the ultimate shooting was accidental, where the prior threats had bearing on the issue of whether the result was manslaughter or murder because they were relevant to show the defendant's state of mind at the time of the incident. *Day v. State*, 589 So. 2d 637, 1991 Miss. LEXIS 767 (Miss. 1991).

Prosecuting examination may examine defendant in manslaughter prosecution who raises defenses of justifiable homicide by reason of self-defense as well as excusable homicide by reason of accident or misfortune regarding why defendant did not back off or flee when deceased pulled knife on defendant where jury is specifically instructed that defendant is under no duty to flee but rather has right to stand ground. *Burge v. State*, 472 So. 2d 392, 1985 Miss. LEXIS 2129 (Miss. 1985).

It is for jury to decide whether slaying constitutes manslaughter or justifiable homicide by reason of self-defense or excusable homicide by reason of accident or misfortune where evidence shows that during course of argument, deceased displayed knife, defendant pulled gun, pointed it at deceased and cocked it, and during ensuing scuffle, gun discharged, striking deceased. *Burge v. State*, 472 So. 2d 392, 1985 Miss. LEXIS 2129 (Miss. 1985).

Failure of court to authorize manslaughter verdict is not error where proof showed no element of manslaughter, theory of defense was that of accidental killing, and neither state nor defense requested an instruction on manslaughter. *Hendrix v. State*, 41 So. 2d 48 (Miss. 1949).

Instructions for state defining malice aforethought is not erroneous on ground

that it omits reference to accidental killing when there is little, if anything, in record from which inference could be drawn by jury that killing was accidental and this was matter of defense fully submitted to jury under instruction obtained by defendant. *Price v. State*, 207 Miss. 111, 41 So. 2d 37, 1949 Miss. LEXIS 321 (Miss.), cert. denied, 338 U.S. 844, 70 S. Ct. 92, 94 L. Ed. 516, 1949 U.S. LEXIS 1836 (U.S. 1949).

An instruction permitting the jury to find the defendant guilty of manslaughter if it believed that the defendant cut or stabbed the deceased with a knife “as shown by the testimony,” is not in direct conflict with an instruction to the effect that defendant could be acquitted if the jury found that he had killed the deceased as a result of an accident or misfortune while in the heat of passion upon a sudden and sufficient provocation, and does not constitute reversible error, where the only positive evidence in the case was to be found in the dying declarations of decedent wherein the declarant said that defendant “knifed him,” and the defendant himself admitted that he was armed with an open knife at the time. *Morris v. State*, 182 Miss. 763, 183 So. 694, 1938 Miss. LEXIS 209 (Miss. 1938).

Where accused unlawfully pointed pistol at deceased who was killed as result, court properly refused to submit accidental killing to jury. *Long v. State*, 163 Miss. 535, 141 So. 591, 1932 Miss. LEXIS 71 (Miss. 1932).

3. Killing in sudden combat.

The defendant was not entitled to an instruction with regard to sudden combat where (1) after the defendant and his wife left a nightclub, the victim walked by his wife while she was making a telephone call, knocked her into a wall, and called her a name, (2) the defendant saw the incident from about 45 feet away, went to aid his wife, and pursued the victim into a dark breezeway, (3) upon entering the breezeway, he felt someone (the victim) grab his shirt and he responded by hitting him twice and kicking him twice, (4) the victim fell and hit his head and died over a month later. *Goff v. State*, 778 So. 2d 779, 2000 Miss. App. LEXIS 287 (Miss. Ct. App. 2000).

Only time homicide cannot be excusable when dangerous weapon is used is when it takes place during sudden combat. *Miller v. State*, 677 So. 2d 726, 1996 Miss. LEXIS 331 (Miss. 1996).

Paragraph (c) of this section [Code 1942, § 2219] is not available to an aggressor. *Jeffcoat v. State*, 21 So. 2d 8 (Miss. 1945).

Evidence that accused struck deceased when deceased was doing no overt act in or toward a combat, and that there was no conduct on part of deceased sufficient to produce any appearance that deceased intended any such act, did not authorize peremptory charge for accused under statute defining “excusable homicide.” *Conner v. State*, 179 Miss. 795, 177 So. 46, 1937 Miss. LEXIS 89 (Miss. 1937).

4. Instructions to jury.

Trial court did not err by refusing to instruct the jury on the excuse of “accident” because defendant offered no explanation for the instruction and he identified no evidence in the record that the killing was an “accident.” The fact that defendant shot the victim six times and then shot two other men, all as they tried to run away, belies any suggestion of “accident.” *Allen v. State*, 2020 Miss. App. LEXIS 122 (April 14, 2020).

In an aggravated assault case, in which defendant alleged that he inadvertently stabbed the victim, trial counsel was not ineffective for not offering what defendant called an “accident instruction” based on the excusable homicide statute because the instruction might have confused the jury; and defendant failed to rebut the presumption that counsel’s failure to offer the proffered instruction was trial strategy. *Greenleaf v. State*, 267 So. 3d 749, 2019 Miss. LEXIS 125 (Miss. 2019).

Trial court correctly denied defendant’s accident-or-misfortune jury instruction because, while she suffered from depression, none of the experts testified that she was insane under M’Naghten standard, and the evidence did not show that she acted with usual and ordinary caution as statutorily required where she was able to walk to her car, drive to the church, carry the suitcase to the woods, drive home, bathe, wash her clothes, attend church the following morning, and go to work the

following week. *Ealey v. State*, 158 So. 3d 283, 2015 Miss. LEXIS 80 (Miss. 2015).

Jury instruction granted by the circuit court did not correctly state the applicable law on accident since it lacked all the elements; the jury should have been privy to all subsections of the statute to determine if any of the subsections applied to defendant's case. *McTiller v. State*, 113 So. 3d 1284, 2013 Miss. App. LEXIS 295 (Miss. Ct. App. 2013).

Trial court's refusal to instruct the jury on defendant's alternative heat-of-passion theory was reversible error where: (1) the requested instruction correctly stated the law, and directly paralleled Miss. Code Ann. § 97-3-17(b); (2) the theory encompassed in the rejected instruction was not covered elsewhere; and (3) sufficient evidence existed for the jury to be instructed on accident and misfortune as defendant testified that he did not mean to do it and that it was an accident, defendant and his wife were engaged in an escalating argument and the wife had used a knife to threaten and cut defendant moments before he shot her, and defendant testified that, just before he shot her, his wife looked like she was fixing to get him and had the knife drawn back. *Clayton v. State*, 106 So. 3d 802, 2012 Miss. LEXIS 615 (Miss. 2012).

In defendant's prosecution on a charge of manslaughter, the trial court correctly denied an instruction on excusable homicide as the evidence showed that defendant's act of shooting the victim was an intentional act; thus, the instruction on accidental killing did not apply to the facts of the case. *Ford v. State*, 52 So. 3d 1245, 2011 Miss. App. LEXIS 53 (Miss. Ct. App. 2011).

In a murder case, the trial court correctly denied defendant's jury instruction because defendant's theory of the case was based upon his own testimony that he intentionally fired each shot, and there was no evidence from which a jury could have found that he fired the shots accidentally. Further, there was sufficient evidence to find that defendant shot into the trailer house with a deliberate design to kill; although there was sufficient evidence that defendant had a deliberate design to kill his brother, defendant's in-

tent to kill his brother was transferred to the sister-in-law, the actual victim. *Walden v. State*, 29 So. 3d 17, 2008 Miss. App. LEXIS 462 (Miss. Ct. App. 2008), cert. denied, 29 So. 3d 774, 2010 Miss. LEXIS 105 (Miss. 2010).

Where a defendant was convicted of manslaughter in the shooting death of his wife, the trial court erred when it denied defendant's request to present a theory of the defense instruction; the denial of this fundamental right was reversible error. *Chinn v. State*, 958 So. 2d 1223, 2007 Miss. LEXIS 381 (Miss. 2007).

Defendant's argument that he acted in the heat of passion as a consequence of his being distraught over the denial of his visitation request was not provocation that the appellate court considered to be either sudden or sufficient within the meaning of the statute. *Jackson v. State*, 815 So. 2d 1196, 2002 Miss. LEXIS 168 (Miss. 2002).

Where defendant presented no evidence that any of the shots fired were accidentally fired, but only that the direction of the bullet was accidental, the court correctly held that because the defendant intentionally fired the weapon, the defendant was precluded from receiving the requested jury instructions. *Montana v. State*, 2002 Miss. LEXIS 172 (Miss. May 9, 2002), op. withdrawn, sub. op., 822 So. 2d 954, 2002 Miss. LEXIS 220 (Miss. 2002).

Evidence was insufficient in a murder prosecution to justify an instruction to the jury with regard to excusable homicide where there was no evidence that the defendant drew his gun in an attempt to break up the fight between the defendant and another. *Robinson v. State*, 758 So. 2d 480, 2000 Miss. App. LEXIS 162 (Miss. Ct. App. 2000).

5. Applicability to assault.

Defendant's convictions for aggravated assault were inappropriate because the undisputed evidence showed that he was acting in necessary self-defense when the projectiles from his firearm struck the bystanders that led to his two aggravated assault convictions. The same principles contained in Miss. Code Ann. § 97-3-17 were applicable to make an assault that

did not result in death excusable. *Rogers v. State*, 994 So. 2d 792, 2008 Miss. App. LEXIS 170 (Miss. Ct. App.), cert. denied, 998 So. 2d 1010, 2008 Miss. LEXIS 668 (Miss. 2008).

6. Illustrative cases.

Culpable-negligence manslaughter instruction's mistaken reference to "his" negligence, when defendant was female, was not plain error because (1) no jury confusion was shown, and (2) the jury was properly instructed on defendant's acci-

dent theories. *McCarty v. State*, 247 So. 3d 260, 2017 Miss. App. LEXIS 623 (Miss. Ct. App. 2017), cert. denied, 246 So. 3d 885, 2018 Miss. LEXIS 263 (Miss. 2018).

Defendant was properly convicted of capital murder with the underlying felony of child abuse because she gave birth to a baby in a hotel room, wrapped the baby in a comforter, put him in a suitcase, left the suitcase partially hidden in a wooded area behind her church, and did not tell anyone what happened. *Ealey v. State*, 158 So. 3d 283, 2015 Miss. LEXIS 80 (Miss. 2015).

RESEARCH REFERENCES

ALR.

Criminal liability for excessive or improper punishment inflicted on child by parent, teacher, or one in loco parentis. 89 A.L.R.2d 396.

Insulting words as provocation of homicide or as reducing the degree thereof. 2 A.L.R.3d 1292.

Mental or emotional condition as diminishing responsibility for crime. 22 A.L.R.3d 1228.

Homicide predicated on improper treatment of disease or injury. 45 A.L.R.3d 114.

Unintentional killing of or injury to third person during attempted self-defense. 55 A.L.R.3d 620.

Homicide: burden of proof on defense that killing was accidental. 63 A.L.R.3d 936.

Venue in homicide cases where crime is committed partly in one country and partly in another. 73 A.L.R.3d 907.

Accused's right, in homicide case, to have jury instructed as to both unintentional shooting and self-defense. 15 A.L.R.4th 983.

Homicide: physician's withdrawal of life

supports from comatose patient. 47 A.L.R.4th 18.

Standard for determination of reasonableness of criminal defendant's belief, for purposes of self-defense claim, that physical force is necessary – modern cases. 73 A.L.R.4th 993.

Homicide: Liability where death immediately results from treatment or mistreatment of injury inflicted by defendant. 50 A.L.R.5th 467.

Am. Jur.

40 Am. Jur. 2d, Homicide §§ 104 et seq.

2 Am. Jur. Trials, Investigating Particular Crimes §§ 40-57 (homicide).

7 Am. Jur. Trials, Homicide §§ 1 et seq.

27 Am. Jur. Trials 261, Hunting Accident Litigation.

40 Am. Jur. Trials 501, Forensic Pathology in Homicide Cases.

CJS.

40 C.J.S., Homicide §§ 150-152.

Practice References.

Ronald L. Schoenberg, Criminal Law Deskbook (Matthew Bender).

§ 97-3-19. Homicide; murder defined; first-degree murder; second-degree murder; capital murder; lesser-included offenses.

(1) The killing of a human being without the authority of law by any means or in any manner shall be murder in the following cases:

(a) When done with deliberate design to effect the death of the person killed, or of any human being, shall be first-degree murder;

(b) When done in the commission of an act eminently dangerous to

others and evincing a depraved heart, regardless of human life, although without any premeditated design to effect the death of any particular individual, shall be second-degree murder;

(c) When done without any design to effect death by any person engaged in the commission of any felony other than rape, kidnapping, burglary, arson, robbery, sexual battery, unnatural intercourse with any child under the age of twelve (12), or nonconsensual unnatural intercourse with mankind, or felonious abuse and/or battery of a child in violation of subsection (2) of Section 97-5-39, or in any attempt to commit such felonies, shall be first-degree murder;

(d) When done with deliberate design to effect the death of an unborn child, shall be first-degree murder.

(2) The killing of a human being without the authority of law by any means or in any manner shall be capital murder in the following cases:

(a) Murder which is perpetrated by killing a peace officer or fireman while such officer or fireman is acting in his official capacity or by reason of an act performed in his official capacity, and with knowledge that the victim was a peace officer or fireman. For purposes of this paragraph, the term "peace officer" means any state or federal law enforcement officer, including, but not limited to, a federal park ranger, the sheriff of or police officer of a city or town, a conservation officer, a parole officer, a judge, senior status judge, special judge, district attorney, legal assistant to a district attorney, county prosecuting attorney or any other court official, an agent of the Alcoholic Beverage Control Division of the Department of Revenue, an agent of the Bureau of Narcotics, personnel of the Mississippi Highway Patrol, and the employees of the Department of Corrections who are designated as peace officers by the Commissioner of Corrections pursuant to Section 47-5-54, and the superintendent and his deputies, guards, officers and other employees of the Mississippi State Penitentiary;

(b) Murder which is perpetrated by a person who is under sentence of life imprisonment;

(c) Murder which is perpetrated by use or detonation of a bomb or explosive device;

(d) Murder which is perpetrated by any person who has been offered or has received anything of value for committing the murder, and all parties to such a murder, are guilty as principals;

(e) When done with or without any design to effect death, by any person engaged in the commission of the crime of rape, burglary, kidnapping, arson, robbery, sexual battery, unnatural intercourse with any child under the age of twelve (12), or nonconsensual unnatural intercourse with mankind, or in any attempt to commit such felonies;

(f) When done with or without any design to effect death, by any person engaged in the commission of the crime of felonious abuse and/or battery of a child in violation of subsection (2) of Section 97-5-39, or in any attempt to commit such felony;

(g) Murder which is perpetrated on educational property as defined in Section 97-37-17;

(h) Murder which is perpetrated by the killing of any elected official of a county, municipal, state or federal government with knowledge that the victim was such public official;

(i) Murder of three (3) or more persons who are killed incident to one (1) act, scheme, course of conduct or criminal episode;

(j) Murder of more than three (3) persons within a three-year period;

(k) Murder which is perpetrated by the killing of a person who: (i) is or would be a witness for the state or federal government in a criminal trial; (ii) is a confidential informant for any agency of the state or federal government; or (iii) is any other person who was cooperating or assisting the state or federal government or was suspected of cooperation or assistance to the state or federal government, if the motive for the killing was either the person's status as a witness, potential witness or informant, or was to prevent the cooperation or assistance to the prosecution. It shall not be a defense to a killing under this subsection that the defendant erroneously suspected or believed the victim to have cooperated or assisted the state or federal government.

(3) An indictment for murder or capital murder shall serve as notice to the defendant that the indictment may include any and all lesser included offenses thereof, including, but not limited to, manslaughter.

HISTORY: Codes, Hutchinson's 1848, ch. 64, art. 12, Title 2 (3, 4); 1857, ch. 64, art. 165; 1871, § 2628; 1880, § 2875; 1892, § 1149; 1906, § 1227; Hemingway's 1917, § 957; 1930, § 985; 1942, § 2215; Laws, 1974, ch. 576, § 6(1, 2); Laws, 1983, ch. 429, § 1; Laws, 1992, ch. 508, § 1; Laws, 1996, ch. 422, § 3; Laws, 1998, ch. 588, § 1; Laws, 2000, ch. 516, § 134; Laws, 2004, ch. 393, § 1; Laws, 2004, ch. 515, § 2; Laws, 2013, ch. 555, § 1; Laws, 2015, ch. 450, § 1; Laws, 2017, ch. 382, § 10, eff from and after July 1, 2017.

Joint Legislative Committee Note — Section 1 of ch. 393 Laws, 2004, effective from and after passage (approved April 20, 2004), amended this section. Section 2 of ch. 515, Laws, 2004, effective from and after passage (approved May 4, 2004), also amended this section. As set out above, this section reflects the language of both amendments pursuant to Section 1-1-109 which gives the Joint Legislative Committee on Compilation, Revision and Publication of Legislation authority to integrate amendments so that all versions of the same code section enacted within the same legislative session may become effective. The Joint Committee on Compilation, Revision and Publication of Legislation ratified the integration of these amendments as consistent with the legislative intent at the July 8, 2004 meeting of the Committee.

Cross References — Construction of the terms “capital case,” “capital offense,” “capital crime,” and “capital murder,” see § 1-3-4.

Prohibition of person convicted of crimes affecting children or other violent crimes from being licensed as foster parent or a foster home, see § 43-15-6.

Investigation of hunting accidents, see § 49-4-31.

Effect of conviction of homicide as disqualification to hold office in labor union, etc., see § 71-1-49.

Murder, as provided in this section, defined as crime of violence, see § 97-3-2.

Assault and battery with deadly weapon, see § 97-3-7.

Penalty for murder, see § 97-3-21.

Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see § 97-43-1 et seq.

Reward for arrest of one fleeing homicide, see §§ 99-3-35 through 99-3-39.

Requisites of indictment for homicide, see § 99-7-37.

Procedures requisite in capital crime cases, see § 99-17-20.

Conviction of constituent offense, see § 99-19-5.

Enhancement of offenses listed in 99-19-401(2) if the instrumentality used in the commission of the 99-19-401(2) offense was initially obtained in the course of the commission of the crime(s) provided for in this section, see § 99-19-401.

JUDICIAL DECISIONS

ANALYSIS

I. IN GENERAL.

1. In general.
2. Definitions and distinctions.
3. Plea.
4. Sentence.
5. Jury selection.
6. Request for state funds.
7. Practice and procedure.
8. Deliberate design; malice.
9. —Interference, use of deadly weapon.
10. Corpus delicti.
11. Provocation.
12. Defenses; generally.
13. —Self-defense.
14. Questions for jury.
15. Mutual combat; dueling.
16. Killing of one other than person intended.
17. Death in consequence of improper treatment of wound.
18. Murder for hire.
19. Homicide by persons joining in commission of felony.
20. Homicide by commission of dangerous act.
21. Killing as manslaughter.
22. Indictment.
23. Variance between pleading and proof.
24. Deliberations of jury; verdict.
25. Conviction of lesser offense.
26. Trial; generally.
27. —Prosecutorial misconduct.
28. —Selection and removal of jurors.
29. —Ineffective assistance of counsel.
30. —Continuance.
31. Prejudicial or harmless error; generally.
32. —Comment or act of counsel.
33. —Instructions.
34. —Self-defense.

II. EVIDENTIARY MATTERS.

35. — Death certificate.

36. Evidence; generally.
37. Witnesses—defendant as only witness to offense.
38. —Defendant's family members.
39. Admissibility; generally.
40. —Statement against interest.
41. —Res gestae; continuing acts.
42. —Admissions; confessions.
43. —Motive; propensity for violence.
44. —Photographs, other prejudicial evidence.
45. — —Photographs as admissible.
46. —Expert testimony; scientific techniques.
47. Circumstantial evidence.
48. Prior difficulty.
49. Threats.
50. Self-defense.
51. Insanity.
52. Sufficiency of evidence; generally.
53. — Conviction sustained — murder.
54. — — Capital murder.
55. —Conviction not sustained.

III. INSTRUCTIONS.

56. In general.
57. Variance between pleadings and instructions.
58. Terms and definitions.
59. Lesser included offenses.
60. — — Depraved heart murder.
61. Failure to give manslaughter instruction—where accused fails to request.
62. —Where evidence supports manslaughter.
63. —Where evidence does not support manslaughter.
64. —Where underlying offense is robbery.
65. Manslaughter instruction given where evidence sufficient for murder.
66. Failure to limit conviction to manslaughter.

- 67. Accessories, accomplices.
- 68. Cautionary instructions.
- 69. Peremptory instructions.
- 70. —Pre-arrest instruction.
- 71. Defendant's theory of defense.
- 72. Flight as evidence of guilt.
- 73. Malice or deliberate design.
- 74. Self-defense.
- 75. Miscellaneous.
- 76. Death penalty.
- 77. Aiding And Abetting.
- 78. Instructions properly denied.
- 79. Instructions improperly denied.

I. IN GENERAL.

1. In general.

The appellate court found merit to defendant's argument that his separate convictions for capital murder and kidnapping violated his right against double jeopardy. Accordingly, the appellate court reversed and rendered the kidnapping conviction and vacated his thirty-year sentence for that conviction. *Gillum v. State*, — So. 3d —, 2020 Miss. App. LEXIS 525 (Miss. Ct. App. Sept. 8, 2020).

Double jeopardy did not bar defendant's prosecution for murder, Miss. Code Ann. § 97-3-19(2)(e), and kidnapping, Miss. Code Ann. § 97-3-53, because murder and kidnapping had separate statutory elements, requiring different facts. *McBeath v. State*, 66 So. 3d 663, 2010 Miss. App. LEXIS 666 (Miss. Ct. App. 2010), cert. denied, 69 So. 3d 9, 2011 Miss. LEXIS 373 (Miss. 2011).

Defendant's capital murder conviction under Miss. Code Ann. § 97-3-19(2)(e) was reversed where his indictment was insufficient to charge him with capital murder or burglary because it failed to assert the underlying offense that comprised the burglary; it also failed to charge him with murder or manslaughter where it omitted the term "unlawfully" or the phrase "without the authority of law." *Jackson v. State*, 2010 Miss. LEXIS 170 (Miss. Apr. 1, 2010).

Defendant's capital murder conviction in violation of Miss. Code Ann. § 97-3-19(2)(a) was proper where the statute did not violate U.S. Const. amends. VIII and XIV. The fact that Mississippi's capital murder scheme made the death penalty a

possible punishment for felony murder where there was no requirement to prove an intent to kill, and not premeditated murder, did not make the Mississippi capital murder statute unconstitutional. *Davis v. State*, 914 So. 2d 200, 2005 Miss. App. LEXIS 269 (Miss. Ct. App.), cert. denied, 921 So. 2d 344, 2005 Miss. LEXIS 746 (Miss. 2005), cert. denied, 549 U.S. 856, 127 S. Ct. 133, 166 L. Ed. 2d 98, 2006 U.S. LEXIS 6743 (U.S. 2006).

Evidence was sufficient to support defendant's conviction for capital murder pursuant to Miss. Code Ann. § 97-3-19(2)(e) based on an underlying burglary felony where the evidence showed that defendant killed his ex-girlfriend's brother after breaking into the girlfriend's home with the intent to kill her and her mother. Also the indictment sufficiently specified the underlying burglary offense. *Hodges v. State*, 912 So. 2d 730, 2005 Miss. LEXIS 164 (Miss.), cert. denied, 546 U.S. 1037, 126 S. Ct. 739, 163 L. Ed. 2d 579, 2005 U.S. LEXIS 8670 (U.S. 2005).

It was previously determined that Miss. Code Ann. § 97-3-19(e), the portion of Mississippi's death penalty statute that provides for the application of the statute to all defendants found guilty of felony murder, is constitutional, as is Miss. Code Ann. § 99-19-101, which provides that a jury is to determine punishment in capital cases, and lists the mitigating and aggravating factors to be considered; jury instructions used in defendant's capital murder trial were in compliance with *Enmund* and *Tison*, in that the jury found that all four factors contained in Miss. Code Ann. § 99-19-101 as to intent beyond a reasonable doubt were present, including that defendant had intended to kill the victim. *Grayson v. State*, 879 So. 2d 1008, 2004 Miss. LEXIS 721 (Miss. 2004), cert. denied, 543 U.S. 1155, 125 S. Ct. 1301, 161 L. Ed. 2d 122, 2005 U.S. LEXIS 1593 (U.S. 2005).

Where four eyewitnesses testified they saw the defendant point a gun and fire at the victim, that the victim was unarmed and made no gestures to suggest that he had a weapon or that he intended any harm to defendant, and where other witnesses testified that defendant, after the first confrontation of the day, acquired a

gun and made purposeful efforts to locate the victim, a jury could reasonably have found that defendant had a deliberate design to kill the victim and that he carried out that plan. *Carter v. State*, 845 So. 2d 748, 2003 Miss. App. LEXIS 440 (Miss. Ct. App. 2003).

Defendant's supported allegations that his guilty plea to murdering his girlfriend was involuntary and the result of coercion because his attorney refused to investigate an allegedly incorrect criminal record that would have shown defendant to be a habitual criminal could properly be rejected by the trial court considering defendant's motion for postconviction relief without holding an evidentiary hearing; trial court could properly impose a life sentence without referring the matter to a jury. *Riley v. State*, 848 So. 2d 888, 2003 Miss. App. LEXIS 196 (Miss. Ct. App. 2003).

Where a trial court fails to instruct the jury on the underlying felony in a capital murder prosecution, the Mississippi Supreme Court applies a harmless error analysis. *Kolberg v. State*, 829 So. 2d 29, 2002 Miss. LEXIS 268 (Miss. 2002), cert. denied, 538 U.S. 981, 123 S. Ct. 1787, 155 L. Ed. 2d 672, 2003 U.S. LEXIS 3010 (U.S. 2003), overruled in part, *Harrell v. State*, 134 So. 3d 266, 2014 Miss. LEXIS 52 (Miss. 2014), overruled in part, *Rowsey v. State*, 188 So. 3d 486, 2015 Miss. LEXIS 573 (Miss. 2015).

Trial court did not err in not declaring Mississippi's death penalty statute, contained in Miss. Code Ann. § 97-3-19(e), unconstitutional as the death sentence was not excessive in relation to defendant's crime of stabbing a 78-year old woman to death and death sentences were imposed with reasonable consistency in Mississippi such that imposing a death sentence in defendant's case was not improper. *Grayson v. State*, 806 So. 2d 241, 2001 Miss. LEXIS 303 (Miss. 2001), cert. denied, 537 U.S. 973, 123 S. Ct. 466, 154 L. Ed. 2d 329, 2002 U.S. LEXIS 7800 (U.S. 2002).

Subsection (2)(f) of this section is constitutional, notwithstanding that it does not require deliberate design. *Miller v. State*, 748 So. 2d 100, 1999 Miss. LEXIS 291 (Miss. 1999).

The phrase "without authority of law" is an element of capital murder as defined by subsection (2)(e) of this section. *Edwards v. State*, 737 So. 2d 275, 1999 Miss. LEXIS 80 (Miss. 1999).

The State supreme court rejected the contention that this section is unconstitutional due to its failure to clearly define "deliberate design;" the defendant did not meet his burden of proving beyond a reasonable doubt that the statute is unconstitutionally vague. *Jones v. State*, 710 So. 2d 870, 1998 Miss. LEXIS 144 (Miss. 1998).

Capital murder defendant cannot be convicted of both capital murder and underlying felony, as defendant cannot be twice prosecuted for the same actions. *Wilcher v. State*, 697 So. 2d 1087, 1997 Miss. LEXIS 100 (Miss. 1997), cert. denied, 522 U.S. 1053, 118 S. Ct. 705, 139 L. Ed. 2d 647, 1998 U.S. LEXIS 149 (U.S. 1998).

Aggravating factor of murder committed during course of robbery is constitutional. *Wilcher v. State*, 697 So. 2d 1087, 1997 Miss. LEXIS 100 (Miss. 1997), cert. denied, 522 U.S. 1053, 118 S. Ct. 705, 139 L. Ed. 2d 647, 1998 U.S. LEXIS 149 (U.S. 1998).

Defendant could be prosecuted for capital murder based on felony murder, even though he could also have been charged with manslaughter. *Blue v. State*, 674 So. 2d 1184, 1996 Miss. LEXIS 304 (Miss.), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517, 1996 U.S. LEXIS 7523 (U.S. 1996).

Where defendant was charged with two acts of sexual battery, one of which constituted the underlying felony to the capital murder and the other of which served as the basis of separate sexual battery conviction, the latter aggravated the crime and narrowed the class of defendants eligible for the death penalty substantially. *Blue v. State*, 674 So. 2d 1184, 1996 Miss. LEXIS 304 (Miss.), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517, 1996 U.S. LEXIS 7523 (U.S. 1996).

Because defendant had previously been convicted of aggravated assault and certified as an adult, he would not have been entitled to a youth court hearing for his capital murder charge even if such a hear-

ing would otherwise be required. *Blue v. State*, 674 So. 2d 1184, 1996 Miss. LEXIS 304 (Miss.), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517, 1996 U.S. LEXIS 7523 (U.S. 1996).

A defendant's convictions for both murder-for-hire capital murder under subsection (2)(d) of this section and conspiracy to commit capital murder under § 97-1-1 violated the constitutional protection against double jeopardy, since the definition of murder-for-hire in subsection (2)(d) of this section completely encompasses the agreement or conspiracy to commit capital murder. *Colosimo v. Senatobia Motor Inn*, 662 So. 2d 552, 1995 Miss. LEXIS 479 (Miss. 1995).

The constitutional principles of double jeopardy are not violated by the "double use" of the pecuniary gain factor in elevating a murder to the status of capital murder because it was perpetrated by one who had been given something of value for the killing pursuant to subsection (2)(d) of this section and in imposing the death penalty for committing murder by pecuniary gain pursuant to § 99-19-101(5)(f). *Nixon v. State*, 533 So. 2d 1078, 1987 Miss. LEXIS 2917 (Miss. 1987), cert. denied, 490 U.S. 1102, 109 S. Ct. 2458, 104 L. Ed. 2d 1012, 1989 U.S. LEXIS 2745 (U.S. 1989), overruled, *Wharton v. State*, 734 So. 2d 985, 1998 Miss. LEXIS 576 (Miss. 1998).

Merger doctrine does not apply, and therefore underlying crime of felonious child abuse does not merge into murder, because societal interests are different regarding capital murder statute and felonious child abuse statute, former designed to punish and act as deterrent to such crimes should death result, the latter intended to protect children. *Faraga v. State*, 514 So. 2d 295, 1987 Miss. LEXIS 2656 (Miss. 1987), cert. denied, 487 U.S. 1210, 108 S. Ct. 2858, 101 L. Ed. 2d 894, 1988 U.S. LEXIS 2778 (U.S. 1988).

Intent of legislature was that serious child abusers would be guilty of capital murder if child died. *Faraga v. State*, 514 So. 2d 295, 1987 Miss. LEXIS 2656 (Miss. 1987), cert. denied, 487 U.S. 1210, 108 S. Ct. 2858, 101 L. Ed. 2d 894, 1988 U.S. LEXIS 2778 (U.S. 1988).

District Attorney's statements that defendant had spent 6 years in jail in Cuba

and had been arrested and imprisoned in Texas, both of which showed significant history of criminal activity, were not used against defendant as aggravating circumstances, because it was proper for District Attorney to rebut defendant's argument that absence of criminal activity should be regarded as mitigating circumstance. Defendant admitted he had previously been convicted in Cuba for possession of marijuana, had been imprisoned in Cuba for 4 years as political prisoner, and had been arrested in Texas but was not convicted of anything. *Faraga v. State*, 514 So. 2d 295, 1987 Miss. LEXIS 2656 (Miss. 1987), cert. denied, 487 U.S. 1210, 108 S. Ct. 2858, 101 L. Ed. 2d 894, 1988 U.S. LEXIS 2778 (U.S. 1988).

Circuit Court did not err when it allowed witness to testify who had refused to talk to defense counsel prior to trial unless District Attorney could be present during interview; it was also not error for Circuit Court to refuse to order disclosure of pre-trial statement of same witness, where there was no inconsistency between pre-trial statement and testimony of witness at trial. *Tolbert v. State*, 511 So. 2d 1368, 1987 Miss. LEXIS 2681 (Miss. 1987), cert. denied, 484 U.S. 1016, 108 S. Ct. 723, 98 L. Ed. 2d 672, 1988 U.S. LEXIS 259 (U.S. 1988).

Trial court may deny defendant's request for permanent injunction enjoining media from covering pretrial motions and hearings in capital murder case. *Johnson v. State*, 476 So. 2d 1195, 1985 Miss. LEXIS 2257 (Miss. 1985).

Venue for murder prosecution is proper in county in which body of victim is found. *Hickson v. State*, 472 So. 2d 379, 1985 Miss. LEXIS 2132 (Miss. 1985).

Trial judge does not impermissibly deny murder defendant right to counsel by denying motion by defense counsel for leave to withdraw which is filed within 2 weeks from date case is to be tried where attorney ably cross-examines state's witnesses at trial, raises appropriate objections to inadmissible material, files numerous pretrial motions, succeeds in having defendant's custodial statements suppressed and in fact is successful in obtaining verdict of less than capital murder. *Fairley v. State*, 467 So. 2d 894, 1985

Miss. LEXIS 1902 (Miss.), cert. denied, 474 U.S. 855, 106 S. Ct. 160, 88 L. Ed. 2d 133, 1985 U.S. LEXIS 3725 (U.S. 1985).

In a prosecution for capital murder (subsection (2)(e) of this section), the trial court did not err in failing to suppress defendant's confession, despite defendant's contention that the confession was not voluntary because he was concerned that the police were implicating his brother in the murder when in fact his brother was not involved, where the record was replete with evidence that defendant was given his Miranda rights on several occasions and where the record would not support a conclusion that his concern was used by officers to overreach him. *Reddix v. State*, 381 So. 2d 999, 1980 Miss. LEXIS 1845 (Miss.), cert. denied, 449 U.S. 986, 101 S. Ct. 408, 66 L. Ed. 2d 251 (U.S. 1980).

This section is constitutional despite the language permitting the imposition of death upon one who harbors no specific intent to kill. Furthermore, since there are no statutory limitations on the mitigating factors that may be considered in the capital sentencing process (§ 97-3-21), it suffers no constitutional infirmities. *Lockett v. Ohio*, 438 U.S. 586, 98 S. Ct. 2954, 57 L. Ed. 2d 973, 1978 U.S. LEXIS 133 (U.S. 1978); *Culbertson v. State*, 379 So. 2d 499, 1979 Miss. LEXIS 2528 (Miss. 1979), cert. denied, 449 U.S. 986, 101 S. Ct. 406, 66 L. Ed. 2d 250, 1980 U.S. LEXIS 3943 (U.S. 1980).

Where a victim was raped and murdered during a connected chain of events, a conviction for capital murder was proper under subsection (2)(e) of this section even though the death of the victim was not a result of the actual rape. *Pickle v. State*, 345 So. 2d 623, 1977 Miss. LEXIS 2472 (Miss. 1977).

Test of defendant's criminal responsibility is his ability at the time he committed the act to realize the nature and quality thereof, and to distinguish right from wrong. *Smith v. State*, 95 Miss. 786, 49 So. 945, 1909 Miss. LEXIS 295 (Miss. 1909).

2. Definitions and distinctions.

Although depraved-heart murder and culpable-negligence manslaughter share some elements, they are separate crimes

with differing states of culpability; depraved-heart murder involves a higher degree of recklessness from which malice of deliberate design may be implied. *Nichols v. State*, 27 So. 3d 433, 2009 Miss. App. LEXIS 473 (Miss. Ct. App. 2009), cert. denied, 27 So. 3d 404, 2010 Miss. LEXIS 70 (Miss. 2010), cert. denied, 562 U.S. 849, 131 S. Ct. 97, 178 L. Ed. 2d 61, 2010 U.S. LEXIS 5836 (U.S. 2010).

Miss. Code Ann. § 97-3-19(2)(e) did not address whether the victim in a felony-murder case had to be innocent as it simply stated that capital murder was the killing of a human being without authority of law by any means or in any manner when committed, regardless of intent, by a person engaged in one of several enumerated felonies; robbery was one of the enumerated felonies, and the jury found that defendant killed the victim during the commission of a robbery. *Grant v. State*, 8 So. 3d 213, 2008 Miss. App. LEXIS 495 (Miss. Ct. App. 2008), cert. denied, 12 So. 3d 531, 2009 Miss. LEXIS 207 (Miss. 2009).

Defendant's prosecutions for both shooting into a vehicle under Miss. Code Ann. § 97-25-47 and murder under Miss. Code Ann. § 97-3-19(1)(a), did not subject him to double jeopardy since the crimes charged required additional facts separate from each other; murder, unlike shooting into a vehicle, required the deliberate killing of an individual and did not require defendant to have shot into a vehicle, while shooting into a vehicle required only that defendant willfully shot into or at a vehicle. Further, the facts were such that it was not clear whether defendant shot into the vehicle when he killed the victim, as there was testimony to the effect that the victim may have had all or part of his head outside the vehicle when he was shot; in essence, the facts were such that defendant could have been found guilty of murder and of shooting into a vehicle without any risk of exposure to double jeopardy. *Peacock v. State*, 970 So. 2d 197, 2007 Miss. App. LEXIS 763 (Miss. Ct. App. 2007).

Miss. Code Ann. § 97-3-19(2) capital murders were found where underlying felonies of burglary and felony child abuse elevated murders of defendant's ex-wife's

family to capital status; the offenses were not merged. *Stevens v. State*, 806 So. 2d 1031, 2001 Miss. LEXIS 234 (Miss. 2001), cert. denied, 537 U.S. 1232, 123 S. Ct. 1384, 155 L. Ed. 2d 195, 2003 U.S. LEXIS 1755 (U.S. 2003).

Subsections (a) and (b), which define premeditated murder and depraved heart murder, respectively, have been coalesced by long standing and widely accepted case law because, as a matter of common sense, every murder done with deliberate design to effect the death of another human being is by definition done in the commission of an act imminently dangerous to others and evincing a depraved heart, without regard for human life. *Ruttley v. State*, 746 So. 2d 872, 1998 Miss. App. LEXIS 1061 (Miss. Ct. App. 1998).

Statute allowing conviction of capital murder if murder is committed by one who is “under sentence of life imprisonment” applies to persons who are on parole from life term. *Taylor v. State*, 672 So. 2d 1246, 1996 Miss. LEXIS 193 (Miss.), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379, 1996 U.S. LEXIS 7020 (U.S. 1996).

In the sentencing phase of a capital murder prosecution, the State’s closing argument did not constitute a comment on the defendant’s failure to take the witness stand in his own defense where the State made the following argument: “Do you think she was suffering? Do you think that’s cruel and atrocious, and what’s even more than that, what do you think was running through [defendant’s] head as he sat through watching her gag on her own blood? What do you think he was thinking?” *Thorson v. State*, 653 So. 2d 876, 1994 Miss. LEXIS 600 (Miss. 1994).

Although the structure of this section suggests that deliberate design/premeditated murder and depraved heart murder are 2 different, mutually exclusive categories of murder, every murder done with deliberate design to effect the death of another human being is by definition done in the commission of an act eminently dangerous to others and evincing a depraved heart, regardless of human life; Mississippi cases have for all practical purposes coalesced the 2 so that subsection (1)(b) subsumes (1)(a) of this section.

Mallett v. State, 606 So. 2d 1092, 1992 Miss. LEXIS 538 (Miss. 1992).

The difference between attempted murder and aggravated assault is the specific intent requirement, for the former, and the element of deadly weapon use, for the latter. In many fact scenarios, both charges are established by the same evidence. *McGowan v. State*, 541 So. 2d 1027, 1989 Miss. LEXIS 180 (Miss. 1989).

A burglary perpetrated with the specific intent of killing a person inside of the burglaried premises will not be deemed to be merged into, or an integral part of the, murder committed, so as to preclude a capital murder charge. *Smith v. State*, 499 So. 2d 750, 1986 Miss. LEXIS 2853 (Miss. 1986).

A killing subsequent to a burglary does not negate the burglary but, rather, the burglary remains a separate and distinct crime from the succeeding killing, and the 2 crimes form the foundation for a capital murder charge. *Smith v. State*, 499 So. 2d 750, 1986 Miss. LEXIS 2853 (Miss. 1986).

The chief distinction between murder and manslaughter is the presence of deliberation and malice in murder and its absence in manslaughter. *Carter v. State*, 198 Miss. 523, 21 So. 2d 404, 1945 Miss. LEXIS 226 (Miss. 1945).

Death of woman from abortion either “murder” or “manslaughter.” *Lee v. State*, 124 Miss. 398, 86 So. 856, 1920 Miss. LEXIS 522 (Miss. 1920).

3. Plea.

Defendant was not entitled to post-conviction relief as to a guilty plea because, after the charge was read, defendant persisted in pleading guilty, admitted not being under the influence of anything that might affect defendant’s thinking, and acknowledged both the charge and the penalty of life imprisonment. *Barton v. State*, — So. 3d —, 2020 Miss. App. LEXIS 59 (Miss. Ct. App. Feb. 25, 2020), cert. denied, — So. 3d —, 2020 Miss. LEXIS 421 (Miss. 2020).

Factual basis supported appellant’s guilty plea to deliberate-design murder. Appellant was given the opportunity to disagree with the factual basis recited by the State but did not. *Pipkin v. State*, 296 So. 3d 90, 2019 Miss. App. LEXIS 476

(Miss. Ct. App. 2019), cert. denied, 293 So. 3d 832, 2020 Miss. LEXIS 217 (Miss. 2020).

Defendant's charge was only reduced to manslaughter pursuant to his plea agreement, and once the guilty plea was withdrawn, his charge of capital murder was reinstated, even if the circuit court neglected to enter an order rescinding the order that had reduced the charge; there was no merit to defendant's contention that he should have been tried on a manslaughter charge instead of a capital murder charge. *Cozart v. State*, 226 So. 3d 639, 2016 Miss. App. LEXIS 270 (Miss. Ct. App. 2016).

Inmate who pled guilty to murder under Miss. Code Ann. § 97-3-19(1)(a) waived his right to challenge the sufficiency of the State's evidence. *Higginbotham v. State*, 114 So. 3d 9, 2012 Miss. App. LEXIS 595 (Miss. Ct. App. 2012), cert. denied, 116 So. 3d 1072, 2013 Miss. LEXIS 317 (Miss. 2013).

Defendant's guilty plea to murder under Miss. Code Ann. § 97-3-19(1)(a) was knowing, voluntary, and intelligent as defense counsel correctly advised the inmate that when he reached the 65, he could petition to be released from custody under Miss. Code Ann. § 47-5-139(1)(a); while counsel might have used the term "parole eligibility" rather than the correct term "conditional release," he correctly advised the inmate that he would be eligible for release at age 65. *Higginbotham v. State*, 114 So. 3d 9, 2012 Miss. App. LEXIS 595 (Miss. Ct. App. 2012), cert. denied, 116 So. 3d 1072, 2013 Miss. LEXIS 317 (Miss. 2013).

Defendant was not entitled to post-conviction relief because the motion was filed outside of the three-year limitation of Miss. Code Ann. § 99-39-5(2) and when defendant pled guilty to murder in violation of Miss. Code Ann. § 97-3-19(1)(a), defendant stated that he understood the nature of the charge, the elements of the crime, and the consequences of pleading guilty to such a crime; thus, defendant was sufficiently informed of the elements of murder and the consequences of pleading guilty to such a crime to make defendant's guilty plea intelligent and voluntary. *Shanks v. State*, 972 So. 2d 734, 2007

Miss. App. LEXIS 410 (Miss. Ct. App. 2007), cert. denied, 973 So. 2d 244, 2008 Miss. LEXIS 24 (Miss. 2008).

Defendant's ex post facto rights were knowingly waived where there was testimony that defendant's attorneys indicated that defendant would waive any and all rights to effectuate the plea agreement for armed robbery as an habitual offender, and avoid a possible death sentence on a murder charge. *Bell v. State*, 751 So. 2d 1035, 1999 Miss. LEXIS 400 (Miss. 1999).

Defendant who pleaded guilty to charges of capital murder and conspiracy was properly informed by trial court of possible sentences, and guilty plea was not involuntarily entered and was valid; defendant was fully advised of nature of charges against him and of consequences of guilty pleas, life sentence was only sentence court could impose, no minimum sentence existed for conspiracy, and defendant was not coerced, intimidated, or promised any reward beyond district attorney's announced recommendation for sentence. *Simpson v. State*, 678 So. 2d 712, 1996 Miss. LEXIS 413 (Miss. 1996).

A trial court erred in allowing a defendant to plead guilty to both capital murder and the underlying felony of burglary which elevated the murder to capital murder; sentencing the defendant separately for both felony murder and the underlying felony violated his right against double jeopardy. *Fuselier v. State*, 654 So. 2d 519, 1995 Miss. LEXIS 222 (Miss. 1995).

A trial court erred in allowing a defendant to plead guilty to both capital murder and burglary where the burglary was the underlying felony elevating the crime of murder to capital murder, and there was no separate indictment for burglary. *Fuselier v. State*, 654 So. 2d 519, 1995 Miss. LEXIS 222 (Miss. 1995).

A circuit court properly summarily denied a defendant's post-conviction relief motion to vacate his murder conviction on the ground that his guilty plea was not made knowingly and intelligently and was devoid of a factual basis, even though the defendant did not admit outright that the killing of the victim was malicious, where the defendant struck the victim twice with the butt of a gun during an altercation and continued to knock the

victim down each time he pulled himself up, and there was nothing in the record to suggest that the defendant was offered any hope of reward for entering his plea of guilty or that he was coerced, threatened or intimidated into making it, but, to the contrary, the circuit court interrogated the defendant thoroughly and carefully explained to him the full gamut of constitutional protections available to him as well as the ramifications of entering a guilty plea. *Lott v. State*, 597 So. 2d 627, 1992 Miss. LEXIS 149 (Miss. 1992).

Before a trial court may accept a guilty plea, it must have before it substantial evidence that the accused did commit the legally defined offense to which he or she is offering the plea. What facts must be shown are a function of the definition of the crime and its assorted elements. A factual showing does not fail merely because it does not flush out the details which might be brought forth at trial. Rules of evidence may be relaxed at plea hearings, and fair inference favorable to guilt may facilitate the finding. There must be enough that the court may say with confidence that the prosecution could prove the accused guilty of the crime charged. Thus, there was an adequate factual basis for a defendant's plea of guilty to murder, even though the defendant advised the trial court at the plea hearing that he "didn't do the shooting," where the defendant admitted that he was at the crime scene, the prosecution's summary of the proof showed guilt and was made in the defendant's presence, and, even taking the defendant's version of the facts, it was fairly inferable that a third party shot and killed the victim under circumstances where the defendant was an accessory before the fact. *Corley v. State*, 585 So. 2d 765, 1991 Miss. LEXIS 591 (Miss. 1991).

Defendant who is granted new trial, after having previously been tried for capital murder and found guilty, and who enters plea of guilty to murder prior to second trial on basis of erroneous advice from counsel that he could be given death penalty upon retrial is entitled to withdraw guilty plea and be given new trial at which, upon conviction, maximum penalty imposed could be life imprisonment.

Odom v. State, 483 So. 2d 343, 1986 Miss. LEXIS 2374 (Miss. 1986).

Prosecutor's disclosure in capital murder case of plea agreement with state witness does not constitute impermissible affirmation or bolstering by prosecutor of credibility of witness. *Cabello v. State*, 471 So. 2d 332, 1985 Miss. LEXIS 2059 (Miss. 1985), cert. denied, 476 U.S. 1164, 106 S. Ct. 2291, 90 L. Ed. 2d 732, 1986 U.S. LEXIS 1720 (U.S. 1986).

Where defendant fired a deadly weapon into a crowd the jury was justified in finding malice and motive from this act and could find the defendant guilty of murder. *Bass v. State*, 54 So. 2d 259 (Miss. 1951).

4. Sentence.

In sentencing the juvenile to life without parole after he pleaded guilty to murder, the trial court applied the correct legal standard, and therefore the juvenile was properly denied postconviction relief, because it observed in its sentencing order that under *Miller* it had to determine whether the juvenile's action, applying the applicable factors, constituted transient immaturity or irreparable corruption. *Shoemaker v. State*, — So. 3d —, 2019 Miss. App. LEXIS 553 (Miss. Ct. App. Nov. 12, 2019).

Trial court did not abuse its discretion by concluding that the juvenile should be sentenced to life without parole because the record showed that he was 18 days short of his 18th birthday when he committed the crime, he came from a stable and caring family, the case involved a planned murder, and the juvenile participated equally in the murder, disposing of the body, and covering up the crime. *Shoemaker v. State*, — So. 3d —, 2019 Miss. App. LEXIS 553 (Miss. Ct. App. Nov. 12, 2019).

Trial court properly resentenced defendant to life in prison without the possibility of parole for murder because, while defendant was a juvenile at the time of the murder, the trial court considered the factors in *Miller v. Alabama*, 567 U.S. 460 (2012), heard testimony from several of defendant's family members, who testified that he was raised in a dysfunctional household with a mother who abused

drugs and alcohol, there was no evidence that defendant succumbed to any peer pressure in committing the crime, it was defendant's premeditated idea to kill the victim in addition to robbing him, and it was defendant who slashed the victim more than 30 times with a knife. *Davis v. State*, 234 So. 3d 440, 2017 Miss. App. LEXIS 379 (Miss. Ct. App. 2017), cert. denied, — So. 3d —, 2018 Miss. LEXIS 19 (Miss. 2018).

Trial court exceeded its authority by suspending all but twenty years of defendant's life sentence for first-degree murder because life imprisonment was the applicable sentence for first-degree murder; therefore, the trial court had no authority to suspend any part of defendant's life sentence. *Shaheed v. State*, 205 So. 3d 1105, 2016 Miss. App. LEXIS 806 (Miss. Ct. App. 2016).

As defendant was 15 at the time of the murder and pursuant to Miss. Code Ann. § 47-7-3(1)(h) was not eligible for parole, and as *Miller v. Alabama*, 2012 U.S. LEXIS 4873, was decided while his appeal was pending, his life sentence was vacated and the case was remanded so the trial court could consider the Miller factors before determining sentence. *Parker v. State*, 119 So. 3d 987, 2013 Miss. LEXIS 321 (Miss. 2013).

In a post-conviction relief proceeding in which a pro se state inmate had been indicted for capital murder and pled guilty to the reduced charge of murder, in violation of Miss. Code Ann. § 97-3-19(1)(a), the only exception that he alleged allowed him to file a successive writ was the existence of an intervening decision. With regard solely to his proposed unconstitutional life sentence, he argued that the Apprendi decision and the Blakely decision satisfied the intervening-decision exception; however, those decisions did not provide any support for his claim since life was the only sentence available under Miss. Code Ann. § 97-3-21. *Glass v. State*, 45 So. 3d 1200, 2010 Miss. App. LEXIS 126 (Miss. Ct. App.), cert. denied, 49 So. 3d 636, 2010 Miss. LEXIS 554 (Miss. 2010).

In a case in which defendant appealed his sentence of death by lethal injection for violating Miss. Code Ann. § 97-3-

19(2)(f), nothing in the record supported a finding that the death sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor. The findings by the trial judge were supported by the record, and upon comparison to other factually similar cases where the death sentence was imposed, the sentence of death was not disproportionate in the present case. *Wilson v. State*, 21 So. 3d 572, 2009 Miss. LEXIS 450 (Miss. 2009), cert. denied, 560 U.S. 909, 130 S. Ct. 3282, 176 L. Ed. 2d 1191, 2010 U.S. LEXIS 3966 (U.S. 2010).

Defendant asserted that he was improperly sentenced to life imprisonment without the possibility of parole for murder; however, that was the sentence for capital murder. Because defendant was only sentenced to life imprisonment, not to life without the possibility of parole, under Miss. Code Ann. § 97-3-21, defendant's sentence for murder under Miss. Code Ann. § 97-3-19(1) was proper. *Staten v. State*, 989 So. 2d 938, 2008 Miss. App. LEXIS 76 (Miss. Ct. App.), cert. denied, 993 So. 2d 832, 2008 Miss. LEXIS 400 (Miss. 2008).

Where defendant entered a plea of guilty to murder as a habitual offender, he was sentenced to serve a term of life in custody of the Mississippi Department of Corrections, without the possibility of parole. Defendant was not entitled to post-conviction relief. *Padgett v. State*, 938 So. 2d 876, 2006 Miss. App. LEXIS 150 (Miss. Ct. App.), cert. denied, 937 So. 2d 450, 2006 Miss. LEXIS 603 (Miss. 2006).

Inmate's claim that when reading Miss. Code Ann. § 97-5-39(2)(c) in conjunction with Miss. Code Ann. § 97-3-19(2)(f), the result was an automatic implication of a capital crime regardless of how or in what manner the child suffered death, was procedurally barred under Miss. Code Ann. § 99-39-21(1) because it could have been raised on direct appeal and was not; the claim was also without merit because the Mississippi Supreme Court had previously found that upon reading the statutes in conjunction that they were constitutional. *Brawner v. State*, 947 So. 2d 254, 2006 Miss. LEXIS 625 (Miss. 2006).

There was no merit in the allegation that the jury considered extraneous reli-

gious matters in connection with the sentencing phase of an inmate's capital murder trial because the inmate failed to show how the jury was improperly influenced and jurors were entitled to rely on all their experiences as long as they followed the law. *Smith v. State*, 877 So. 2d 369, 2004 Miss. LEXIS 547 (Miss. 2004).

Court found no merit in an inmate's claim that counsel was ineffective for failing to adequately investigate, develop, and present mitigation evidence at the sentencing phase for capital murder; some of the proposed evidence would have been irrelevant or inadmissible, and most of the proposed testimony was testified to by the inmate's mother, and there was a minimal showing of deficient performance and no assertion of prejudice. *Smith v. State*, 877 So. 2d 369, 2004 Miss. LEXIS 547 (Miss. 2004).

Because the court had already determined on direct appeal that an inmate's sentence for capital murder was not disproportionate, even though it appeared that co-defendant was the actual triggerman, and nothing changed the court's determination, the inmate's claim that the inmate's death sentence was subject to review was without merit. *Smith v. State*, 877 So. 2d 369, 2004 Miss. LEXIS 547 (Miss. 2004).

Given case law, the court could not constitutionally deny an inmate the opportunity to present the issue of the inmate's possible mental retardation to the trial court in connection with the inmate's death sentence for capital murder. *Smith v. State*, 877 So. 2d 369, 2004 Miss. LEXIS 547 (Miss. 2004).

There was no merit in the allegation that the jury failed to consider an inmate's conviction and sentence for capital murder separately from co-defendant's; the court first noted that the issue was raised on direct appeal and was therefore barred pursuant to Miss. Code Ann. § 99-39-21(2), and in any event, the jury returned individualized verdicts and the evidence showed that the jury considered the inmate separately. *Smith v. State*, 877 So. 2d 369, 2004 Miss. LEXIS 547 (Miss. 2004).

Jury executed process for narrowing class of persons eligible for death penalty

by finding that defendant intended to kill and actually killed victim while contemplating that lethal force would be used in her murder, and, thus, felony murder aggravating circumstance was not constitutionally infirm and penalty was not disproportionate to crime. *Berry v. State*, 703 So. 2d 269, 1997 Miss. LEXIS 639 (Miss. 1997).

Felony-murder aggravator is not disproportionate within meaning of Eighth Amendment, although unintentional felony murder is punishable by death, while premeditated murder, standing alone, is not; not every defendant eligible for death penalty will have committed murder while in course of robbery or kidnapping or other statutorily enumerated felonies, and thus, felony-murder aggravator genuinely narrows class of defendants eligible for death penalty. *Wilcher v. State*, 697 So. 2d 1123, 1997 Miss. LEXIS 101 (Miss. 1997).

In order to impose death sentence, jury must determine that defendant either actually killed, attempted to kill, and intended that killing take place, or intended that lethal force would be employed. *Blue v. State*, 674 So. 2d 1184, 1996 Miss. LEXIS 304 (Miss.), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517, 1996 U.S. LEXIS 7523 (U.S. 1996).

Upon determining that defendant actually killed or intended that a killing take place, jury must identify and weigh aggravating circumstances against mitigating circumstances which it has identified and, if it is unable to find aggravating circumstance or determines that aggravating circumstance is outweighed by mitigating circumstances, death penalty is statutorily barred. *Blue v. State*, 674 So. 2d 1184, 1996 Miss. LEXIS 304 (Miss.), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517, 1996 U.S. LEXIS 7523 (U.S. 1996).

Sentence of death imposed upon 17-year-old defendant with IQ of 67 who struck victim with baseball bat, inserted it into her anus, and had sex with her after she was dead was not disproportionate. *Blue v. State*, 674 So. 2d 1184, 1996 Miss. LEXIS 304 (Miss.), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517, 1996 U.S. LEXIS 7523 (U.S. 1996).

Instructing jury that defendant could be sentenced to life in prison precluded claim that overlapping statutes for felonious child abuse and manslaughter, one which permitted death penalty and another that did not, gave prosecutors and juries unfettered discretion to impose the death penalty, in violation of Eighth Amendment rights. *Jackson v. State*, 672 So. 2d 468, 1996 Miss. LEXIS 718 (Miss. 1996).

Death sentence was not excessive or disproportionate for defendant convicted of fatal stabbing of 4 children and inflicting life-threatening wounds upon an adult and another child while in search of money kept in residence. *Jackson v. State*, 672 So. 2d 468, 1996 Miss. LEXIS 718 (Miss. 1996).

Imposition of death penalty on defendant who killed victim during course of robbery was not disproportionate to penalty imposed in similar cases, although defendant was 17 years old at time of offense, had disadvantaged background and had low IQ. *Holly v. State*, 671 So. 2d 32, 1996 Miss. LEXIS 15 (Miss.), cert. denied, 518 U.S. 1025, 116 S. Ct. 2565, 135 L. Ed. 2d 1082, 1996 U.S. LEXIS 4179 (U.S. 1996).

Proportionality requirement was satisfied in capital murder case involving kidnapping of stranger, sexual assault prior to killing, and efforts to hide body and obscure evidence; death penalty had been given, and found to be proportional, in another case involving same elements. *Walker v. State*, 671 So. 2d 581, 1995 Miss. LEXIS 494 (Miss. 1995), cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406, 1996 U.S. LEXIS 7236 (U.S. 1996).

Imposition of death penalty, on defendant convicted for kidnapping, sexually assaulting and killing victim, was not disproportionate even though accomplice who provided evidence against defendant received sentence of life imprisonment; it was defendant's idea to take victim to deserted location, and defendant had been actual perpetrator of assaults, other than one rape perpetrated by accomplice. *Walker v. State*, 671 So. 2d 581, 1995 Miss. LEXIS 494 (Miss. 1995), cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406, 1996 U.S. LEXIS 7236 (U.S. 1996).

Sentence of death, imposed on defendant convicted of killing prison guard, was not excessive or disproportionate to other similar cases in which death sentence had been imposed. *Russell v. State*, 670 So. 2d 816, 1995 Miss. LEXIS 617 (Miss. 1995), cert. denied, 519 U.S. 982, 117 S. Ct. 436, 136 L. Ed. 2d 333, 1996 U.S. LEXIS 6884 (U.S. 1996), cert. dismissed, 520 U.S. 1249, 117 S. Ct. 2406, 137 L. Ed. 2d 1064, 1997 U.S. LEXIS 3537 (U.S. 1997).

Death penalty was not disproportionate sentence for felony murder, where defendant instigated and planned robbery of victim, she had several opportunities to back out of robbery, she provided guns to accomplices to use against victim, and she burned victim's house to cover her guilt. *Ballenger v. State*, 667 So. 2d 1242, 1995 Miss. LEXIS 451 (Miss. 1995), cert. denied, 518 U.S. 1025, 116 S. Ct. 2565, 135 L. Ed. 2d 1082, 1996 U.S. LEXIS 4177 (U.S. 1996).

In imposing a sentence of death in a capital murder case, the fact that the jury's specific written findings supporting its verdict were "parroted" from the sentencing forms did not render the verdict ambiguous in violation of the 6th and 14th Amendments to the United States Constitution and Article 3, § 24 of the Mississippi Constitution. *Carr v. State*, 655 So. 2d 824, 1995 Miss. LEXIS 56 (Miss. 1995), cert. denied, 516 U.S. 1077, 116 S. Ct. 783, 133 L. Ed. 2d 734, 1996 U.S. LEXIS 547 (U.S. 1996).

An agreement between a capital murder defendant and the State for the imposition of a sentence of life imprisonment without the possibility of parole was void and unenforceable on public policy grounds where the defendant was not an habitual offender, since a sentence of life imprisonment without the possibility of parole is not an option unless the defendant is adjudged an habitual offender; the agreement was an attempt to circumvent § 99-19-101, which only authorizes a sentence of life imprisonment or death for capital murder, and its enforcement by the court would bind the parole board, which would effect judicial encroachment on an executive function. *Lanier v. State*, 635 So. 2d 813, 1994 Miss. LEXIS 165 (Miss. 1994), overruled in part, *Twillie v.*

State, 892 So. 2d 187, 2004 Miss. LEXIS 1322 (Miss. 2004).

A sentence of death was not so disproportionate as to require reversal, in spite of the defendant's argument that his mental condition and emotional history, including a diagnosis of schizophrenia, his pre-trial suicidal "gesture," and his "limited intelligence," mitigated against a sentence of death where the record did not indicate that the defendant was ever diagnosed as suffering from paranoid schizophrenia, a report from a mental hospital, at which the defendant was examined prior to trial, stated that the defendant exhibited few, if any, symptoms of schizophrenia and that he knew the difference between right and wrong in relation to his actions, and a community health center placed the defendant's level of intelligence on the low side of average. *Conner v. State*, 632 So. 2d 1239, 1993 Miss. LEXIS 541 (Miss. 1993), cert. denied, 513 U.S. 927, 115 S. Ct. 314, 130 L. Ed. 2d 276, 1994 U.S. LEXIS 7088 (U.S. 1994), overruled, *Weatherspoon v. State*, 732 So. 2d 158, 1999 Miss. LEXIS 4 (Miss. 1999).

The Weathersby Rule is applicable only in the context of whether or not the defendant killed with malice or intent, i.e., whether there is sufficient evidence to prove that the defendant killed with malice or intent where his or her version of the incident as the only eyewitness, says otherwise. Where the trial on a capital offense has reached the sentencing phase, the defendant's guilt has been found and Weathersby considerations are no longer applicable. *Minnick v. State*, 551 So. 2d 77, 1988 Miss. LEXIS 612 (Miss. 1988), rev'd, 498 U.S. 146, 111 S. Ct. 486, 112 L. Ed. 2d 489, 1990 U.S. LEXIS 6118 (U.S. 1990), overruled, *Willie v. State*, 585 So. 2d 660, 1991 Miss. LEXIS 454 (Miss. 1991).

Death sentence is valid if based on single statutory aggravating factor. *Faraga v. State*, 514 So. 2d 295, 1987 Miss. LEXIS 2656 (Miss. 1987), cert. denied, 487 U.S. 1210, 108 S. Ct. 2858, 101 L. Ed. 2d 894, 1988 U.S. LEXIS 2778 (U.S. 1988).

Prosecutor did not improperly argue possibility of parole during sentencing

phase by stating that defendant needed death penalty and not life sentence, and in any event comment was in response to defense counsel's argument for life sentence instead of death penalty and therefore proper in rebuttal. *Faraga v. State*, 514 So. 2d 295, 1987 Miss. LEXIS 2656 (Miss. 1987), cert. denied, 487 U.S. 1210, 108 S. Ct. 2858, 101 L. Ed. 2d 894, 1988 U.S. LEXIS 2778 (U.S. 1988).

Where respondent was charged with capital murder for participating in assault during course of which respondent's companion killed victim, and was sentenced to death under capital murder statute, but death sentence was vacated under intervening U.S. Supreme Court decision holding that Eighth Amendment forbids imposition of death penalty on one who aids and abets felony in the course of which murder is committed but who does not himself kill, attempt to kill, or intend that killing take place or that lethal force be employed, curt on federal habeas corpus review should require state's judicial system to examine entire course of proceedings to determine whether at some point requisite factual finding has been made to support death penalty, which under proper circumstances does not offend Eighth amendment. *Cabana v. Bullock*, 474 U.S. 376, 106 S. Ct. 689, 88 L. Ed. 2d 704, 1986 U.S. LEXIS 46 (U.S. 1986), overruled in part, *Pope v. Illinois*, 481 U.S. 497, 107 S. Ct. 1918, 95 L. Ed. 2d 439, 1987 U.S. LEXIS 1934 (U.S. 1987).

In light of "special interest" in affording protection to law enforcement officers, state's inclusion of subsection (2)(a) of this section as category of murder for which death penalty may be imposed can in no manner be termed arbitrary where any mitigating circumstances may be considered at sentencing phase. *Johnson v. Thigpen*, 623 F. Supp. 1121, 1985 U.S. Dist. LEXIS 12803 (S.D. Miss. 1985), aff'd, 806 F.2d 1243, 1986 U.S. App. LEXIS 36450 (5th Cir. Miss. 1986).

While there may be legitimate differences of opinion as to just when and how heightened scrutiny on appeal works in death penalty cases, it would seem clear that heightened scrutiny approach is most needed and most applicable in cases resting upon circumstantial evidence and

where matter of whether defendant is guilty at all is by no means free of all doubt. *Fisher v. State*, 481 So. 2d 203, 1985 Miss. LEXIS 2281 (Miss. 1985).

A trial judge in a murder prosecution was well within his discretion in sentencing the 14-year-old defendant to life imprisonment for aiding and abetting in the murder, in spite of the defendant's argument that the judge abused his discretion by not stating in the record his reasons for declining to utilize possible alternative criminal sanctions for juvenile offenders provided for in § 43-21-159 of the Youth Court Act, where the judge stated that he was very much aware of the requirements in *May v. State* (Miss. 1981) 398 So. 2d 1331 because of the many cases he had handled dealing with teenagers charged with capital offenses; although minimal, the trial court adequately addressed the reasons for not utilizing the alternatives afforded. *Swinford v. State*, 653 So. 2d 912, 1995 Miss. LEXIS 90 (Miss. 1995).

Discretion of prosecutor and his power to plea bargain did not render capital murder law unconstitutional, since both practices are necessary to the system of justice, nor did imposition of the mandatory death penalty pursuant to the statute constitute cruel and unusual punishment, especially since there was no showing that it was discriminatorily applied. *Stevenson v. State*, 325 So. 2d 113, 1975 Miss. LEXIS 1601 (Miss. 1975).

5. Jury selection.

Trial court's decision denying defendant's Batson challenge to the State's use of a preemptory challenge to exclude a black juror was not clearly erroneous; defendant failed to establish a prima facie case that the challenge of the juror was racially motivated. *Smith v. State*, 835 So. 2d 927, 2002 Miss. LEXIS 298 (Miss. 2002).

The trial court erred in finding that defendant's counsel exercised his peremptory challenges in a racially motivated manner when his reason for striking the juror was because the juror was a member of management at a company that the attorney had successfully sued for discriminatory employment practices on behalf of defendant's sister-in-law. *Webster*

v. State, 754 So. 2d 1232, 2000 Miss. LEXIS 19 (Miss. 2000).

Prosecutor's question to prospective jurors during voir dire asking whether they would be influenced by fact that thirty years had passed between murder and current trial was appropriate to determine whether any jurors were predisposed to finding defendant not guilty simply due to passage of such length of time. *De La Beckwith v. State*, 707 So. 2d 547, 1997 Miss. LEXIS 749 (Miss. 1997), cert. denied, 525 U.S. 880, 119 S. Ct. 187, 142 L. Ed. 2d 153, 1998 U.S. LEXIS 5751 (U.S. 1998).

Prosecutor's question to individual venireperson in chambers regarding racial attitudes during earlier mistrial did not amount to prejudicial error in prosecution for murder of African-American civil rights leader, as such venireperson was not finally seated on jury. *De La Beckwith v. State*, 707 So. 2d 547, 1997 Miss. LEXIS 749 (Miss. 1997), cert. denied, 525 U.S. 880, 119 S. Ct. 187, 142 L. Ed. 2d 153, 1998 U.S. LEXIS 5751 (U.S. 1998).

Trial court's refusal to excuse for cause jurors who stated on voir dire that they had read newspaper articles or seen television newscasts about the case after being admonished by trial court not to do so was not prejudicial error in murder prosecution; upon questioning, none of these jurors said that his or her opinion would be affected by anything they had read or seen. *De La Beckwith v. State*, 707 So. 2d 547, 1997 Miss. LEXIS 749 (Miss. 1997), cert. denied, 525 U.S. 880, 119 S. Ct. 187, 142 L. Ed. 2d 153, 1998 U.S. LEXIS 5751 (U.S. 1998).

Defendant was not denied opportunity to intelligently use peremptory challenges when trial court conducted voir dire itself; trial court asked venire whether anyone would automatically vote for death penalty regardless of mitigating circumstances, counsel for both sides stated they were satisfied with voir dire, and defendant did not ask trial court to further voir dire jurors and did not ask that she be allowed to do so. *Ballenger v. State*, 667 So. 2d 1242, 1995 Miss. LEXIS 451 (Miss. 1995), cert. denied, 518 U.S. 1025, 116 S. Ct. 2565, 135 L. Ed. 2d 1082, 1996 U.S. LEXIS 4177 (U.S. 1996).

A trial court in a capital murder prosecution did not err by allowing the prosecutor to question potential jurors first in individual sequestered voir dire or by allowing the prosecutor to use leading questions during voir dire. *Davis v. State*, 660 So. 2d 1228, 1995 Miss. LEXIS 287 (Miss. 1995), cert. denied, 517 U.S. 1192, 116 S. Ct. 1684, 134 L. Ed. 2d 785, 1996 U.S. LEXIS 3101 (U.S. 1996).

A murder defendant did not establish that the trial judge abused his discretion by refusing the defendant's request to draw venire members from both of the county's judicial districts where the defendant did not offer evidence indicating that the jury selected was biased or partial. *Davis v. State*, 660 So. 2d 1228, 1995 Miss. LEXIS 287 (Miss. 1995), cert. denied, 517 U.S. 1192, 116 S. Ct. 1684, 134 L. Ed. 2d 785, 1996 U.S. LEXIS 3101 (U.S. 1996).

A trial court in a capital murder prosecution did not abuse its discretion by refusing to grant the defendant's motion for individual sequestered voir dire of the entire venire where the court asked the collective venire about the effect of pre-trial publicity or information received about the case, and the court later asked if there was any reason that a juror felt that he or she could not be fair and impartial, and anyone who responded affirmatively was questioned individually in chambers. *Carr v. State*, 655 So. 2d 824, 1995 Miss. LEXIS 56 (Miss. 1995), cert. denied, 516 U.S. 1077, 116 S. Ct. 783, 133 L. Ed. 2d 734, 1996 U.S. LEXIS 547 (U.S. 1996).

Circuit Court did not commit error when it refused to grant new trial upon discovery that father of one juror had been murdered, where that fact having not been disclosed in voir dire would not per se have rendered juror subject to defense challenge for cause, and question propounded to prospective jurors during voir dire was ambiguous. *Tolbert v. State*, 511 So. 2d 1368, 1987 Miss. LEXIS 2681 (Miss. 1987), cert. denied, 484 U.S. 1016, 108 S. Ct. 723, 98 L. Ed. 2d 672, 1988 U.S. LEXIS 259 (U.S. 1988).

When coverage by local media, including television, radio and newspaper, of capital murder case, which in effect tries and finds defendant guilty not only of capital murder as charged, but also of

capital murder in another, uncharged case, is so extensive that at proceedings on voir dire of prospective jurors some 101/2 months after defendant's arrest, everyone of prospective jurors has heard of case, there is presumption that defendant cannot obtain fair and impartial jury and venue of case should be transferred to county substantially outside area of coverage of local media. *Fisher v. State*, 481 So. 2d 203, 1985 Miss. LEXIS 2281 (Miss. 1985).

Trial court is not required to excuse juror for cause on basis of juror's acquaintance with witness for prosecution where credibility of witness is not crucial issue and where defense has unexercised peremptory challenges remaining. *Cabello v. State*, 471 So. 2d 332, 1985 Miss. LEXIS 2059 (Miss. 1985), cert. denied, 476 U.S. 1164, 106 S. Ct. 2291, 90 L. Ed. 2d 732, 1986 U.S. LEXIS 1720 (U.S. 1986).

The jury selection process under this section and § 99-19-101 is constitutional. *Billiot v. State*, 454 So. 2d 445, 1984 Miss. LEXIS 1777 (Miss. 1984), cert. denied, 469 U.S. 1230, 105 S. Ct. 1232, 84 L. Ed. 2d 369, 1985 U.S. LEXIS 171 (U.S. 1985).

6. Request for state funds.

In appellant's trial regarding the death of a one-year-old child who had been in appellant's care, a trial court did not abuse its discretion in denying appellant's request for expert funds because appellant had not been declared indigent and appellant's attorney failed to show a concrete need for a state-funded expert; although the attorney had filed a motion for expert funds in July 2008, she did not request the motion be heard until thirteen months later at an emergency telephonic hearing the Friday before trial was scheduled to begin on Monday. *Brandon v. State*, 109 So. 3d 128, 2013 Miss. App. LEXIS 49 (Miss. Ct. App. 2013).

Defendant admitted that he shook a two-year-old girl, the victim, so hard that she flew from his hands and hit the television; he also admitted that he was the only person who could have effected the victim's death. Thus, even if defendant had produced an expert witness to testify that the cause of death was shaken baby syndrome or suffocation, he would remain

guilty of depraved heart murder under Miss. Code Ann. § 97-3-19(1)(b); as the exact cause of the victim's death was not an essential component of the defense, there was no abuse of discretion in the trial court's denial of funds for an expert witness for the defense. *McFadden v. State*, 929 So. 2d 365, 2006 Miss. App. LEXIS 105 (Miss. Ct. App. 2006).

Trial court did not err in denying defendant's request to authorize defense counsel and a court-appointed investigator to personally contact out-of-state witnesses or a request to appoint a forensic entomologist to review the report of a court-appointed pathologist; counsel and the investigator could conduct all necessary interviews by phone and the entomologist would not have been able to reach any conclusions from the pathologist's report without some missing photographs. *Smith v. State*, 835 So. 2d 927, 2002 Miss. LEXIS 298 (Miss. 2002).

In sentencing phase of capital murder prosecution, jury cannot doubly weigh commission of underlying felony and motive behind underlying felony as separate aggravating circumstances. *Foster v. State*, 687 So. 2d 1124, 1996 Miss. LEXIS 216 (Miss. 1996), cert. denied, 521 U.S. 1108, 117 S. Ct. 2488, 138 L. Ed. 2d 996, 1997 U.S. LEXIS 3936 (U.S. 1997).

In a prosecution for capital murder committed during the commission of a rape, the trial court's failure to provide funds to the defendant to retain an independent pathologist constituted reversible error where the opinion of the State's pathologist that the victim was raped was the only evidence offered to prove this critical aspect of the State's case. In re the Reinstatement of Turner, 635 So. 2d 894, 1994 Miss. LEXIS 197 (Miss. 1994).

A murder defendant was not denied a fair trial because his motion for a court-appointed expert criminalist was denied, in spite of the defendant's argument that he was thereby prevented from properly presenting his theory of defense of accidental discharge of the pistol used to kill the victim, where the State did not present any expert and the defendant elicited testimony from witnesses to support his defense of accidental discharge. *Green v. State*, 631 So. 2d 167, 1994 Miss. LEXIS 13 (Miss. 1994).

A murder defendant was not denied a fair trial by the denial of his motion for a court-appointed psychologist, in spite of the defendant's argument that he was thereby prevented from properly presenting his theory of defense related to his state of mind when he was assaulted by the victim, where the State offered no expert testimony regarding the defendant's state of mind, the defendant did not testify as to his state of mind, and the record did not "even hint at a defense of this nature." *Green v. State*, 631 So. 2d 167, 1994 Miss. LEXIS 13 (Miss. 1994).

A murder defendant was not entitled to state funds to employ an independent fingerprint expert where the defense counsel had full access to the state's experts and their reports, counsel were able to subject them to rigorous cross-examination, and there was nothing to indicate that the experts were biased or incompetent. *Johnson v. State*, 529 So. 2d 577, 1988 Miss. LEXIS 272 (Miss. 1988).

Capital murder defendant is not denied due process by trial court's refusal to provide defendant funds with which to obtain own experts, nor does defendant suffer any disadvantage thereby where defendant's counsel has full access to experts of state, together with investigation and reports of those experts, counsel is able to subject them to rigid cross-examination, and there is nothing to indicate that state experts are biased or incompetent. *Johnson v. State*, 476 So. 2d 1195, 1985 Miss. LEXIS 2257 (Miss. 1985).

Trial court may refuse defense request for funds to hire criminal investigator to aid defense counsel in preparation of defense where there is no indication of purpose and value of investigator to defense and where there is no contention that state's expert witnesses are not impartial and independent. *Cabello v. State*, 471 So. 2d 332, 1985 Miss. LEXIS 2059 (Miss. 1985), cert. denied, 476 U.S. 1164, 106 S. Ct. 2291, 90 L. Ed. 2d 732, 1986 U.S. LEXIS 1720 (U.S. 1986).

In a prosecution under section 97-3-19(2)(e) for murder while in the commission of the crime of rape, the overruling by the trial court of a defense motion for the payment by the state of the expenses of hiring independent experts to examine

fingerprints and blood, hair, fiber, and spermatazoa samples obtained by the prosecution did not constitute reversible error, since an indigent's right to defense expenses is not absolute but is conditioned upon a showing that such expenses are needed to prepare and present an adequate defense, and since (1) the prosecution's evidence as to blood, hair, and spermatazoa was admitted by stipulation, (2) defense counsel had had an opportunity to ask the state's investigating officers whether or not the defendant's fingerprints had been found anywhere in or around the victim's residence, and (3) if examination of samples tested by the state's laboratory could have had any possible benefit to the defendant, diligent counsel could somehow have raised the small sum necessary for such tests. *Ruffin v. State*, 447 So. 2d 113, 1984 Miss. LEXIS 1629 (Miss. 1984).

7. Practice and procedure.

In a case in which a jury convicted defendant of the capital murder of a sheriff, the trial court did not err in denying defendant's motion to quash the indictment. Defendant was indicted for capital murder pursuant to a depraved-heart theory, and the indictment satisfied statutory requirements. *Williams v. State*, 234 So. 3d 1278, 2017 Miss. LEXIS 388 (Miss. 2017).

A murder indictment which stated that the defendant, "willfully, and feloniously, with the deliberate design to effect the death" of the two victims, killed them by "suffocation," sufficiently notified defendant of the charges against her, even though expert testimony established the victims died of strangulation, which is not exactly synonymous with suffocation; the purpose of the indictment is to give the accused notice and a reasonable description of the charges, to enable her to prepare a defense, and there is no requirement that it set forth the means of the victims' death. *Blakeney v. State*, 2009 Miss. App. LEXIS 887 (Miss. Ct. App.), op. withdrawn, sub. op., 2009 Miss. App. LEXIS 978 (Miss. Ct. App. Dec. 8, 2009).

In a case in which defendant appealed his sentence of death by lethal injection for violating Miss. Code Ann. § 97-3-

19(2)(f), he argued his lawyer's ineffective assistance prevented him from receiving the benefit of the plea agreement with the State, which would have resulted in a sentence of life imprisonment rather than death. That issue was better suited for future post-conviction-relief proceedings commenced pursuant to the Mississippi Uniform Post-Conviction Collateral Relief Act, Miss. Code Ann. §§ 99-39-1 to 99-39-29. *Wilson v. State*, 21 So. 3d 572, 2009 Miss. LEXIS 450 (Miss. 2009), cert. denied, 560 U.S. 909, 130 S. Ct. 3282, 176 L. Ed. 2d 1191, 2010 U.S. LEXIS 3966 (U.S. 2010).

In a case in which defendant appealed his sentence of death by lethal injection for violating Miss. Code Ann. § 97-3-19(2)(f), he argued unsuccessfully that the trial court abused its discretion and arbitrarily refused to accept the first guilty plea, thus preventing him from accepting the plea-bargain agreement for life imprisonment. Given that defendant had no absolute right to have his plea accepted and given that the trial judge did not accept the plea due to his expressed dissatisfaction with appointed counsel, defendant's argument that his plea was arbitrarily rejected was without merit. *Wilson v. State*, 21 So. 3d 572, 2009 Miss. LEXIS 450 (Miss. 2009), cert. denied, 560 U.S. 909, 130 S. Ct. 3282, 176 L. Ed. 2d 1191, 2010 U.S. LEXIS 3966 (U.S. 2010).

It was proper, under the Eighth Amendment, for an aggravating circumstance in a capital case to duplicate an element of the capital crime of conviction, specifically rape as set forth in Miss. Code Ann. § 97-3-19(2)(e). *Holland v. Anderson*, 583 F.3d 267, 2009 U.S. App. LEXIS 20769 (5th Cir. Miss. 2009), cert. denied, 559 U.S. 1073, 130 S. Ct. 2100, 176 L. Ed. 2d 731, 2010 U.S. LEXIS 3429 (U.S. 2010).

Federal court's denial of habeas corpus under 28 U.S.C.S. § 2254 to an inmate convicted of capital murder pursuant to Miss. Code Ann. § 97-3-19(2)(e) was proper because there was a clear split among federal courts as to whether there was a constitutional right to present evidence of innocence at sentencing when such evidence would contravene prior guilty adjudication. *Holland v. Anderson*, 583 F.3d 267, 2009 U.S. App. LEXIS

20769 (5th Cir. Miss. 2009), cert. denied, 559 U.S. 1073, 130 S. Ct. 2100, 176 L. Ed. 2d 731, 2010 U.S. LEXIS 3429 (U.S. 2010).

Denial of petitioner state death row inmate's motion for severance did not violate his Fifth Amendment rights because Miss. Code Ann. § 99-7-2 allowed for joinder of the four counts of capital murder under Miss. Code Ann. § 97-3-19(2) and the state did not tie a weak case to a stronger one; the evidence against the inmate in each count was roughly the same and overwhelming, and it was not likely that four different juries would have returned different verdicts. *Stevens v. Epps*, 2008 U.S. Dist. LEXIS 69564 (S.D. Miss. Sept. 15, 2008), aff'd, 618 F.3d 489, 2010 U.S. App. LEXIS 18696 (5th Cir. Miss. 2010).

Defendant's convictions for murder and for shooting into an occupied dwelling did not violate the double jeopardy clause of the Fifth Amendment. In order to convict defendant for shooting into an occupied dwelling, the State was required to prove that defendant shot into a dwelling house, but no such showing was required to convict defendant under the felony-murder statute. *Boyd v. State*, 977 So. 2d 329, 2008 Miss. LEXIS 144 (Miss. 2008).

Prosecutors remark asking jury to convict defendant of capital murder was proper rebuttal where defense counsel had based his closing argument on premise that defendant should be convicted of murder instead of capital murder; also, prosecutor's remarks could not be construed as arguing possibility of parole and did not rise to level of reversible error. *Faraga v. State*, 514 So. 2d 295, 1987 Miss. LEXIS 2656 (Miss. 1987), cert. denied, 487 U.S. 1210, 108 S. Ct. 2858, 101 L. Ed. 2d 894, 1988 U.S. LEXIS 2778 (U.S. 1988).

It was not reversible error for prosecutor to recall witness to stand to repeat statements, made by defendant when he was struggling immediately after commission of murder, for purposes of impeaching defendant's testimony about his activities immediately following incident. *Faraga v. State*, 514 So. 2d 295, 1987 Miss. LEXIS 2656 (Miss. 1987), cert. denied, 487 U.S. 1210, 108 S. Ct. 2858, 101 L. Ed. 2d 894, 1988 U.S. LEXIS 2778 (U.S. 1988).

Homicide defendant is entitled to fully cross-examine prosecution witness regarding witness' relationship and conduct with defendant and victim where state's theory of homicide is that homicide resulted from romantic triangle between defendant, witness and victim. *Miskelley v. State*, 480 So. 2d 1104, 1985 Miss. LEXIS 2309 (Miss. 1985).

8. Deliberate design; malice.

Trial court properly denied defendant's motion for a new trial because the evidence was sufficient to find that defendant killed the victim with deliberate design, and not in a heat of passion where defendant began acting aggressively toward the victim in a store, kept his right hand in his pocket, argued with him outside the store, and fired into the car in which the victim was a passenger when it lurched toward the curb and bystanders, the jury could have found that the unintentional bump of a bystander, which resulted in no injuries, was not a sufficient provocation to reduce the killing from murder to manslaughter, and the jury could have found that defendant did not kill the victim in the midst of a violent and uncontrollable rage. *Baker v. State*, — So. 3d —, 2020 Miss. App. LEXIS 590 (Miss. Ct. App. Oct. 20, 2020).

Trial court violated defendant's Sixth Amendment rights under the Confrontation Clause by admitting the victim's affidavit into evidence because the affidavit was testimonial hearsay, defendant was unable to cross-examine the victim regarding the statements in the affidavit, and he did not forfeit his right to cross-examine her as he did not kill her to prevent her from testifying at his murder trial. The error was not harmless, and therefore defendant's murder conviction was reversed, because the affidavit helped to establish the premeditation necessary to convict defendant of first-degree murder. *Montson v. State*, — So. 3d —, 2020 Miss. App. LEXIS 600 (Miss. Ct. App. Oct. 27, 2020).

In a case in which defendant, who was 15 years old when he shot and killed the victim, was indicted for deliberate design murder, but pled guilty to manslaughter and kidnapping, his second petition for

post-conviction relief was properly denied as he was not actually and factually innocent of deliberate design murder, for which he was originally indicted; or kidnapping, as he agreed under oath that he and another juvenile planned in advance to kill the victim and that he killed the victim by shooting him in the back of the head. *Mason v. State*, 235 So. 3d 129, 2017 Miss. App. LEXIS 322 (Miss. Ct. App. 2017), cert. denied, — So. 3d —, 2018 Miss. LEXIS 48 (Miss. 2018).

Evidence was sufficient to prove that defendant acted with deliberate design when he shot and killed his wife where it showed that he gave inconsistent accounts of the events surrounding his wife's death, a forensic scientist testified that defendant's gun would not have misfired in the circumstances described, defendant's daughter testified about his life-long insistence on gun safety, and defendant had motive to kill his wife given his affair with another woman. *Parvin v. State*, 212 So. 3d 863, 2016 Miss. App. LEXIS 101 (Miss. Ct. App. 2016), cert. denied, — So. 3d —, 2017 Miss. LEXIS 95 (Miss. 2017), cert. denied, — U.S. —, 138 S. Ct. 140, 199 L. Ed. 2d 36, 2017 U.S. LEXIS 5483 (U.S. 2017).

Sufficient evidence supported defendant's deliberate-design murder conviction because, inter alia, (1) the jury rejected defendant's properly instructed "castle doctrine" defense, and (2) the killing was not justified under this doctrine, as a matter of law, as the victim had not entered defendant's home and was not doing so when defendant shot the victim. *Rodgers v. State*, 166 So. 3d 537, 2014 Miss. App. LEXIS 656 (Miss. Ct. App. 2014), cert. denied, 166 So. 3d 38, 2015 Miss. LEXIS 344 (Miss. 2015).

Evidence was sufficient to support defendant's conviction for murder as defendant admitted that he shot the victim in one typewritten statement, indicating that he and the victim got into an argument, that he worked on a puzzle, that he then walked over to a cabinet where he retrieved his pistol, and that he proceeded to the bedroom where he shot the victim in the neck. In a second handwritten statement defendant admitted that he shot the victim during an argument over her tak-

ing his pills; thus, these statements strongly supported the State's position that defendant acted with deliberate design. *Adams v. State*, 62 So. 3d 432, 2011 Miss. App. LEXIS 66 (Miss. Ct. App. 2011).

Defendants' murder convictions were appropriate under Miss. Code Ann. § 97-3-19(1)(a) because the evidence showed the intent of three defendants to kill the victim; all defendants joined together once one defendant found out that his mother had been in an altercation with the victim and the group went together to the victim's apartment where they waited for the victim. Then, one defendant punched the victim and everyone in the group kicked the victim. *Sneed v. State*, 31 So. 3d 33, 2009 Miss. App. LEXIS 556 (Miss. Ct. App. 2009), cert. denied, 2010 Miss. LEXIS 150 (Miss. Mar. 25, 2010), cert. denied, 29 So. 3d 774, 2010 Miss. LEXIS 152 (Miss. 2010), cert. denied, 562 U.S. 1150, 131 S. Ct. 931, 178 L. Ed. 2d 775, 2011 U.S. LEXIS 350 (U.S. 2011).

Defendant's conviction for murder under Miss. Code Ann. § 97-3-19(1)(a) was affirmed because a rational jury could find that defendant possessed the deliberate design required for murder based on defendant's statement to interrogating officers, the eyewitnesses' testimonies, and the autopsy results which materially contradicted defendant's version of the killing. *Griffin v. State*, 13 So. 3d 833, 2009 Miss. App. LEXIS 394 (Miss. Ct. App. 2009).

Petitioner state death row inmate's argument that the charge of murder for each victim was enhanced by underlying offenses that used murder as an element, thus violating the Double Jeopardy Clause of the Fifth Amendment, was rejected because Miss. Code Ann. § 97-3-19(1), described murder to include killing with deliberate design to effect the death of the person killed, and in Miss. Code Ann. § 97-3-19(2)(e) defined capital murder as including such a killing when done without any design to effect death by any person engaged in the commission of the crime of felonious child abuse and/or battery of a child in violation Miss. Code Ann. § 97-5-39(2) and child abuse, as had been alleged in the indictment, was not so

much an “underlying felony” as an element of the offense of capital murder, thus, the merger doctrine did not really apply. *Stevens v. Epps*, 2008 U.S. Dist. LEXIS 69564 (S.D. Miss. Sept. 15, 2008), *aff’d*, 618 F.3d 489, 2010 U.S. App. LEXIS 18696 (5th Cir. Miss. 2010).

When considering the evidence in the light most favorable to the state, a rational juror could conclude that defendant acted not out of the heat of passion, but with deliberate design to kill the victim where the evidence showed that defendant repeatedly hit the victim with multiple bricks, that defendant struck the victim from behind, that the victim had no defensive wounds on his hands, and that defendant had plenty of time to contemplate hitting the victim; thus, a jury could find that defendant acted with deliberate design. *Givens v. State*, 967 So. 2d 1, 2007 Miss. LEXIS 494 (Miss. 2007).

Sufficient evidence existed to convict defendant of depraved heart murder in violation of Miss. Code Ann. § 97-3-19(1)(a) and (b) because, at the very least, defendant shot into a home where people were present. *Chatman v. State*, 952 So. 2d 945, 2006 Miss. App. LEXIS 541 (Miss. Ct. App. 2006), *cert. denied*, 951 So. 2d 563, 2007 Miss. LEXIS 532 (Miss. 2007).

Court rejected defendant’s argument that the evidence was insufficient to sustain his conviction of the offenses for which he was indicted, arson and capital murder with the underlying felony of arson, because defendant was not convicted of the offenses for which he was indicted, but rather the jury found him guilty of deliberate design murder pursuant to Miss. Code Ann. § 97-3-19 (1)(a), which the jury was instructed on by the trial court in addition to the indicted offenses. Defendant’s statements before and after the crime about his desire to burn down his ex-wife’s house and kill his grandson, and his requests that others burn down the house, constituted admissions on deliberate design, a significant element of murder, and were direct evidence of his guilt. *Smith v. State*, 897 So. 2d 1002, 2004 Miss. App. LEXIS 1128 (Miss. Ct. App. 2004).

In a case where defendant was convicted of murdering his wife and her son,

the trial court did not err in denying defendant’s motion for a directed verdict because there was ample evidence of deliberate design, as two of the State’s seven witnesses testified that defendant admitted killing his wife and her child, defendant used a kitchen knife to stab his unarmed wife 29 times and his unarmed son 27 times, and defendant admitted that he lived in the mobile home where the victims were found. *Wortham v. State*, 883 So. 2d 599, 2004 Miss. App. LEXIS 618 (Miss. Ct. App. 2004).

Defendant’s effort to locate the victim after an earlier altercation and effort in obtaining a gun was sufficient evidence to prove the “deliberate design” element of deliberate design murder. *Carter v. State*, 845 So. 2d 748, 2003 Miss. App. LEXIS 440 (Miss. Ct. App. 2003).

Evidence that defendant lured the victim to a field and shot the victim in the back because defendant thought the victim had “snitched” to police about a burglary supported defendant’s conviction for murder rather than manslaughter; whether the offense was murder or manslaughter was a question for the jury. *Hodge v. State*, 823 So. 2d 1162, 2002 Miss. LEXIS 251 (Miss. 2002).

Malice aforethought is not an element of the capital murder of a peace officer. *Stevenson v. State*, 733 So. 2d 177, 1998 Miss. LEXIS 627 (Miss. 1998).

In a depraved heart murder, malice can be inferred from circumstances if actions involved very high degree of carelessness evincing reckless indifference to danger to human life. *Clark v. State*, 693 So. 2d 927, 1997 Miss. LEXIS 162 (Miss. 1997).

Finding that state presented sufficient evidence that defendant acted with deliberate design in killing victim, so as to preclude directed verdict, was supported by defendant’s statement to police following incident, transcript of 911 emergency call from victim, and testimony at trial, all of which indicated sufficient degree of recklessness and indifference to human life pointing to conviction, at the very least, for manslaughter or murder, and not culpable negligence. *Clark v. State*, 693 So. 2d 927, 1997 Miss. LEXIS 162 (Miss. 1997).

Act which poses risk to only one individual and which results in that individu-

al's death may be deemed depraved heart murder. *Catchings v. State*, 684 So. 2d 591, 1996 Miss. LEXIS 214 (Miss. 1996).

Death resulting from injuries inflicted through use of sawhorse was within scope of depraved-heart murder statute. *Catchings v. State*, 684 So. 2d 591, 1996 Miss. LEXIS 214 (Miss. 1996).

"Malice aforethought," "premeditated design," and "deliberate design" all mean same thing for purposes of offense of murder. *Tran v. State*, 681 So. 2d 514, 1996 Miss. LEXIS 432 (Miss. 1996).

Although a "deliberate design" to kill a person, as required for murder under subsection (1)(a) of this section, may be formed very quickly, and perhaps only moments before the act of consummating the intent, it is a contradiction in terms to state that a "deliberate design" can be formed at the very moment of the fatal act. *Windham v. State*, 520 So. 2d 123, 1987 Miss. LEXIS 2880 (Miss. 1987).

Defendant's statement that he wanted to kill the victim, which was made prior to the fatal stabbing, was evidence of malice. *Russell v. State*, 497 So. 2d 75, 1986 Miss. LEXIS 2696 (Miss. 1986).

Subsection (2)(e), making a homicide a capital murder when done "with or without any design to effect death" by any person engaged in the commission of designated major crimes, is not unconstitutionally vague. *Gray v. State*, 351 So. 2d 1342, 1977 Miss. LEXIS 1951 (Miss. 1977).

Malice aforethought is the single most important element in the crime of murder. *Pendergraft v. State*, 213 So. 2d 560, 1968 Miss. LEXIS 1293 (Miss. 1968), cert. denied, 394 U.S. 715, 89 S. Ct. 1453, 22 L. Ed. 2d 671, 1969 U.S. LEXIS 1875 (U.S. 1969).

In murder prosecution it is unnecessary and unwise to define malice. *Smith v. State*, 237 Miss. 626, 114 So. 2d 676, 1959 Miss. LEXIS 513 (Miss. 1959).

The universal malice murder statute is not applicable to one who kills a woman as a result of performing an attempted abortion upon her at her request. *Lackey v. State*, 211 Miss. 892, 53 So. 2d 25, 1951 Miss. LEXIS 421 (Miss. 1951).

No particular period of deliberation is required to make killing deliberate, since

malice may be suddenly formed and deliberate design to effect the death of another may be formed in an instant. *Howard v. State*, 212 Miss. 722, 55 So. 2d 436, 1951 Miss. LEXIS 501 (Miss. 1951).

Actual malice is not a necessary ingredient of murder; deliberate design is all that is required. *Hughes v. State*, 207 Miss. 594, 42 So. 2d 805, 1949 Miss. LEXIS 372 (Miss. 1949).

To constitute murder, the malice must precede the unlawful act which is being attempted or committed by the person killed, where the killing is done in resisting his attempt to do an unlawful act. *Bangren v. State*, 196 Miss. 887, 17 So. 2d 599, 1944 Miss. LEXIS 264 (Miss. 1944), overruled, *Ferrell v. State*, 733 So. 2d 788, 1999 Miss. LEXIS 87 (Miss. 1999).

While malice aforethought is a necessary element in the crime of murder, it does not always follow therefrom that the existence of actual malice at the time of the slaying would necessarily have the effect of rendering a particular homicide a case of murder, since a person may be guilty only of manslaughter or justifiable homicide when slaying another even though the accused is mad and is bearing ill will toward his adversary at the time of the killing, if the act is done while resisting an attempt of the latter "to do any unlawful act, or after such attempt shall have failed," if such anger or ill will is engendered by the particular circumstances of the unlawful act then being attempted, or the commission of which is then thwarted, and is nonexistent prior thereto, each case depending upon its own facts and circumstances. *Bangren v. State*, 196 Miss. 887, 17 So. 2d 599, 1944 Miss. LEXIS 264 (Miss. 1944), overruled, *Ferrell v. State*, 733 So. 2d 788, 1999 Miss. LEXIS 87 (Miss. 1999).

"Malice aforethought" is equivalent to "premeditated design" or "deliberate design" and not "felonious design to effect the death of the person killed." *Dye v. State*, 127 Miss. 492, 90 So. 180, 1921 Miss. LEXIS 249 (Miss. 1921).

Design to effect death and lack of justification are essential to malice aforethought. *Ellis v. State*, 108 Miss. 62, 66 So. 323, 1914 Miss. LEXIS 168 (Miss. 1914).

"Malice" may be ascertained from previous threat and preparatory measures, or

may arise suddenly and be implied from circumstances, as from intentional use at outset of deadly weapon. *Brown v. State*, 98 Miss. 786, 54 So. 305, 1910 Miss. LEXIS 124 (Miss. 1910), overruled, 200 Miss. 881, 27 So. 2d 838, 1946 Miss. LEXIS 349 (Miss. 1946).

Malice is necessary element of murder. *Guest v. State*, 96 Miss. 871, 52 So. 211, 1910 Miss. LEXIS 209 (Miss. 1910).

Deliberation is necessary element of murder. *Guest v. State*, 96 Miss. 871, 52 So. 211, 1910 Miss. LEXIS 209 (Miss. 1910).

Absence of deliberation is one of things distinguishing manslaughter from murder. *Guest v. State*, 96 Miss. 871, 52 So. 211, 1910 Miss. LEXIS 209 (Miss. 1910).

Law sometimes presumes malice from existence of certain facts; jury alone can determine whether such facts exist. *Burnett v. State*, 92 Miss. 826, 46 So. 248, 1908 Miss. LEXIS 225 (Miss. 1908).

The statute does not alter the common law so as to limit murder to killing with express malice. The words "premeditated design," in the old statute, meant the same as "malice aforethought" in the common-law definition. *McDaniel v. State*, 16 Miss. 401, 1847 Miss. LEXIS 36 (Miss. 1847).

9. —Interference, use of deadly weapon.

A killing with a deadly weapon may be susceptible of clear explanation by the accused or eyewitnesses as an accident, or justified as having been committed by the accused acting in lawful self-defense, or mitigated manslaughter. When no such proof is forthcoming the jury is warranted in finding the accused guilty of murder. *Nicolaou v. State*, 534 So. 2d 168, 1988 Miss. LEXIS 524 (Miss. 1988).

Malice may be inferred from defendant's use of a deadly weapon. *Russell v. State*, 497 So. 2d 75, 1986 Miss. LEXIS 2696 (Miss. 1986).

Though malice is essential element of murder, malice may be implied from deliberate use of deadly weapon and it is not necessary that actual malice be shown. *Smith v. State*, 205 Miss. 283, 38 So. 2d 725, 1949 Miss. LEXIS 431 (Miss. 1949); *Stokes v. State*, 240 Miss. 453, 128 So. 2d 341, 1961 Miss. LEXIS 477 (Miss. 1961).

Law presumes malice from killing of human being with deadly weapon, and this presumption prevails and characterizes homicide as murder unless facts are introduced in evidence changing character of killing and showing either justification or necessity, but unless facts in evidence explain character of killing, presumption stands and state is entitled to instruction announcing this legal principle. *Dickins v. State*, 208 Miss. 69, 43 So. 2d 366, 1949 Miss. LEXIS 409 (Miss. 1949).

If accused armed himself with a deadly weapon with the purpose of killing the deceased on sight, and in pursuance of such intent, did so, then, under the law, accused's right of self-defense is cut off and it is wholly immaterial which one provoked the difficulty or who was the aggressor immediately before the homicide. *Lewis v. State*, 188 Miss. 410, 195 So. 325, 1940 Miss. LEXIS 47 (Miss. 1940).

Evidence in murder trial that defendant discharged deadly weapon at passing truck, crowded with human beings, killing one of them, held to warrant finding of malice by jury. *Talbert v. State*, 172 Miss. 243, 159 So. 549, 1935 Miss. LEXIS 120 (Miss. 1935).

If facts relied on to change presumption of murder from killing with deadly weapon are unreasonable and improbable, verdict of murder will not be disturbed on appeal. *McGehee v. State*, 138 Miss. 822, 104 So. 150, 1925 Miss. LEXIS 100 (Miss. 1925).

Effect of presumption of innocence in murder trial stated; presumption of malice from use of deadly weapon will not support conviction of murder as against evidence of justification. *Patty v. State*, 126 Miss. 94, 88 So. 498, 1921 Miss. LEXIS 13 (Miss. 1921).

10. Corpus delicti.

Witness testified that (1) the victim and defendant got out of his car and walked into an empty field; (2) the witness then heard a shot, looked up, and saw defendant holding a gun; (3) defendant ran to the car and they left; (4) when the witness and defendant came to a bridge defendant threw the gun into the river because he said that he needed to get rid of it; (5)

early that morning, defendant knocked on the witness's window and told him that they needed to move the body; (6) the witness drove back to the location at which he heard the shot; and (7) although the witness did not see the clothes or the victim's body as they were already in garbage bags, he testified that he and defendant disposed on the victim's clothes in a dumpster and threw her body into the river. The witness's testimony was sufficient to allow a reasonable jury to infer that defendant shot and killed the victim; thus, the State proved its corpus delicti for homicide. *Jackson v. State*, 924 So. 2d 531, 2005 Miss. App. LEXIS 451 (Miss. Ct. App. 2005), cert. denied, 927 So. 2d 750, 2006 Miss. LEXIS 175 (Miss. 2006).

Defendant's conviction for murdering her husband in violation of Miss. Code Ann. § 97-3-19 was proper where her confession to a State witness was sufficient to establish the corpus delicti of murder. *Stephens v. State*, 911 So. 2d 424, 2005 Miss. LEXIS 386 (Miss. 2005).

Corpus delicti in capital murder case consists of death of victim and existence of criminal agency as cause of death. *Taylor v. State*, 672 So. 2d 1246, 1996 Miss. LEXIS 193 (Miss.), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379, 1996 U.S. LEXIS 7020 (U.S. 1996).

Medical evidence is not required to prove elements of corpus delicti in capital murder case. *Taylor v. State*, 672 So. 2d 1246, 1996 Miss. LEXIS 193 (Miss.), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379, 1996 U.S. LEXIS 7020 (U.S. 1996).

State had proven corpus delicti in capital murder case by showing that victim left home under unusual circumstances, that victim was dead, and that victim's family had identified clothing and objects found on victim's body as same items that victim was wearing when she disappeared; state could, therefore, introduce inculpatory statements that defendant had made to witness. *Taylor v. State*, 672 So. 2d 1246, 1996 Miss. LEXIS 193 (Miss.), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379, 1996 U.S. LEXIS 7020 (U.S. 1996).

Corpus delicti of criminal homicide was established despite argument of defen-

dant that because 21 days had elapsed between injury and death, and there was no expert or lay testimony as to cause of death, it had not been established, where death certificate and medical examiner's report were admitted into evidence by stipulation; death certificate listed cause of death as cardio-pulmonary arrest due to or as consequence of generalized sepsis and multiple systems failure due to or as consequence of gunshot wound to abdomen; report of medical examiner also listed gunshot wound as cause of death; cause of death may be established not only by physician or pathologist, but by lay and circumstantial evidence. *Luster v. State*, 515 So. 2d 1177, 1987 Miss. LEXIS 2912 (Miss. 1987).

In a homicide case, the corpus delicti consists of the fact of death, and the fact of the existence of criminal agency as the cause of death. *Freeman v. State*, 228 Miss. 687, 89 So. 2d 716, 1956 Miss. LEXIS 564 (Miss. 1956).

Corpus delicti must be established by evidence. *Taylor v. State*, 108 Miss. 18, 66 So. 321, 1914 Miss. LEXIS 164 (Miss. 1914).

11. Provocation.

Weight of the evidence did not support a manslaughter conviction rather than a murder conviction because defendant failed to detail what he considered "sufficient provocation," and his sister testified that the victim had gotten up and had began walking into the kitchen when defendant ran and grabbed the victim from behind. There was no testimony that the victim had a weapon and there was no testimony that defendant had to use deadly force under the circumstances. *Ravencraft v. State*, 989 So. 2d 437, 2008 Miss. App. LEXIS 480 (Miss. Ct. App. 2008).

Defendant's murder conviction in violation of Miss. Code Ann. § 97-3-19 was proper because, although the victim's comments might have been crude and insulting, mere words, no matter how provocative, were insufficient to reduce an intentional and unjustifiable homicide from murder to manslaughter. *Booze v. State*, 942 So. 2d 272, 2006 Miss. App. LEXIS 852 (Miss. Ct. App. 2006).

After defendant had a confrontation with his wife, she sat down outside a relative's home, and he fired a fatal shot into her head. The record supported the jury's verdict of murder, rather than manslaughter, because there was no evidence of provocation. *Bradford v. State*, 910 So. 2d 1232, 2005 Miss. App. LEXIS 598 (Miss. Ct. App. 2005).

Mere words of reproach, however grievous or provoking, are not sufficient to reduce to manslaughter what otherwise is murder. *Gaddis v. State*, 207 Miss. 508, 42 So. 2d 724, 1949 Miss. LEXIS 359 (Miss. 1949).

Facts that accused was provoked over domestic difficulties with wife, that he was intoxicated, that he resented interference of deceased in his family row, neither singly nor collectively, were sufficient to reduce his crime from murder to manslaughter. *Gaddis v. State*, 207 Miss. 508, 42 So. 2d 724, 1949 Miss. LEXIS 359 (Miss. 1949).

An opprobrious epithet directed to the slayer by the deceased immediately preceding the stabbing is not sufficient to reduce to manslaughter what otherwise is murder. *Camden Fire Ins. Co. v. New Buena Vista Hotel Co.*, 199 Miss. 585, 26 So. 2d 174, 1946 Miss. LEXIS 230 (Miss. 1946).

Where express malice is shown, and the killing afterward takes place with a deadly weapon, and the question is whether the killing sprang from the heat of passion or previous grudge, no mere provocation at the time the act is done will reduce the homicide from murder to manslaughter. *Riggs v. State*, 30 Miss. 635, 1856 Miss. LEXIS 14 (Miss. 1856).

12. Defenses; generally.

In a murder prosecution, the trial court did not abuse its discretion by refusing to instruct the jury on imperfect self-defense because the requested instruction was without foundation in the evidence. The only theory presented through witnesses called by the defense was that defendant was not the shooter, and no evidence was presented that defendant feared the victim or believed the victim to be a threat. *Morgan v. State*, 117 So. 3d 619, 2013 Miss. LEXIS 371 (Miss. 2013).

In defendant's capital murder case, he was not entitled to an instruction that duress was a defense to the underlying felony of kidnapping because defendant never indicated that the victim had threatened him or had done anything in particular to cause a well-founded fear of death or serious bodily injury. Moreover, on at least two occasions—once at the home and once at the cornfield—defendant actually possessed the gun; additionally, defendant could have attempted to renounce any further participation in the crime, and joined the other occupants at the back of the home. *Ruffin v. State*, 992 So. 2d 1165, 2008 Miss. LEXIS 518 (Miss. 2008).

Evidence, though wholly circumstantial, was sufficient to convict defendant of murdering his wife's lover; the theory that the victim committed suicide was unreasonable because, inter alia, the victim would not have packed an ice chest if he planned to kill himself, and though he had guns, he had no shells that fit defendant's shotgun. *Cox v. State*, 2003 Miss. LEXIS 103 (Miss. Mar. 13, 2003), op. withdrawn, sub. op., 849 So. 2d 1257, 2003 Miss. LEXIS 337 (Miss. 2003).

A defendant is presumed sane until a reasonable doubt of his or her sanity is created. When such a doubt arises, the burden is then placed upon the State to prove, beyond a reasonable doubt, the defendant's sanity. The issue of a defendant's insanity is a determination for the jury to make, and the finding will not be reversed if it is supported by substantial evidence. In making this determination, the jury may accept or reject expert and lay testimony. *Davis v. State*, 551 So. 2d 165, 1989 Miss. LEXIS 364 (Miss. 1989), cert. denied, 494 U.S. 1074, 110 S. Ct. 1796, 108 L. Ed. 2d 797, 1990 U.S. LEXIS 1741 (U.S. 1990).

A finding that one is mentally ill does not necessarily mean that one is M'Naghten insane. *Davis v. State*, 551 So. 2d 165, 1989 Miss. LEXIS 364 (Miss. 1989), cert. denied, 494 U.S. 1074, 110 S. Ct. 1796, 108 L. Ed. 2d 797, 1990 U.S. LEXIS 1741 (U.S. 1990).

Where respondent was charged with capital murder for participating in assault during course of which respondent's companion killed victim, and was sentenced to

death under capital murder statute, but death sentence was vacated under intervening U.S. Supreme Court decision holding that Eighth Amendment forbids imposition of death penalty on one who aids and abets felony in the course of which murder is committed but who does not himself kill, attempt to kill, or intend that killing take place or that lethal force be employed, curt on federal habeas corpus review should require state's judicial system to examine entire course of proceedings to determine whether at some point requisite factual finding has been made to support death penalty, which under proper circumstances does not offend Eighth amendment. *Cabana v. Bullock*, 474 U.S. 376, 106 S. Ct. 689, 88 L. Ed. 2d 704, 1986 U.S. LEXIS 46 (U.S. 1986), overruled in part, *Pope v. Illinois*, 481 U.S. 497, 107 S. Ct. 1918, 95 L. Ed. 2d 439, 1987 U.S. LEXIS 1934 (U.S. 1987).

Fact that a defendant suffers from schizophrenia, paranoia type mental disorder does not in itself make him M'Naghten insane. *Laney v. State*, 486 So. 2d 1242, 1986 Miss. LEXIS 2890 (Miss. 1986).

The defense of irresistible or uncontrollable impulse is unavailable unless such impulse springs from mental illness to such a degree as to overwhelm reason, judgment and conscience. *Burr v. State*, 237 Miss. 338, 114 So. 2d 764, 1959 Miss. LEXIS 475 (Miss. 1959).

Uncontrollable impulse cannot be inferred from the severity of the beating by a mother of her child for a trivial reason. *Burr v. State*, 237 Miss. 338, 114 So. 2d 764, 1959 Miss. LEXIS 475 (Miss. 1959).

Where defendant denies that he fired a gun, there is no issue of justification and the homicide is therefore murder or no crime at all. *Wright v. State*, 209 Miss. 795, 48 So. 2d 509, 1950 Miss. LEXIS 444 (Miss. 1950).

Partial intoxication will not lessen criminality. *Butler v. State*, 39 So. 1005 (Miss. 1906).

13. —Self-defense.

Evidence supported defendant's conviction for deliberate-design murder because defendant initiated an altercation when an employee of a power utility company

came to defendant's home to turn off the power, used a deadly weapon to shoot and kill the employee, and hid the employee's body. Defendant failed to show that defendant acted in self-defense as defendant acted without any threat or provocation from the unarmed employee. *Davis v. State*, 165 So. 3d 537, 2015 Miss. App. LEXIS 297 (Miss. Ct. App. 2015).

Evidence was sufficient to support a conviction for deliberate design murder where the State put on evidence that placed a reasonable doubt regarding defendant's self-defense claim; there were no signs of a struggle or altercation, other than the shooting, and defendant shot the victim four times in the back. *Davis v. State*, 158 So. 3d 1190, 2015 Miss. App. LEXIS 63 (Miss. Ct. App. 2015).

Murder conviction was not against the overwhelming weight of the evidence because the evidence against defendant included his admission to shooting the victim, the gunshots striking the victim from behind, the evidence conveying a scene without a struggle, and the statements from the victim naming defendant as the shooter. The question of a self-defense claim fell under the purview of the jury as fact-finders. *Davis v. State*, 158 So. 3d 1190, 2015 Miss. App. LEXIS 63 (Miss. Ct. App. 2015).

Trial judge should have allowed defendant to introduce evidence of his knowledge of victim's violent criminal history. The trial judge committed reversible error by refusing to allow defendant to defend himself with evidence that tended to show his state of mind at the time of the killing, as the evidence was crucial to defendant's claim of self-defense. *Richardson v. State*, 147 So. 3d 838, 2014 Miss. LEXIS 310 (Miss. 2014).

Defendant's conviction for murder under Miss. Code Ann. § 97-3-19(1)(b) was proper, in part because the jury was properly instructed regarding the State's burden to prove that defendant did not act in self-defense. In part, because defendant, not the State, requested jury instruction D-1, defendant was unable to complain on appeal that the instruction was erroneous; further, jury instruction S-6 cited the appropriate standard regarding reasonableness. *Franklin v. State*, 72 So. 3d

1129, 2011 Miss. App. LEXIS 125 (Miss. Ct. App.), cert. denied, 71 So. 3d 1207, 2011 Miss. LEXIS 508 (Miss. 2011).

Defendant's conviction for murder under Miss. Code Ann. § 97-3-19(1)(b) was proper, in part because evidence was presented to show that defendant and the victim had gotten into an altercation earlier that evening, which resulted in gunfire. It was the jury's province to consider the evidence and determine whether defendant shot the victim in self-defense. *Franklin v. State*, 72 So. 3d 1129, 2011 Miss. App. LEXIS 125 (Miss. Ct. App.), cert. denied, 71 So. 3d 1207, 2011 Miss. LEXIS 508 (Miss. 2011).

Even though he contended that he shot her in self-defense, the evidence was sufficient to convict defendant of murder under Miss. Code Ann. § 97-3-19(1)(a) (2006) because there was sufficient contradictory evidence from which a reasonable juror could have rejected this claim, including testimony from a neighbor, who heard an altercation, and testimony from a friend, who averred that defendant stated he intended to kill his girlfriend due to her infidelity. *Reed v. State*, 31 So. 3d 48, 2009 Miss. App. LEXIS 611 (Miss. Ct. App. 2009), cert. denied, 29 So. 3d 774, 2010 Miss. LEXIS 151 (Miss. 2010).

Where defendant asserted self defense in what he alleged was the accidental killing of his former girlfriend when he allegedly was confronted by her male friend, the trial court abused its discretion when it prohibited the question on the male friend's prior gun ownership. However, in a second instance, the State elicited the same information on redirect examination that defendant was barred from eliciting on cross-examination, in regard to whether the male friend had also been a suspect early in the investigation; in the former respect, the error was harmless given the overwhelming weight of the evidence against defendant, and in the latter respect, defendant's right to confrontation was not violated as he suffered no prejudice. *Raiford v. State*, 907 So. 2d 998, 2005 Miss. App. LEXIS 279 (Miss. Ct. App. 2005).

Defendant's murder conviction was proper under Miss. Code Ann. § 97-3-19(1)(a), where a hypothetical juror could

have been convinced that physical facts contradicted defendant's claims that the shooting was in self-defense or accidentally inflicted. *Davis v. State*, 891 So. 2d 256, 2004 Miss. App. LEXIS 914 (Miss. Ct. App. 2004).

Defendant was not entitled to a directed verdict based on the theory of "imperfect self-defense" for the killing of her abusive husband where at least 45 minutes elapsed between the last act of abuse by the husband and the time defendant killed him and during that time, defendant could have obtained help against her husband, could have requested aid from the owner of the trailer where defendant and her husband resided, or could have left the premises completely. *Moore v. State*, 859 So. 2d 379, 2003 Miss. LEXIS 654 (Miss. 2003).

Defendant in a murder trial was not entitled to a directed verdict or JNOV when the jury was entitled to reject defendant's claim of self-defense. *Thomas v. State*, 818 So. 2d 335, 2002 Miss. LEXIS 130 (Miss. 2002).

The defense of self-defense is unavailable to a defendant who is charged with capital felony-murder. *Layne v. State*, 542 So. 2d 237, 1989 Miss. LEXIS 190 (Miss. 1989).

A murder defendant who claimed self-defense should have been permitted to present testimonial evidence that the deceased habitually went armed with concealed weapons, and that the defendant was cognizant of that fact, in order to enable the jury to determine whether there was a reasonable cause to apprehend danger. *Stoop v. State*, 531 So. 2d 1215, 1988 Miss. LEXIS 493 (Miss. 1988).

Refusal to grant instruction that jury should put themselves in place of defendant and judge his acts by facts and circumstances by which he was surrounded at time of difficulty was not erroneous where theory of self-defense was fully covered in another instruction. *Fairman v. State*, 513 So. 2d 910, 1987 Miss. LEXIS 2791 (Miss. 1987).

The fact that deceased husband was found to have been shot in back contradicted defendant wife's testimony that she had shot her husband in self-defense as he was approaching her. *Mullins v. State*, 493

So. 2d 971, 1986 Miss. LEXIS 2591 (Miss. 1986).

It is well settled in Mississippi that the person who provokes the difficulty and remains the aggressor throughout the difficulty cannot invoke the plea of self-defense. *Weatherspoon v. State*, 243 So. 2d 53, 1971 Miss. LEXIS 1499 (Miss. 1971).

Where defendant, armed with a pistol, left the victim's yard upon being told to do so by the victim, but after leaving came back into the yard at which time the victim rose from his chair on the porch and started toward the defendant with a pistol in his hand and both parties began shooting, resulting in the victim's death, such evidence was sufficient to justify the jury in finding that the defendant provoked the difficulty and was the aggressor throughout, and that the defendant was guilty of manslaughter. *Weatherspoon v. State*, 243 So. 2d 53, 1971 Miss. LEXIS 1499 (Miss. 1971).

To justify a killing in self-defense the defendant must have believed, and had good reason to believe, that at the time he was in danger of the loss of his life, or great bodily harm at the hands of the deceased. *Spivey v. State*, 47 So. 2d 855 (Miss. 1950).

Right to resist unlawful arrest is phase of right of self-defense. *Wilkinson v. State*, 143 Miss. 324, 108 So. 711, 1926 Miss. LEXIS 270 (Miss. 1926).

Killing after blow struck in self-defense and when no real or apparent danger existed held murder. *Hays v. State*, 130 Miss. 381, 94 So. 212, 1922 Miss. LEXIS 208 (Miss. 1922).

Fact that accused, while unarmed and with no intention to kill, brought about difficulty did not preclude him from setting up self-defense. *Lucas v. State*, 109 Miss. 82, 67 So. 851, 1915 Miss. LEXIS 117 (Miss. 1915).

One who kills another, reasonably believing that he is in real or apparent danger of his life or great bodily harm, is not guilty of murder. *Echols v. State*, 99 Miss. 683, 55 So. 485, 1911 Miss. LEXIS 238 (Miss. 1911).

14. Questions for jury.

When the defendant or the defendant's witnesses are the only eyewitnesses to the

homicide, their version, if reasonable, must be accepted as true, but when there is a contradiction between the physical evidence and the defendant's version of what happened, the matter properly sits before the jury as a question of fact. *Hudson v. State*, 754 So. 2d 582, 2000 Miss. App. LEXIS 10 (Miss. Ct. App. 2000).

Due process clause, through vagueness doctrine, places limits on state's ability to define different courses of conduct or states of mind as alternative means of committing single offense, thereby permitting conviction without jury agreement as to which course of conduct or state of mind occurred; if two mental states are supposed to be equivalent means of satisfying mental state requirement of offense, they must reasonably reflect notions of equivalent blameworthiness or culpability; under right circumstances, such equivalence may reasonably be found, and first-degree murder conviction was not rendered invalid by trial court's failure to require jury to agree whether defendant was guilty of first-degree murder by virtue of premeditation or by virtue of felony murder, each of which constitutes first-degree murder under state law. *Schad v. Arizona*, 501 U.S. 624, 111 S. Ct. 2491, 115 L. Ed. 2d 555, 1991 U.S. LEXIS 3631 (U.S. 1991).

In cases in which the defendant is the only eyewitness to the slaying, and in which the *Weathersby* rule is inapplicable (i.e., the defendant does not secure a directed verdict of acquittal), it then becomes a jury issue as to whether to believe or not believe the defendant's testimony of how the slaying occurred, and to either convict or acquit. *Blanks v. State*, 547 So. 2d 29, 1989 Miss. LEXIS 322 (Miss. 1989).

Expert opinions of psychiatrists are not conclusive upon the issue of insanity but rather insanity is an issue for the jury. *Laney v. State*, 486 So. 2d 1242, 1986 Miss. LEXIS 2890 (Miss. 1986).

A jury issue as to whether the accused had sexually assaulted victim while in commission of murder was made by evidence showing that a puddle of liquid was found under the pelvic area of the partially unclad body, although testimony of witnesses showed that a shot was fired almost immediately after accused had

forced his way into victim's apartment, and the pathologist testified that bullet had gone through victim's heart. *West v. State*, 485 So. 2d 681, 1985 Miss. LEXIS 2445 (Miss. 1985), cert. denied, 479 U.S. 983, 107 S. Ct. 570, 93 L. Ed. 2d 574, 1986 U.S. LEXIS 4897 (U.S. 1986).

In a prosecution for capital murder whether or not defendant "robbed" the victim of his car was a question for the jury, in light of the circumstances of the murder including the facts that the feet and hands of the victim's body were tied and there was a bullet hole through the back of his head and shortly after the time of the murder the defendant was solely in possession of the victim's vehicle and its contents. *Wheat v. State*, 420 So. 2d 229, 1982 Miss. LEXIS 2206 (Miss. 1982), cert. denied, 460 U.S. 1056, 103 S. Ct. 1507, 75 L. Ed. 2d 936, 1983 U.S. LEXIS 4354 (U.S. 1983).

In a prosecution for murder the court did not err in failing to instruct the jury to restrict its verdict and find the defendant "guilty of manslaughter or not guilty," where the evidence was for the jury to resolve the issue of whether the defendant was guilty of murder, manslaughter, or no crime. *Polk v. State*, 417 So. 2d 930, 1982 Miss. LEXIS 2101 (Miss. 1982).

Evidence presented jury question as to whether accused fired the shot in his necessary self-defense at a time when he was in danger, either real or apparent, of losing his life or sustaining great bodily harm at the hands of the victim. *Pickert v. State*, 234 Miss. 513, 106 So. 2d 681, 1958 Miss. LEXIS 525 (Miss. 1958).

The testimony of accused, charged with murder of his wife, which contained many contradictions as to material matters, as well as the physical facts and the contradiction of the accused by other credible witnesses in particular matters, clearly established that the accused was not entitled to a peremptory instruction under the rule that where the defendant or his witnesses are the only eyewitnesses to the homicide their version must be accepted unless substantially contradicted in material particulars by credible witnesses, physical facts, or facts of common knowledge. *Murphy v. State*, 232 Miss. 424, 99 So. 2d 595, 1958 Miss. LEXIS 289 (Miss. 1958).

In a prosecution of a husband for the killing of his wife, state's evidence, including testimony with reference to the accused's anger at being served with a summons in wife's divorce action, his prior purchase of a pistol and bullets, his entry without invitation into his father-in-law's home where the wife was living, the location of her body in the room with the fatal shot behind her right ear, and the accused's statements, made a jury issue as to whether accused shot his wife with an intentional design to do so, as against accused's contention that he had accidentally shot her while shooting at his father-in-law. *Dykes v. State*, 232 Miss. 379, 99 So. 2d 602, 1957 Miss. LEXIS 484 (Miss. 1957).

Where there was both circumstantial and direct evidence, and there was some conflict in the testimony of the witnesses, the question of whether or not the accused was the man who fired the shot that killed the deceased was a question for the determination of the jury. *Freeman v. State*, 228 Miss. 687, 89 So. 2d 716, 1956 Miss. LEXIS 564 (Miss. 1956).

State's proof that accused without cause or justification cruelly and brutally beat his wife with an ax handle and slab of wood and choked her to such an extent as to cause her death by strangulation was sufficient to take the question of the accused's guilt to the jury, where the accused's sole defense was intoxication, and the evidence as to this issue was in conflict. *Jackson v. State*, 228 Miss. 604, 89 So. 2d 626, 1956 Miss. LEXIS 552 (Miss. 1956).

Evidence that accused without cause or justification cruelly and brutally beat his wife with an axe handle and slab of wood and choked her to such an extent as to cause her death by strangulation made a jury question as to the guilt of the accused, whose sole defense was intoxication, and the evidence as to this was conflicting. *Jackson v. State*, 228 Miss. 604, 89 So. 2d 626, 1956 Miss. LEXIS 552 (Miss. 1956).

Testimony of doctor in response to hypothetical question, embodying the material facts in the case, to the effect that he did not believe accused knew the difference between right and wrong, was erro-

neously excluded, since it was for the jury to determine whether such testimony, and similar testimony of accused's father, was such as to be calculated to raise a reasonable doubt as to whether accused was of such mental condition as to be able to distinguish between right and wrong at the time he shot and killed his wife. *Lewis v. State*, 209 Miss. 110, 46 So. 2d 78, 1950 Miss. LEXIS 365 (Miss. 1950).

Ordinarily, whether a homicide is murder or manslaughter is a question for the jury. *Anderson v. State*, 199 Miss. 885, 25 So. 2d 474, 1946 Miss. LEXIS 258 (Miss. 1946).

Whether accused, killing a visitor at her home in ejecting him therefrom after forbidding him to re-enter, used more force than reasonably appeared necessary for that purpose, or whether she killed decedent in what reasonably appeared to be in her necessary self-defense, were questions for the jury to determine. *Bangren v. State*, 196 Miss. 887, 17 So. 2d 599, 1944 Miss. LEXIS 264 (Miss. 1944), overruled, *Ferrell v. State*, 733 So. 2d 788, 1999 Miss. LEXIS 87 (Miss. 1999).

In prosecution for murder incident to defendant's alleged battering of infant, defendant's testimony as only witness to baby's death was materially contradicted by physical facts and circumstances in evidence, as indicated by photographs and medical testimony and, under *Weathersby v. State* (1933) 164 Miss 898, 147 So2d 481, matter became question for jury and court was not required to direct verdict for defendant. *Wetz v. State*, 503 So. 2d 803, 1987 Miss. LEXIS 2362 (Miss. 1987).

Jury have wide discretion where quality of act in issue; verdict for manslaughter upon indictment for murder held authorized by the evidence. *Woodward v. State*, 130 Miss. 611, 94 So. 717, 1922 Miss. LEXIS 232 (Miss. 1922).

Whether killing in quarrel was in self-defense, held question for jury. *Staiger v. State*, 110 Miss. 557, 70 So. 690, 1915 Miss. LEXIS 72 (Miss. 1915).

15. Mutual combat; dueling.

A man commits murder when he kills another in a duel, whether formal or extemporaneous, and however fairly conducted. *Thomas v. State*, 61 Miss. 60, 1883 Miss. LEXIS 72 (Miss. 1883).

To make the killing of an adversary in a duel necessarily murder, in such case the weapon must have been procured for the combat, or the accused must have provoked the difficulty or entered into it with an intention to use the weapon. *Long v. State*, 52 Miss. 23, 1876 Miss. LEXIS 160 (Miss. 1876).

If a party enter into a mutual combat dangerously armed, and fight under an undue advantage and kill his adversary, it is murder. *Price v. State*, 36 Miss. 531, 1858 Miss. LEXIS 123 (Miss. 1858), limited, *Helm v. State*, 66 Miss. 537, 6 So. 322, 1889 Miss. LEXIS 144 (Miss. 1889).

The fact that the accused sought the difficulty and brought it about, being armed with a deadly weapon with which he killed the deceased, does not necessarily render him guilty of murder; for if he commence the contest, intending at the outset to inflict little or no violence on his antagonist, he may justifiably slay him if the danger of his own destruction be imminent and impending and otherwise unavoidable; or, when the necessity to kill does not exist, if the killing be done not in pursuance of a premeditated design, but on a sudden quarrel, it will, in such case, amount to manslaughter only. *Cotton v. State*, 31 Miss. 504, 1856 Miss. LEXIS 108 (Miss. 1856).

16. Killing of one other than person intended.

In a murder case, the trial court correctly denied defendant's jury instruction because defendant's theory of the case was based upon his own testimony that he intentionally fired each shot, and there was no evidence from which a jury could have found that he fired the shots accidentally. Further, there was sufficient evidence to find that defendant shot into the trailer house with a deliberate design to kill; although there was sufficient evidence that defendant had a deliberate design to kill his brother, defendant's intent to kill his brother was transferred to the sister-in-law, the actual victim. *Walden v. State*, 29 So. 3d 17, 2008 Miss. App. LEXIS 462 (Miss. Ct. App. 2008), cert. denied, 29 So. 3d 774, 2010 Miss. LEXIS 105 (Miss. 2010).

Where there is an express intent to kill or do grievous bodily harm directed to-

ward one person and another is killed unintentionally by the act, it is murder at common law. *Dykes v. State*, 232 Miss. 379, 99 So. 2d 602, 1957 Miss. LEXIS 484 (Miss. 1957).

The transferred intent doctrine does not apply where it appears that the accused in shooting or striking at another person with intent to kill, unintentionally kills another, if the accused has previously been acquitted of the death of the person at whom he was shooting or striking, and such acquittal will bar a subsequent prosecution of the accused for the murder of the other person, unless the killing of the other person was not accidental, but an independent separate offense arising out of the transaction. In the latter event the accused may be successively prosecuted for two offenses. *Dykes v. State*, 232 Miss. 379, 99 So. 2d 602, 1957 Miss. LEXIS 484 (Miss. 1957).

Accidental killing of human being other than one intended constitutes "murder," where there is express malice and intent to kill. *Ross v. State*, 158 Miss. 827, 131 So. 367, 1930 Miss. LEXIS 119 (Miss. 1930).

17. Death in consequence of improper treatment of wound.

Where act of accused contributed to death of victim, he was not relieved of responsibility by fact that other causes also contributed to death, such as mal-treatment by physician who administered treatment in emergency room. *Fairman v. State*, 513 So. 2d 910, 1987 Miss. LEXIS 2791 (Miss. 1987).

If death ensue from a wound given in malice, but not of its nature mortal, but of which, being neglected or mismanaged, the party die, this will not excuse the party who gave it; but he will be held guilty of murder, unless it clearly and certainly appear, either by the evidence of the state or defendant, that the neglect and want of care on the part of the deceased, and not the wound itself, was the cause of his death. *Quinn v. State*, 106 Miss. 844, 64 So. 738, 1914 Miss. LEXIS 26 (Miss. 1914).

18. Murder for hire.

Where the jury is properly instructed to determine whether a secondary killing

was reasonably anticipated to be necessary in order to accomplish the contract killing, then that secondary killing is also part of the contract and the absent principal can be found guilty of capital murder. *Saunders v. State*, 733 So. 2d 325, 1998 Miss. App. LEXIS 1115 (Miss. Ct. App. 1998).

19. Homicide by persons joining in commission of felony.

There was sufficient evidence to convict defendant of capital murder during the commission of a robbery; the State did not need to prove that defendant actually committed the robbery himself, only that he acted in concert with or aided and abetted two others, and there was sufficient evidence to show that defendant participated in one of the three positions needed to rob the store. Furthermore, defendant had gunshot residue on his hand and his DNA was found on a hat found near the cash register. *Booker v. State*, — So. 3d —, 2020 Miss. App. LEXIS 578 (Miss. Ct. App. Oct. 13, 2020).

Although defendant, who was convicted of murder while engaged in the crime of drive-by shooting and for shooting into an occupied dwelling, argued that the State failed to prove that he willfully discharged a pistol into a dwelling, the evidence amply supported the jury's finding that defendant willfully shot into an occupied dwelling. Two witnesses testified that defendant expressed his intent to shoot at the victim's house and that he admitted shooting the victim, and the victim's girlfriend identified defendant's voice during an altercation that took place outside the victim's home immediately prior to the shooting. *Boyd v. State*, 977 So. 2d 329, 2008 Miss. LEXIS 144 (Miss. 2008).

In order to obtain a valid conviction of a defendant for felony murder while engaged in the crime of drive-by shooting, the State is required to prove all essential elements of both Miss. Code Ann. § 97-3-19(1)(c) and Miss. Code Ann. § 97-3-109(1). Thus, the State is required to prove under Miss. Code Ann. § 97-3-109(1) that the defendant caused serious bodily injury to another purposely, knowingly or recklessly under circumstances manifesting extreme indifference to the

value of human life by discharging a firearm while in or on a vehicle. *Boyd v. State*, 977 So. 2d 329, 2008 Miss. LEXIS 144 (Miss. 2008).

Post-conviction relief was properly denied where: (1) trial counsel did not err in failing to seek a change of venue because of pretrial publicity; (2) petitioner's culpability as a capital murder accomplice would not be reduced by testimony of a clinical psychologist who opined that petitioner was not by nature a violent person; (3) although the aggravating circumstances which invoked the death penalty were not charged in the indictment, the fact that the capital murder statute listed the possible aggravating circumstances refuted the contention that petitioner had inadequate notice; (4) because the record supported no findings of error, there could be no prejudicial cumulative error; (5) use of the underlying felony as an aggravating sentencing factor did not constitute impermissible double prejudice; and (6) other issues raised on direct appeal could not be considered on collateral appeal under Miss. Code Ann. § 99-39-21. *Thong Le v. State*, 967 So. 2d 627, 2007 Miss. LEXIS 452 (Miss. 2007), cert. denied, 552 U.S. 1300, 128 S. Ct. 1747, 170 L. Ed. 2d 547, 2008 U.S. LEXIS 2913 (U.S. 2008).

Where a shooting was committed during a robbery, the evidence supported the jury's finding of an aggravating circumstance under Miss. Code Ann. § 99-19-101(5)(d), even if defendant was not the shooter; whether or not defendant intended to kill the victim was irrelevant because Miss. Code Ann. § 97-3-19(2)(e) defines capital murder, in part, as the killing of a human being when done with or without any design to effect death, by any person engaged in the commission of the crime of robbery. *Dycus v. State*, 875 So. 2d 140, 2004 Miss. LEXIS 366 (Miss. 2004), vacated, 544 U.S. 901, 125 S. Ct. 1589, 161 L. Ed. 2d 271, 2005 U.S. LEXIS 2212 (U.S. 2005).

State was not required to prove that murder was committed in furtherance of both underlying felonies to obtain conviction for felony murder, although indictment charged defendant with murder during course of kidnapping and robbery. *Wilcher v. State*, 697 So. 2d 1123, 1997 Miss. LEXIS 101 (Miss. 1997).

Capital murder defendant cannot be convicted of both capital murder and underlying felony, as defendant cannot be twice prosecuted for the same actions. *Wilcher v. State*, 697 So. 2d 1087, 1997 Miss. LEXIS 100 (Miss. 1997), cert. denied, 522 U.S. 1053, 118 S. Ct. 705, 139 L. Ed. 2d 647, 1998 U.S. LEXIS 149 (U.S. 1998).

Fact that indictment charged defendant with murder during course of kidnapping and with robbery did not require state to prove that offense was committed in furtherance of both underlying felonies in order to support death penalty. *Wilcher v. State*, 697 So. 2d 1087, 1997 Miss. LEXIS 100 (Miss. 1997), cert. denied, 522 U.S. 1053, 118 S. Ct. 705, 139 L. Ed. 2d 647, 1998 U.S. LEXIS 149 (U.S. 1998).

Aggravating factor of murder committed during course of robbery is constitutional. *Wilcher v. State*, 697 So. 2d 1087, 1997 Miss. LEXIS 100 (Miss. 1997), cert. denied, 522 U.S. 1053, 118 S. Ct. 705, 139 L. Ed. 2d 647, 1998 U.S. LEXIS 149 (U.S. 1998).

Felony-murder aggravator is not disproportionate within meaning of Eighth Amendment even though unintentional felony-murder is punishable by death while premeditated murder, standing alone, is not, as not every defendant eligible for death penalty will have committed murder while in the course of statutorily enumerated felonies, so that felony-murder aggravator genuinely narrows class of defendants eligible for the death penalty. *Wilcher v. State*, 697 So. 2d 1087, 1997 Miss. LEXIS 100 (Miss. 1997), cert. denied, 522 U.S. 1053, 118 S. Ct. 705, 139 L. Ed. 2d 647, 1998 U.S. LEXIS 149 (U.S. 1998).

During penalty phase of capital murder prosecution involving murder of child victim while engaging in felonious abuse and/or battery, it was proper to instruct jury that it could consider as aggravating factor that murder had occurred during commission of crime of felonious abuse and/or battery of child. *Brown v. State*, 690 So. 2d 276, 1996 Miss. LEXIS 681 (Miss. 1996), cert. denied, 522 U.S. 849, 118 S. Ct. 136, 139 L. Ed. 2d 85, 1997 U.S. LEXIS 5165 (U.S. 1997), rev'd, — So. 3d —, 2017 Miss. LEXIS 524 (Miss. 2017).

Capital murder defense counsel did not provide ineffective assistance of counsel in failing at punishment stage to object to robbery aggravator on ground that aggravating circumstance unconstitutionally duplicated element of offense of capital murder because jury found that defendant committed capital murder in commission of crime of robbery; Supreme Court had already rejected that contention and, thus, there was no reason for counsel to object to underlying felony being counted as aggravator. *Foster v. State*, 687 So. 2d 1124, 1996 Miss. LEXIS 216 (Miss. 1996), cert. denied, 521 U.S. 1108, 117 S. Ct. 2488, 138 L. Ed. 2d 996, 1997 U.S. LEXIS 3936 (U.S. 1997).

Capital murder defense counsel did not provide ineffective assistance of counsel in failing at sentencing phase to object to double use of robbery and pecuniary gain aggravating circumstances; defendant's trial took place before effective date of later state Supreme Court decision prospectively prohibiting double counting for same conduct and, thus, defense counsel had no basis to object. *Foster v. State*, 687 So. 2d 1124, 1996 Miss. LEXIS 216 (Miss. 1996), cert. denied, 521 U.S. 1108, 117 S. Ct. 2488, 138 L. Ed. 2d 996, 1997 U.S. LEXIS 3936 (U.S. 1997).

Defendant charged with capital offense of killing while engaged in commission of child abuse or battery was not entitled to lesser included offense instruction on manslaughter based on killing while committing a felony. *Jackson v. State*, 684 So. 2d 1213, 1996 Miss. LEXIS 7 (Miss. 1996), cert. denied, 520 U.S. 1215, 117 S. Ct. 1703, 137 L. Ed. 2d 828, 1997 U.S. LEXIS 2937 (U.S. 1997).

Existence of two separate statutes under which defendant could be prosecuted for killing during course of committing felonious child abuse, only one of which could result in capital murder conviction, did not give prosecutor impermissible discretion to impose death penalty, in violation of Eighth Amendment, where jury was instructed that it could impose life sentence. *Jackson v. State*, 684 So. 2d 1213, 1996 Miss. LEXIS 7 (Miss. 1996), cert. denied, 520 U.S. 1215, 117 S. Ct. 1703, 137 L. Ed. 2d 828, 1997 U.S. LEXIS 2937 (U.S. 1997).

Whether felonious child abuse statute was void for vagueness and whether jury instructions did not sufficiently narrow definition of child abuse was procedurally barred, where defendant failed to object at trial. *Jackson v. State*, 684 So. 2d 1213, 1996 Miss. LEXIS 7 (Miss. 1996), cert. denied, 520 U.S. 1215, 117 S. Ct. 1703, 137 L. Ed. 2d 828, 1997 U.S. LEXIS 2937 (U.S. 1997).

Instructing jury on armed robbery, after indictment charged robbery, constituted formal rather than substantive amendment to indictment, and thus any variance which existed between indictment and proof was harmless error, where all defenses and evidence available to defendant remained equally applicable, and jury could not have convicted defendant of armed robbery and found him not guilty of robbery, inasmuch as armed robbery is simply robbery with weapon. *Davis v. State*, 684 So. 2d 643, 1996 Miss. LEXIS 292 (Miss. 1996), cert. denied, 520 U.S. 1170, 117 S. Ct. 1437, 137 L. Ed. 2d 544, 1997 U.S. LEXIS 2295 (U.S. 1997).

In prosecution for capital offense of murder during commission of robbery, jury instruction given regarding sequence of the robbery and murder did not sufficiently instruct jury on elements of underlying crime of robbery, for purposes of determining whether failure to specifically instruct jury on elements of robbery constituted reversible error. *Hunter v. State*, 684 So. 2d 625, 1996 Miss. LEXIS 288 (Miss. 1996).

State had duty, in prosecution for capital offense of murder during commission of robbery, to ensure that jury was properly instructed on elements of underlying crime of robbery, and therefore failure to give such instruction constituted reversible error, even though defendant did not present acceptable robbery instruction. *Hunter v. State*, 684 So. 2d 625, 1996 Miss. LEXIS 288 (Miss. 1996).

Sentencing court in bifurcated capital murder prosecution properly allowed jury to consider, as aggravating circumstance, whether capital offense was committed while defendant was engaged in commission of armed robbery, notwithstanding fact that robbery was also element of capital murder for which defendant was

being prosecuted. *Brown v. State*, 682 So. 2d 340, 1996 Miss. LEXIS 427 (Miss. 1996), cert. denied, 520 U.S. 1127, 117 S. Ct. 1271, 137 L. Ed. 2d 348, 1997 U.S. LEXIS 1821 (U.S. 1997).

Convictions for both murder during course of armed robbery and grand larceny violated double jeopardy prohibition against multiple punishments for same offense, where robbery charge, which was used to elevate case to capital murder, encompassed elements of grand larceny. *Holly v. State*, 671 So. 2d 32, 1996 Miss. LEXIS 15 (Miss.), cert. denied, 518 U.S. 1025, 116 S. Ct. 2565, 135 L. Ed. 2d 1082, 1996 U.S. LEXIS 4179 (U.S. 1996).

Sexual battery could be used as underlying felony, to elevate murder to level of capital murder, and could be used again for sentencing purposes as an aggravator to support imposition of death penalty, without violating prohibition against cruel and unusual punishment. *Walker v. State*, 671 So. 2d 581, 1995 Miss. LEXIS 494 (Miss. 1995), cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406, 1996 U.S. LEXIS 7236 (U.S. 1996).

Robbery is not a component of murder and is, therefore, not a lesser included offense of murder. *Ballenger v. State*, 667 So. 2d 1242, 1995 Miss. LEXIS 451 (Miss. 1995), cert. denied, 518 U.S. 1025, 116 S. Ct. 2565, 135 L. Ed. 2d 1082, 1996 U.S. LEXIS 4177 (U.S. 1996).

Use of robbery as both aggravating factor in sentencing and as essential element of crime of capital murder did not unconstitutionally fail to narrow class of death eligible offenders; required narrowing had been done legislatively. *Ballenger v. State*, 667 So. 2d 1242, 1995 Miss. LEXIS 451 (Miss. 1995), cert. denied, 518 U.S. 1025, 116 S. Ct. 2565, 135 L. Ed. 2d 1082, 1996 U.S. LEXIS 4177 (U.S. 1996).

A defendant's right to be shielded from double jeopardy was violated where the defendant was convicted and punished for both kidnapping under § 97-3-53 and capital murder while engaged in the crime of kidnapping under subsection (2)(e) of this section; since the defendant was indicted, tried and found guilty of capital murder under subsection (2)(e) of this section with the kidnapping as the underlying felony, and thereafter exposed to

trial for his life, the State was precluded from punishing him further for the § 97-3-53 kidnapping. *Meeks v. State*, 604 So. 2d 748, 1992 Miss. LEXIS 400 (Miss. 1992).

In a prosecution for murder while engaged in the crime of robbery, the jury could reasonably have found that the defendant intended the killings and intended that lethal force be used, for purposes of imposing the death penalty, where the defendant actually participated in the robbery with his accomplice and was present in some role while both murders were committed. *Minnick v. State*, 551 So. 2d 77, 1988 Miss. LEXIS 612 (Miss. 1988), rev'd, 498 U.S. 146, 111 S. Ct. 486, 112 L. Ed. 2d 489, 1990 U.S. LEXIS 6118 (U.S. 1990), overruled, *Willie v. State*, 585 So. 2d 660, 1991 Miss. LEXIS 454 (Miss. 1991).

Defendant, who was indicted under subsection (2)(a) of this section, had no standing to argue that felony murder provision in subsection (2)(e) of this section was unconstitutional, as he was never charged with that crime. *Johnson v. Thigpen*, 449 So. 2d 1207, 1984 Miss. LEXIS 1713 (Miss. 1984).

Subsection (2)(e) of this section is not constitutionally infirm even though it permits verdict of guilty absent finding of design to effect death and allows imputation of intent from one defendant to another, although applicable standard for determination of guilt must not be confused with constitutionally mandated standard for imposition of capital punishment, such standard precluding capital punishment based upon imputed intent. *Bullock v. Lucas*, 743 F.2d 244, 1984 U.S. App. LEXIS 18361 (5th Cir. Miss. 1984), modified, 474 U.S. 376, 106 S. Ct. 689, 88 L. Ed. 2d 704, 1986 U.S. LEXIS 46 (U.S. 1986).

Under subsection (2)(e) of this section a defendant may apparently be convicted of capital murder if someone is killed during the course of a robbery in which he was participating. Furthermore, no murder committed during the course of a robbery can be simple murder. *Bell v. Watkins*, 692 F.2d 999, 1982 U.S. App. LEXIS 23546 (5th Cir. Miss. 1982), cert. denied, 464 U.S. 843, 104 S. Ct. 142, 78 L. Ed. 2d 134, 1983 U.S. LEXIS 1426 (U.S. 1983).

Where evidence showed that defendant and his brothers kidnapped the deceased, and during the commission of this crime, she was killed by one of defendant's brothers alone without any participation by the defendant, defendant could be guilty of no greater crime than manslaughter. *Griffin v. State*, 293 So. 2d 810, 1974 Miss. LEXIS 1811 (Miss. 1974).

Where the evidence proved a combination or conspiracy entered into by the defendant and others to commit armed robbery, and the victim was thereafter shot to death by a codefendant at a time when all conspirators were present and each was doing his or her assigned part in the conspiracy to rob, the defendant became an accessory to armed robbery before the fact, and under the specific provisions of Code 1942, § 1995 was deemed and considered a principal so that every essential element of the crime of murder listed in Code 1942, § 2215 was proved by the state against the defendant. *Alexander v. State*, 250 So. 2d 629, 1971 Miss. LEXIS 1185 (Miss. 1971).

Where evidence showed that both defendant and his companion fired shots at deceased, defendant was properly convicted of murder, though fatal shot may have been fired by companion. *Wilkerson v. State*, 209 Miss. 360, 46 So. 2d 807, 1950 Miss. LEXIS 399 (Miss. 1950).

Where the evidence disclosed that the murder took place during the robbery of deceased by accused and others, the fact that the accused did not himself strike the fatal blow but that it was struck by one of his confederates as an aid in carrying out the common purpose to rob, did not relieve him of responsibility therefore. *Carrol v. State*, 183 Miss. 1, 183 So. 703, 1938 Miss. LEXIS 211 (Miss. 1938).

Evidence held to sustain conviction for murder of officer while attempting arrest of parties who had committed robbery; refusal of requested instruction that defendant could not be convicted of murder unless he fired fatal shot held not erroneous. *Hurd v. State*, 137 Miss. 178, 102 So. 293, 1924 Miss. LEXIS 230 (Miss. 1924).

Where two parties aid in commission of homicide, it is not law that neither can be convicted unless shown beyond reasonable doubt that he, by his own act, did the

killing. *McCoy v. State*, 91 Miss. 257, 44 So. 814, 1907 Miss. LEXIS 147 (Miss. 1907).

20. Homicide by commission of dangerous act.

Evidence was sufficient to convict defendant of depraved-heart murder because he fired a gun into a fleeing group of people, which was a classic case of this offense. *Humphries v. State*, 18 So. 3d 305, 2009 Miss. App. LEXIS 606 (Miss. Ct. App. 2009).

Depraved-heart murder as defined in subsection (1)(b) of this section and culpable-negligence manslaughter as defined in § 97-3-47 are distinguishable simply by degree of mental state of culpability, in that depraved-heart murder involves a higher degree of recklessness from which malice or deliberate design may be implied; thus, an instruction on depraved-heart murder did not amount to a "denial, or substantial diminishing, of a manslaughter consideration" by the jury. *Windham v. State*, 602 So. 2d 798, 1992 Miss. LEXIS 227 (Miss. 1992).

The evidence justified an instruction on, and a finding of, depraved-heart murder where the defendant used a hammer to assault a 79-year-old, one-armed man, who was running away, and his 78-year-old wife, during a dispute over a debt he owed them. *Windham v. State*, 602 So. 2d 798, 1992 Miss. LEXIS 227 (Miss. 1992).

An act which poses a risk to only one individual and which results in that individual's death may be deemed depraved-heart murder within the meaning of subsection (1)(b) of this section; a distinction between the risk of death to one particular individual and the risk of death to more than one individual is senseless and outmoded and was properly discarded. *Windham v. State*, 602 So. 2d 798, 1992 Miss. LEXIS 227 (Miss. 1992).

The *Weathersby* rule applies with equal force in a case involving a killing "done in the commission of an act eminently dangerous to others and evincing a depraved heart, regardless of human life, although without any premeditated design to effect the death of any particular individual" as well as one in which the defendant is charged with murder by deliberate design.

Blanks v. State, 547 So. 2d 29, 1989 Miss. LEXIS 322 (Miss. 1989).

A defendant who seized an officer's gun and fired it recklessly and at random engaged in the type of conduct contemplated by subsection (1)(b) of this section, which provides that killing is murder when done in the commission of an act eminently dangerous to others and evincing a depraved heart, regardless of human life, although without any premeditated design to effect the death of any particular individual. Wheeler v. State, 536 So. 2d 1341, 1988 Miss. LEXIS 605 (Miss. 1988).

Having been indicted separately for both murder, under this section, and for felony of shooting into occupied building, under § 97-37-29, defendant who was tried on murder indictment alone, and who had been convicted only of manslaughter, could not be prosecuted in second trial for shooting felony, since, under circumstances of case, it was lesser offense that was included in murder charge. Davis v. Herring, 800 F.2d 513, 1986 U.S. App. LEXIS 31243 (5th Cir. Miss. 1986).

Where the trial judge in a murder prosecution implied that no murder committed during the course of a robbery could be simple murder and implied that it became, by definition, capital murder under this section, the appellate court would hold that theory of trial judge was flawed since it determined what instruction would be granted at the request of a capital murder defendant on the basis of a presumption that he had already been found guilty of the underlying felony. Fairchild v. State, 459 So. 2d 793, 1984 Miss. LEXIS 1983 (Miss. 1984).

Evidence showing killing by shooting with pistol sustained murder conviction under statutory provision defining murder as killing in commission of act imminently dangerous to others, and evincing depraved heart regardless of human life, though without premeditated design to effect death. Jones v. State, 169 Miss. 292, 152 So. 879, 1934 Miss. LEXIS 43 (Miss. 1934).

Where defendant while drunk fired pistol in the highway and the bullet glanced and struck and killed deceased, it was not manslaughter unless killing was the natural or necessary consequence. Dixon v.

State, 104 Miss. 410, 61 So. 423, 1913 Miss. LEXIS 40 (Miss. 1913).

It was fatal error to refuse instruction that malice aforethought was necessary element of murder. Burnett v. State, 92 Miss. 826, 46 So. 248, 1908 Miss. LEXIS 225 (Miss. 1908).

Under indictment for assault with intent to kill and murder a named person where proof showed defendant shot into wagon occupied by such person and others, instruction that jury may convict without proof of premeditated design to kill the person named is fatally erroneous. Gentry v. State, 92 Miss. 141, 45 So. 721, 1907 Miss. LEXIS 26 (Miss. 1907).

21. Killing as manslaughter.

In defendant's trial for murder, defendant's act of shooting the victim in the head at short range did not qualify as heat of passion of manslaughter because while the conversation might have been heated with defendant's mother, the victim was a mere bystander to it; the victim's statement that defendant and defendant's mother needed to quit fighting did not cause a normal mind to be roused to the extent that reason was overthrown and that passion usurped the mind destroying judgment. Mullen v. State, 986 So. 2d 320, 2007 Miss. App. LEXIS 605 (Miss. Ct. App. 2007), cert. denied, 987 So. 2d 451, 2008 Miss. LEXIS 559 (Miss. 2008).

There was sufficient evidence to support a conviction for murder under Miss. Code Ann. § 97-3-19(1)(a), rather than manslaughter under Miss. Code Ann. § 97-3-35, where the facts showed that defendant had been having domestic problems with his wife, he cashed a check for a large sum of money, and then went to her work where he shot her to death. Bennett v. State, 956 So. 2d 964, 2006 Miss. App. LEXIS 675 (Miss. Ct. App. 2006), cert. denied, 2007 Miss. LEXIS 293 (Miss. May 17, 2007).

Where defendant was indicted for murder under Miss. Code Ann. § 97-3-19(1)(a), and the State failed to prove the charge, the trial judge should have been authorized to issue a limited directed verdict as to the murder charge and allow the State to proceed on the lesser unindicted offense of manslaughter, under Miss.

Code Ann. § 97-3-35. *State v. Shaw*, 880 So. 2d 296, 2004 Miss. LEXIS 1027 (Miss. 2004).

Manslaughter indictment that stated the date and place of the crime, specifically named both victims, and alleged that defendant committed the crime with others while he and the others were committing the felony crime of aggravated assault was sufficient to inform the defendant of the charge against him. *Stevens v. State*, 2001 Miss. LEXIS 301 (Miss. Oct. 31, 2001).

Having been indicted separately for both murder, under this section, and for felony of shooting into occupied building, under § 97-37-29, defendant who was tried on murder indictment alone, and who had been convicted only of manslaughter, could not be prosecuted in second trial for shooting felony, since, under circumstances of case, it was lesser offense that was included in murder charge. *Davis v. Herring*, 800 F.2d 513, 1986 U.S. App. LEXIS 31243 (5th Cir. Miss. 1986).

Capital sentencing scheme in which prosecutor has discretion as to which murders he can try as capital offenses did not grant unfettered discretion to prosecutor and did not violate constitutional protections, where discretion was statutorily limited, manslaughter instruction had to be given if warranted by facts, and imposition of death penalty was channelled through weighing of aggravating and mitigating circumstances. *Berry v. State*, 703 So. 2d 269, 1997 Miss. LEXIS 639 (Miss. 1997).

Defendant charged with capital offense of killing while engaged in commission of child abuse or battery was not entitled to lesser included offense instruction on manslaughter based on killing while committing a felony. *Jackson v. State*, 684 So. 2d 1213, 1996 Miss. LEXIS 7 (Miss. 1996), cert. denied, 520 U.S. 1215, 117 S. Ct. 1703, 137 L. Ed. 2d 828, 1997 U.S. LEXIS 2937 (U.S. 1997).

In capital murder trial based on allegation that defendant killed child victim while engaged in commission of child abuse or battery, evidence that defendant used victim as shield while struggling with victim's mother was insufficient to support heat of passion manslaughter in-

struction, in view of evidence that defendant planned robbery of victim's home, had told victim's mother that he was going to kill her and her family, and did not stab victim until after struggle with mother. *Jackson v. State*, 684 So. 2d 1213, 1996 Miss. LEXIS 7 (Miss. 1996), cert. denied, 520 U.S. 1215, 117 S. Ct. 1703, 137 L. Ed. 2d 828, 1997 U.S. LEXIS 2937 (U.S. 1997).

A trial court erred in refusing a murder defendant's proffered lesser included offense manslaughter instructions where, taking the evidence in the light most favorable to the defendant, the jury could have found that the defendant lacked the requisite intent of malice aforethought to assist in the murder but that he did participate in kidnapping the victim. *Welch v. State*, 566 So. 2d 680, 1990 Miss. LEXIS 152 (Miss. 1990).

The trial court in a capital murder prosecution erred reversibly in refusing defendant's requested instruction on manslaughter, where, although a jury might have properly found that the threat of death or serious bodily injury had not been imminently pending and therefore might have rejected defendant's self-defense theory, the jury might nevertheless, from the same facts, have found defendant not guilty of capital murder on the basis that the fatal shot had been in response to a shot first fired at him by an officer in a tense, sudden confrontation arising without the design of either party, thereby reducing the offense to manslaughter with a corresponding reduction in sentence. *Lanier v. State*, 450 So. 2d 69, 1984 Miss. LEXIS 1695 (Miss. 1984).

Manslaughter charge not error where parties engaged in fight immediately prior to killing done in heat of passion and without malice. *Springer v. State*, 129 Miss. 589, 92 So. 633, 1922 Miss. LEXIS 72 (Miss. 1922).

One may have felonious design to kill and kill in the heat of passion, which is manslaughter. *Dye v. State*, 127 Miss. 492, 90 So. 180, 1921 Miss. LEXIS 249 (Miss. 1921).

22. Indictment.

Defendant's second indictment was sufficient because it specified that he commit-

ted burglary by breaking and entering the victim's trailer with the intent to commit the crime of assault, with or without any design to effect the death of the victim; and it alleged each offense necessary to charge defendant with capital murder: assault, burglary, and, ultimately, murder. *Clark v. State*, 233 So. 3d 832, 2017 Miss. App. LEXIS 129 (Miss. Ct. App.), cert. denied, — So. 3d —, 2017 Miss. LEXIS 518 (Miss. 2017).

Although defendant maintained that the second indictment should have been dismissed because the crimes of burglary and capital murder were both predicated on his commission of an assault, which was subject to a two-year statute of limitations for prosecution, defendant's argument was without merit as the passage of time would never bar prosecution against any person for the offenses of murder, aggravated assault, or burglary. *Clark v. State*, 233 So. 3d 832, 2017 Miss. App. LEXIS 129 (Miss. Ct. App.), cert. denied, — So. 3d —, 2017 Miss. LEXIS 518 (Miss. 2017).

Defendant's capital-murder charge was sufficiently pleaded, and the indictment was not defective, because the indictment identified the underlying felony as robbery and listed the section of the capital murder statute under which defendant was charged. Furthermore, although defendant contended that the indictment for capital murder was defective because it omitted the phrase "malice aforethought," the capital murder statute did not require that the language "malice aforethought" be in the indictment. *Burns v. State*, 187 So. 3d 1080, 2016 Miss. App. LEXIS 138 (Miss. Ct. App. 2016).

Defendant's indictment was not fatally defective; he was charged with capital murder as a result of felonious child abuse, which was a crime at the time of the commission of the offense and at the time of his indictment. *Cozart v. State*, 226 So. 3d 639, 2016 Miss. App. LEXIS 270 (Miss. Ct. App. 2016).

Defendant's conviction for capital murder was reversed because the trial court erred in amending defendant's indictment to charge him as a violent habitual offender because the State presented no evidence supporting its allegation that

one of defendant's prior burglaries actually involved violence; and the State did not allege with particularity the nature or description of the offense constituting the previous convictions and did not afford defendant a fair opportunity to present a defense to the habitual-offender charge. *Burleson v. State*, 166 So. 3d 499, 2015 Miss. LEXIS 243 (Miss. 2015).

Indictment sufficiently identifying robbery under as the underlying offense and listing its statutory section is all that is required to charge capital murder premised on robbery; because petitioner's indictment identified the underlying felony as robbery and listed the statutory section under which he was charged, the capital murder charge was sufficiently pleaded and the indictment was not defective. *Randall v. State*, 148 So. 3d 686, 2014 Miss. App. LEXIS 575 (Miss. Ct. App. 2014).

Defendant juvenile's indictment was not defective because the capital-murder statute was cited in the heading of the indictment but not the body of the indictment since the indictment listed the appropriate section and subsection in the heading and tracked the language of the statute in the body, and Miss. Code Ann. § 99-17-20 did not specify where the charged section and subsection number had to appear in the indictment. *Hye v. State*, 162 So. 3d 818, 2013 Miss. App. LEXIS 292 (Miss. Ct. App. 2013), *aff'd in part*, vacated in part, 162 So. 3d 750, 2015 Miss. LEXIS 69 (Miss. 2015).

Indictment for robbery was appropriate because defendant's due process rights were not violated as the indictment was not required to have specified the items alleged to have been taken in the robbery. *Batiste v. State*, 121 So. 3d 808, 2013 Miss. LEXIS 295 (Miss. 2013), cert. denied, 572 U.S. 1117, 134 S. Ct. 2287, 189 L. Ed. 2d 178, 2014 U.S. LEXIS 3424 (U.S. 2014).

Defendant was placed in double jeopardy when he was convicted on two counts of armed robbery and two counts of capital murder for killing while engaged in the commission of those same two armed robberies; although there were several other armed robbery victims present, only the two murder victims were named in the

indictment. *Rowland v. State*, 98 So. 3d 1032, 2012 Miss. LEXIS 484 (Miss. 2012), overruled in part, *Carson v. State*, 212 So. 3d 22, 2016 Miss. LEXIS 473 (Miss. 2016).

Court rejected defendant's argument that his death sentence has to be vacated because the indictment failed to include a statutory aggravating factor or the mens rea standard required for capital murder. When defendant was charged with capital murder, he was put on notice that the death penalty might result, what aggravating factors might be used, and the mens rea standard that was required. *Goff v. State*, 14 So. 3d 625, 2009 Miss. LEXIS 273 (Miss. 2009), cert. denied, 559 U.S. 944, 130 S. Ct. 1513, 176 L. Ed. 2d 122, 2010 U.S. LEXIS 1251 (U.S. 2010).

Indictment against defendant alleged the essential elements of murder, even though the initial indictment did not allege that he acted out of "deliberate design," because it alleged "malice aforethought." Amending the indictment from "malice aforethought" to "deliberate design" was one of form, not substance, and the two terms were synonymous. *Gilbert v. State*, 934 So. 2d 330, 2006 Miss. App. LEXIS 241 (Miss. Ct. App. 2006).

Defendant contended that the indictment failed to charge all of the elements necessary to impose the death penalty under Mississippi law, but his argument failed because (1) pursuant to Miss. Code Ann. § 99-19-101(7), a jury only needed to find that defendant killed, and did not need a true mens rea; (2) under Miss. Code Ann. § 99-19-101(5), aggravating circumstances existed; and (3) there was no increase in the maximum penalty because the maximum penalty for killing while engaged in the commission of sexual battery was death as the crime was defined as capital murder under Miss. Code Ann. § 97-3-19(2)(e), and, pursuant to Miss. Code Ann. § 1-3-4, a capital murder was a crime punishable by death. *Havard v. State*, 928 So. 2d 771, 2006 Miss. LEXIS 90 (Miss. 2006), cert. denied, 549 U.S. 1119, 127 S. Ct. 931, 166 L. Ed. 2d 716, 2007 U.S. LEXIS 153 (U.S. 2007).

Capital murder indictment was not deficient for failing to list the aggravating factors the State intended to prove at sentencing; the death penalty statute

clearly states the only aggravating circumstances that may be relied upon by the prosecution in seeking the death penalty, so that every time someone is charged with capital murder he or she is put on notice that the death penalty may result. *Brown v. State*, 890 So. 2d 901, 2004 Miss. LEXIS 1104 (Miss. 2004), cert. denied, 544 U.S. 981, 125 S. Ct. 1842, 161 L. Ed. 2d 735, 2005 U.S. LEXIS 3424 (U.S. 2005).

Felony murder as a capital crime by definition requires that there be two felonies, the homicide being the intentional or unintentional product of the other felony. The elements set out in the indictment against defendant only charged one felony, that defendant killed the victim by setting the victim on fire, and that act was not a capital offense; thus, the indictment as written did not charge capital murder, and reversal and remand of defendant to the custody of the sheriff pending the calling of a new grand jury was required. *Buckley v. State*, 875 So. 2d 1110, 2004 Miss. App. LEXIS 586 (Miss. Ct. App. 2004).

Indictment charging defendant with murder using the language of the statute was not deficient; indictment did not have to allege which specific theory defendant was being charged under. *Capnord v. State*, 840 So. 2d 826, 2003 Miss. App. LEXIS 236 (Miss. Ct. App. 2003).

Indictment charging defendant with murder that generally tracked the relevant statutory language and contained each element of the crime charged was sufficient to charge defendant with murder even though it omitted the words "although without any premeditated design to effect the death of any particular individual," as the lack of premeditated design was not an essential element of the offense of depraved-heart murder. *Montana v. State*, 822 So. 2d 954, 2002 Miss. LEXIS 220 (Miss. 2002).

Indictment for depraved-heart murder that replaced the statutory phrase "without the authority of law" with the word "unlawfully" did not fail to charge defendant with an essential element of that crime, as the terms were synonymous. *Turner v. State*, 796 So. 2d 998, 2001 Miss. LEXIS 190 (Miss. 2001).

An indictment for capital murder was sufficient, notwithstanding the contention that it failed to identify the essential elements of the underlying felony offense of burglary, as the indictment adequately informed the defendant of the acts underlying the alleged burglary. *Lockett v. Anderson*, 230 F.3d 695, 2000 U.S. App. LEXIS 25501 (5th Cir. Miss. 2000).

An allegation that the deceased victim was a human being is not an essential element of the indictment. *Coffield v. State*, 749 So. 2d 215, 1999 Miss. App. LEXIS 508 (Miss. Ct. App. 1999).

Only in capital murder cases predicated upon the felony of burglary will the Supreme Court require a more detailed indictment: to the extent of noticing the defendant with what felony was intended in the burglary. *Turner v. State*, 732 So. 2d 937, 1999 Miss. LEXIS 61 (Miss.), cert. denied, 528 U.S. 969, 120 S. Ct. 409, 145 L. Ed. 2d 319, 1999 U.S. LEXIS 7156 (U.S. 1999).

Because the original indictment adequately charged the defendant with murder, an amendment including the statutory language of subsection (1)(a) and facts added concerning the weapon used by the defendant were amendments as to form and not of substance. *Greenlee v. State*, 725 So. 2d 816, 1998 Miss. LEXIS 300 (Miss. 1998).

Mississippi capital murder indictments alleging that defendant entered house "to unlawfully do violence to the persons situated therein" were fatally defective for their failure to state intended felony that comprised charged burglary; "intent to do violence" was not a crime, prosecutor based his argument to support charge of burglary upon that "non-crime," and jury was instructed that burglary charge could be predicated upon defendant's intent either to steal or to "unlawfully do violence." *Lockett v. Puckett*, 988 F. Supp. 1019, 1997 U.S. Dist. LEXIS 20731 (S.D. Miss. 1997), rev'd, vacated, 230 F.3d 695, 2000 U.S. App. LEXIS 25501 (5th Cir. Miss. 2000).

Capital murder indictment predicated on burglary must state underlying offense that comprises burglary, and mere tracking in indictment of language of capital murder statute is insufficient; burglary is

only capital murder predicate offense having essential element of intent to commit another felony, and permitting state to indict for capital murder without specifying underlying offense of burglary could result in trial on theory never placed before grand jury and with respect to which defendant had no opportunity to prepare defense. *State v. Berryhill*, 703 So. 2d 250, 1997 Miss. LEXIS 532 (Miss. 1997).

A capital murder indictment alleging that the murder was committed while the defendant was "engaged in the commission of the crime of robbery . . ." gave the defendant sufficient notice of the nature and cause of the charges against him, even though the indictment did not specify the overt acts constituting the crime of robbery, where the indictment further read "contrary to and in violation of subsection (2)(e) of this section," which is the statutory provision for capital murder, so that the indictment was in compliance with § 99-17-20. *Mackbee v. State*, 575 So. 2d 16, 1990 Miss. LEXIS 831 (Miss. 1990).

An indictment charging a killing occurring "while engaged in the commission of" one of the enumerated felonies in this section includes the actions of the defendant leading up to the felony, the attempted felony, and flight from the scene of the felony. Thus, in a capital murder prosecution, involving the underlying felony of sexual battery, the fact that the actual moment of the victim's death preceded consummation of the underlying felony did not vitiate the capital charge. *Baker v. Baker*, 553 So. 2d 8, 1989 Miss. LEXIS 537 (Miss. 1989).

A multiple-count indictment, charging murder and aggravated assault, was permissible where both the murder and the aggravated assault arose from a single fusillade, the defendant presented the same self-defense defense to the 2 charges, almost all of the evidence admissible against the defendant on the murder count was also admissible against him on the assault count and visa-versa, and no legally cognizable prejudice could be said to have resulted from the consolidation at trial of the 2 charges. *Blanks v. State*, 542 So. 2d 222, 1989 Miss. LEXIS 165 (Miss. 1989).

When indictment charges defendant with capital murder in course of rape and robbery and trial judge's instructions, as requested by state, tell jury that before it can convict defendant it must find that defendant killed victim while in course of committing rape and robbery, state undertakes burden of showing sufficiency of proof to establish both underlying rape and robbery as well as murder. *Fisher v. State*, 481 So. 2d 203, 1985 Miss. LEXIS 2281 (Miss. 1985).

Murder indictment which follows language of "depraved heart" provision of this section need not use words "malice aforethought." *Johnson v. State*, 475 So. 2d 1136, 1985 Miss. LEXIS 2238 (Miss. 1985).

Indictment for murder includes all lower grades of felonious homicide, including manslaughter, and failure of state to elect between murder and manslaughter does not leave defendant ignorant of charge in violation of Sixth Amendment of United States Constitution and § 26 of Mississippi Constitution. *Kelly v. State*, 463 So. 2d 1070, 1985 Miss. LEXIS 1878 (Miss. 1985).

In a prosecution for capital murder under this section, even though a technical error in the indictment charged the defendant under a different subsection of statute, the indictment was sufficient and the requirements of due process were met since the defendant and his attorney understood well in advance of trial that the charge was capital murder and that he was in jeopardy of the possible imposition of the penalty of death. *Jones v. State*, 461 So. 2d 686, 1984 Miss. LEXIS 2009 (Miss. 1984).

A person who intentionally sets fire to a building, with or without knowledge that it is occupied, may properly be charged with capital murder under subsection (2)(e) of this section, if the fire results in the death of an occupant of the building. *Dycus v. State*, 440 So. 2d 246, 1983 Miss. LEXIS 2790 (Miss. 1983).

The trial court had jurisdiction over a prosecution for capital murder, a violation of subsection (2)(e) of this section, where the essential underlying element of the crime, kidnapping, started in Mississippi when defendant forcefully took the victim

from her place of employment, notwithstanding the fact that the actual murder took place in Alabama. *Pruett v. State*, 431 So. 2d 1101, 1983 Miss. LEXIS 2448 (Miss.), cert. denied, 464 U.S. 865, 104 S. Ct. 201, 78 L. Ed. 2d 176, 1983 U.S. LEXIS 5350 (U.S. 1983).

In a prosecution for capital murder committed in the course of a robbery, the defendant's demurrer to the indictment on the grounds that it did not set forth the necessary and essential elements of the crime of robbery and did not refer to the proper statute was properly denied where the indictment was sufficient to give the accused fair notice of the crime charged in clear and intelligible language. *Bullock v. State*, 391 So. 2d 601, 1980 Miss. LEXIS 2055 (Miss. 1980), cert. denied, 452 U.S. 931, 101 S. Ct. 3068, 69 L. Ed. 2d 432 (U.S. 1981).

The indictment in a murder prosecution was not defective for failure to adequately describe and define the offenses charged where the statutory language used in the indictment adequately defined the offense so as to give the defendant fair notice of the crime charged in clear and intelligible language. *Bell v. State*, 360 So. 2d 1206, 1978 Miss. LEXIS 2318 (Miss. 1978).

Trial court in prosecution for capital murder committed during armed robbery properly refused to quash indictment, which failed to cite section and subsection of code defining offense as required by § 99-17-20, where indictment was amended prior to trial so as to cite applicable statutory offense involved. *Bell v. State*, 353 So. 2d 1141, 1977 Miss. LEXIS 2024 (Miss. 1977).

The court properly permitted the state to amend a murder indictment by striking from it the language "while engaged in commission of armed robbery or in violation of this section, Mississippi Code Annotated (1972)", since all the ingredients charged by the amended indictment were there before the amendment, and thus no additional burden was placed on the defendant, and, though the indictment before amendment failed to specify that the charge was under subsection (2), which defines capital murder, this was not a fatal error or ground for demurrer, such as to prevent amendment, but rather the

indictment thereby had merely charged defendant with murder (not capital). *Porter v. State*, 339 So. 2d 564, 1976 Miss. LEXIS 1675 (Miss. 1976).

Defendant's indictment for murder was sufficient despite its failure to apprise him of whether he was charged under the capital murder section of the homicide statute [subsection (2) of this section] or under the section pertaining to murder [subsection (1) of this section], since, in light of the requirement of § 99-17-20 that one can only be tried for capital murder if such offense was specifically cited in the indictment, defendant could only have been charged with and convicted of murder, and since § 99-7-37, concerning requirements for indictments for homicide, does not require that the defendant be specifically apprised of whether he is being charged with murder or capital murder. *Varnado v. State*, 338 So. 2d 1239, 1976 Miss. LEXIS 1657 (Miss. 1976).

Where it was shown by direct evidence that the deceased was one and the same person as charged in the indictment to have been killed, the fact that the name of the deceased was shown by inference and hearsay would not render the conviction void. *Duke v. State*, 243 Miss. 602, 140 So. 2d 863, 1962 Miss. LEXIS 383 (Miss. 1962).

Murder indictment held not demurrable as not charging wilfulness and accused's malice aforethought. *Wexler v. State*, 167 Miss. 464, 142 So. 501, 1932 Miss. LEXIS 203 (Miss. 1932).

Indictment charging defendant with killing unnamed infant, child of named parent, is sufficient. *State v. Peek*, 95 Miss. 240, 48 So. 819, 1909 Miss. LEXIS 242 (Miss. 1909).

23. Variance between pleading and proof.

An indictment charging a defendant with intentional murder and assigning a maximum penalty of life was sufficient to give the defendant fair notice of the crime charged, even though the jury instructions in the ensuing prosecution failed to include a charge that the murder was intentional. *Berry v. State*, 575 So. 2d 1, 1990 Miss. LEXIS 849 (Miss. 1990), cert.

denied, 500 U.S. 928, 111 S. Ct. 2042, 114 L. Ed. 2d 126, 1991 U.S. LEXIS 2673 (U.S. 1991).

In a prosecution for capital murder, the indictment charging defendant with willful murder in the commission of the crime of robbery sufficiently informed defendant of the constituent offense with which he was charged, despite his contention that the testimony at trial only related to attempted robbery, since the statutory language "engaged in the commission of" includes an attempt to commit the constituent felony, the completed constituent felony, as well as immediate post-felony acts. *Culberson v. State*, 379 So. 2d 499, 1979 Miss. LEXIS 2528 (Miss. 1979), cert. denied, 449 U.S. 986, 101 S. Ct. 406, 66 L. Ed. 2d 250, 1980 U.S. LEXIS 3943 (U.S. 1980).

Where the accused's contention that he was incapable of forming a criminal intent or a deliberate design to effect the death of the deceased was submitted to the jury with an instruction that the claimed state of intoxication would constitute a defense, there was not a fatal variance between the indictment charging that the accused wilfully, feloniously and with malice aforethought killed his wife and the proof, showing that the evidence upon the question of the extent accused's intoxication was in conflict. *Jackson v. State*, 228 Miss. 604, 89 So. 2d 626, 1956 Miss. LEXIS 552 (Miss. 1956).

Where the record discloses that the witnesses, although calling the slain man by various names, were obviously referring to the person named in the indictment as having been killed, the rule is satisfied that it is necessary for the proof to show that the person killed is the same person as the one charged in the indictment as to have been killed. *McDaniels v. State*, 203 Miss. 239, 33 So. 2d 785, 1948 Miss. LEXIS 255 (Miss. 1948).

Variance between indictment charging defendant with the murder of "Myrtle" McCune and proof that defendant killed "Nettie" McCune, could not be availed of for the first time in the supreme court to reverse conviction of murder. *Childress v. State*, 188 Miss. 573, 195 So. 583, 1940 Miss. LEXIS 62 (Miss. 1940).

24. Deliberations of jury; verdict.

Inmate's claim concerning error on a

verdict form in connection with the inmate's capital murder trial was found to be without merit on direct appeal, and thus the issue was barred under Miss. Code Ann. § 99-39-21(2), and (2) in any event, the inmate raised nothing new before the court. *Smith v. State*, 877 So. 2d 369, 2004 Miss. LEXIS 547 (Miss. 2004).

Inmate failed to show, in connection with the inmate's capital murder trial, any prejudicial jury misconduct as alleged in an affidavit submitted under Miss. Code Ann. § 99-39-9(1)(e); while the affidavit stated that some jurors heard that the inmate's co-defendant had committed a rape in the past, there was no allegation that the jurors came to their decision based on a rape allegation against co-defendant. *Smith v. State*, 877 So. 2d 369, 2004 Miss. LEXIS 547 (Miss. 2004).

Jurors were not prohibited, in connection with the sentencing phase of an inmate's capital murder trial, from discussing among themselves whether parole was a possibility because they were instructed correctly; furthermore, the jury knew that if the inmate was sentenced to life, the inmate would never be paroled, and thus little stock could be put in the affidavits, submitted under Miss. Code Ann. § 99-39-9(1)(e), that said that the jurors were concerned that the inmate would be paroled one day. *Smith v. State*, 877 So. 2d 369, 2004 Miss. LEXIS 547 (Miss. 2004).

In defendant's conviction for murder of the child while in the commission of felonious abuse and/or battery of the child, there were two notes passed to the trial judge by the bailiff from the jurors, but neither of the notes indicated that the jury had reached a conclusion or that they were deliberating; thus, defendant was not denied the right to an impartial jury. *Seeling v. State*, 844 So. 2d 439, 2003 Miss. LEXIS 119 (Miss. 2003).

That murder was committed (1) while engaged in crime of robbery and (2) for pecuniary gain may not be given as two separate and independent aggravating circumstances, as they essentially comprise one. When life is at state, a jury cannot be allowed to doubly weigh the commission of the underlying felony and the motive behind it as separate aggrava-

tors. *Willie v. State*, 585 So. 2d 660, 1991 Miss. LEXIS 454 (Miss. 1991).

The Weathersby rule is not a jury instruction, but is a guide for the circuit judge in determining whether a defendant is entitled to a directed verdict. *Blanks v. State*, 547 So. 2d 199, 1989 Miss. LEXIS 322 (Miss. 1989).

If, after day and one-half of hearing trial of murder and manslaughter case, jury deliberates from 3:21 p.m. until 10:38 p.m., 3 jurors express desire to recess deliberation, but trial court nonetheless sends jury back for further deliberations, verdict comes at 11:07 p.m., special interrogatory confines jury until 11:35 p.m., and there has been excessive deliberation time. *Isom v. State*, 481 So. 2d 820, 1985 Miss. LEXIS 2336 (Miss. 1985).

Capital murder defendant is not entitled to have jury separately instructed and separately to consider whether or not defendant is guilty of being accessory after fact. *Johnson v. State*, 477 So. 2d 196, 1985 Miss. LEXIS 2072 (Miss. 1985), cert. denied, 476 U.S. 1109, 106 S. Ct. 1958, 90 L. Ed. 2d 366 (U.S. 1986).

Mistrial is appropriate in capital murder prosecution in which, while jury is deliberating during sentencing phase, juror is given message by spouse that juror's mother has died. *Fuselier v. State*, 468 So. 2d 45, 1985 Miss. LEXIS 2035 (Miss. 1985).

Trial court does not improperly communicate with individual juror by replying to juror in response to juror's request to be excused that court will not excuse juror for reason expressed by juror. *Fairley v. State*, 467 So. 2d 894, 1985 Miss. LEXIS 1902 (Miss.), cert. denied, 474 U.S. 855, 106 S. Ct. 160, 88 L. Ed. 2d 133, 1985 U.S. LEXIS 3725 (U.S. 1985).

Juror's receipt of telephone call from unidentified third party in middle of murder prosecution does not constitute jury tampering for which new trial will be ordered where defendant has failed to request that jury be sequestered and where defendant fails to place in record any objection upon learning that juror has received telephone call and where record reflects that defense counsel says nothing about matter until several days later when jury's guilty verdict is returned.

Gerlach v. State, 466 So. 2d 75, 1985 Miss. LEXIS 1986 (Miss. 1985).

Where, in a prosecution under subsection (2)(e) of this section, for murder while engaged in the commission of the crime of rape, there was evidence that a crime had been committed and that the defendant and two other persons had been present, the only conclusion that could be drawn was that one or more of them had committed the crime, and when each of such persons proceeded to blame the other for the actual perpetration of the crime, it was up to the jury to determine which person or persons were guilty. *Ruffin v. State*, 447 So. 2d 113, 1984 Miss. LEXIS 1629 (Miss. 1984).

A guilty verdict in a murder prosecution need not be signed by the jurors. *Wright v. State*, 209 Miss. 795, 48 So. 2d 509, 1950 Miss. LEXIS 444 (Miss. 1950).

Fact that death of victim was caused by a single stab wound does not entitle one of two defendants to directed verdict of acquittal when both defendants by concerted action did all within their power to effect death of victim with common design toward that end, and it is immaterial as to which of them proved to be successful in the effort. *Riley v. State*, 208 Miss. 336, 44 So. 2d 455, 1950 Miss. LEXIS 252 (Miss. 1950).

Where evidence disclosed that jury after twenty-three hours of deliberations stood 11 to 1 for verdict for guilty of murder when bailiff stated to jury that judge told him he had until next convening of court to wait until they reached verdict and that as far as he was concerned they could stay there until they rotted and that shortly thereafter the jury returned a verdict of guilty, such conduct constituted a coercive inference on the jury prejudicial to the defendant, it being immaterial whether the judge actually made such statement. *McCoy v. State*, 207 Miss. 272, 42 So. 2d 195, 1949 Miss. LEXIS 336 (Miss. 1949).

25. Conviction of lesser offense.

Defendant's conviction for culpable negligence manslaughter was not against the weight of the evidence because (1) culpable negligence manslaughter was a lesser-included offense of the deliberate design murder for which defendant was

indicted, and (2) the evidence allowed a reasonable jury to conclude that defendant barred the victim's departure from the parties' confrontation, defeating defendant's self-defense claim. *Brisco v. State*, 295 So. 3d 498, 2019 Miss. App. LEXIS 481 (Miss. Ct. App. 2019), cert. denied, 293 So. 3d 834, 2020 Miss. LEXIS 142 (Miss. 2020).

Sufficient evidence supported defendant's manslaughter conviction because (1) sufficient evidence of depraved-heart murder showed defendant knew her husband was sitting behind her car when she ran over him, showing culpable-negligence manslaughter, (2) presenting an alternate factual theory inadequate to sustain the conviction did not warrant reversal, as the jury could discard any factually insufficient theories, and (3) there was legally sufficient evidence of heat of passion. *McCarty v. State*, 247 So. 3d 260, 2017 Miss. App. LEXIS 623 (Miss. Ct. App. 2017), cert. denied, 246 So. 3d 885, 2018 Miss. LEXIS 263 (Miss. 2018).

Evidence was sufficient to convict defendant of manslaughter under Miss. Code Ann. § 97-3-35 as she was the only other person in the house, a deadly weapon was used, there was no evidence of self-defense, and scientific evidence of the gunshot wound showed that the victim could not have inflicted it himself, either by accident or suicide. Further, there was no prejudice to defendant as she was convicted of the lesser-included offense where proof would have supported conviction of the greater offense of deliberate-design murder. *Simpson v. State*, 993 So. 2d 400, 2008 Miss. App. LEXIS 334 (Miss. Ct. App.), cert. denied, 997 So. 2d 924, 2008 Miss. LEXIS 552 (Miss. 2008), cert. denied, 555 U.S. 1188, 129 S. Ct. 1348, 173 L. Ed. 2d 614, 2009 U.S. LEXIS 1379 (U.S. 2009).

Manslaughter is not a lesser-included offense of murder; therefore, a trial court was not permitted to enter a limited directed verdict on a murder charge and allow a jury to consider the unindicted offense of manslaughter because defendant did not receive notice of the manslaughter charge in the murder indictment. *State v. Shaw*, 2003 Miss. LEXIS 525 (Miss. Oct. 9, 2003), op. withdrawn,

sub. op., 880 So. 2d 296, 2004 Miss. LEXIS 1027 (Miss. 2004).

Where respondent was charged with capital murder for participating in assault during course of which respondent's companion killed victim, and was sentenced to death under capital murder statute, but death sentence was vacated under intervening U.S. Supreme Court decision holding that Eighth Amendment forbids imposition of death penalty on one who aids and abets felony in the course of which murder is committed but who does not himself kill, attempt to kill, or intend that killing take place or that lethal force be employed, curt on federal habeas corpus review should require state's judicial system to examine entire course of proceedings to determine whether at some point requisite factual finding has been made to support death penalty, which under proper circumstances does not offend Eighth amendment. *Cabana v. Bullock*, 474 U.S. 376, 106 S. Ct. 689, 88 L. Ed. 2d 704, 1986 U.S. LEXIS 46 (U.S. 1986), overruled in part, *Pope v. Illinois*, 481 U.S. 497, 107 S. Ct. 1918, 95 L. Ed. 2d 439, 1987 U.S. LEXIS 1934 (U.S. 1987).

In a prosecution for murder in which evidence was insufficient to support a conviction for capital murder, since it was not shown beyond a reasonable doubt that the defendant murdered the victim while committing a kidnapping, the indictment for capital murder was sufficient to charge defendant with murder as a lesser included offense, and the jury could have been instructed that it could find the defendant guilty of such lesser included offense if the evidence justified such a finding; defendant's conviction of capital murder was reversed, the jury's verdict was affirmed as to guilt, and the case was remanded for resentencing of defendant for murder. *Biles v. State*, 338 So. 2d 1004, 1976 Miss. LEXIS 1646 (Miss. 1976), cert. denied, 431 U.S. 940, 97 S. Ct. 2655, 53 L. Ed. 2d 258, 1977 U.S. LEXIS 2010 (U.S. 1977).

Unwarranted conviction of manslaughter held harmless error under indictment for murder supported by evidence. *Calicoat v. State*, 131 Miss. 169, 95 So. 318, 1922 Miss. LEXIS 296 (Miss. 1922).

Conviction of manslaughter in prosecution for murder is an acquittal of murder.

Walker v. State, 123 Miss. 517, 86 So. 337, 1920 Miss. LEXIS 50 (Miss. 1920).

On an indictment for murder the accused may be convicted of manslaughter. *Dyson v. State*, 26 Miss. 362, 1853 Miss. LEXIS 103 (Miss. 1853).

26. Trial; generally.

In defendant's trial for capital murder, the State, for reasons that did not appear in the record, elected not to offer the subject incriminating statement into evidence, and it was purely speculative to suggest that the State would have attempted to belatedly offer the statement after ending its case in chief and then only if defendant took the stand. Thus, because the trial court determined the statement to be admissible as bearing directly on the central issue of defendant's guilt, rather than for some alternate and limited purpose such as witness impeachment, the trial court's ruling could not be seen as having had any chilling effect on defendant in deciding whether or not to take the stand. *Bernardini v. State*, 872 So. 2d 690, 2004 Miss. App. LEXIS 372 (Miss. Ct. App. 2004).

Trial court's cautionary admonition to defendant in prosecution for murder of African-American leader of civil rights organization to avoid racially inflammatory language during voir dire questioning was not unduly restrictive of defendant's inquiry into racial prejudice; court permitted extensive questioning of jurors regarding racial matters, including civil rights activities. *De La Beckwith v. State*, 707 So. 2d 547, 1997 Miss. LEXIS 749 (Miss. 1997), cert. denied, 525 U.S. 880, 119 S. Ct. 187, 142 L. Ed. 2d 153, 1998 U.S. LEXIS 5751 (U.S. 1998).

Testimony of accomplice, which was partially corroborated by fellow inmate of defendant and by state's ballistics expert, presented question of fact to be determined by jury as to whether defendant was guilty of robbery and subsequent shooting of store clerk. *Brown v. State*, 682 So. 2d 340, 1996 Miss. LEXIS 427 (Miss. 1996), cert. denied, 520 U.S. 1127, 117 S. Ct. 1271, 137 L. Ed. 2d 348, 1997 U.S. LEXIS 1821 (U.S. 1997).

Experts who rendered diagnosis of "no mental disorder" for low intelligence quo-

tient for capital murder defendant, after being appointed to perform mental examination of him to determine his competency to stand trial, afforded defendant constitutionally adequate evaluation and furnished constitutionally adequate report. *Cole v. State*, 666 So. 2d 767, 1995 Miss. LEXIS 595 (Miss. 1995).

The trial court in a capital murder prosecution did not err in permitting 3 off-the-record bench conferences and a jury instruction conference to be conducted when the defendant was not present where the defendant was represented by counsel at every critical stage of the proceedings, and he was not prejudiced by his absences at the conferences. *Carr v. State*, 655 So. 2d 824, 1995 Miss. LEXIS 56 (Miss. 1995), cert. denied, 516 U.S. 1077, 116 S. Ct. 783, 133 L. Ed. 2d 734, 1996 U.S. LEXIS 547 (U.S. 1996).

In a prosecution for murder, an exclamation from the audience by the victim's mother that the defendant "cold blooded killed my child" did not prejudice the defendant's right to a fair trial where the victim's mother was immediately escorted from the courtroom after her outburst, and the judge then properly admonished the jury to disregard the incident and questioned the jurors to determine whether they could disregard the comments. *Bell v. State*, 631 So. 2d 817, 1994 Miss. LEXIS 74 (Miss. 1994).

In a capital murder trial, the phrase "they haven't shown it" used by the prosecutor in his closing argument with respect to the defendant's alibi defense did not shift the burden of proof from the State to the defendant and deprive him of his right to a presumption of innocence where the prosecutor stated that the alibi instruction required the defendant to be in a place so remote and distant that he could not have committed the offense and "they haven't shown it"; the prosecutor did not tell the jury that the defendant's failure to establish his alibi should automatically translate into a verdict of guilty, but merely stated that the defense had not proven or "shown" that the defendant was "in a place so remote and distant that he could not have committed the offense" at the time when the crime occurred. *Conner v. State*, 632 So. 2d 1239, 1993 Miss.

LEXIS 541 (Miss. 1993), cert. denied, 513 U.S. 927, 115 S. Ct. 314, 130 L. Ed. 2d 276, 1994 U.S. LEXIS 7088 (U.S. 1994), overruled, *Weatherspoon v. State*, 732 So. 2d 158, 1999 Miss. LEXIS 4 (Miss. 1999).

A trial court's refusal to permit a capital murder defendant to impeach an eyewitness regarding his statement that he had been employed by his cousin for part of the previous year did not deprive the defendant of his constitutional right to confront witnesses against him since the issue of the witness' employment was a collateral matter; the constitutional right to confront witnesses applies only to issues pertinent to the crime charged, and the general rule that a party may not impeach a witness on collateral matters is applicable. *Conner v. State*, 632 So. 2d 1239, 1993 Miss. LEXIS 541 (Miss. 1993), cert. denied, 513 U.S. 927, 115 S. Ct. 314, 130 L. Ed. 2d 276, 1994 U.S. LEXIS 7088 (U.S. 1994), overruled, *Weatherspoon v. State*, 732 So. 2d 158, 1999 Miss. LEXIS 4 (Miss. 1999).

A trial court in a murder prosecution erred in allowing the prosecutor to cross-examine a witness about a certified lab report of results of the defendant's drug screen test, where the test results were never offered into evidence during the trial and the witness had no actual knowledge of the drug screen analysis; without the testimony of a sponsoring witness with personal knowledge of the facts contained therein, the drug screen report was inadmissible hearsay, and without the opportunity to cross-examine the person responsible for the information contained in the report, the defendant's right to confront witnesses secured by the Sixth Amendment and Article 3, § 26 of the Mississippi Constitution were violated. *Balfour v. State*, 598 So. 2d 731, 1992 Miss. LEXIS 131 (Miss. 1992).

A trial court's denial of a capital murder defendant's request for a private mental examination did not violate the Eighth and Fourteenth Amendments, where the defendant did not attempt to use an insanity defense, the State did not produce psychiatric testimony against him, and he did not demonstrate that sanity was to be a significant factor at trial. *Ladner v. State*, 584 So. 2d 743, 1991 Miss. LEXIS

434 (Miss.), cert. denied, 502 U.S. 1015, 112 S. Ct. 663, 116 L. Ed. 2d 754, 1991 U.S. LEXIS 7261 (U.S. 1991).

A trial court in a capital murder prosecution did not abuse its discretion in declining to grant a mistrial or a new trial on the ground that the victim's daughter, who found the body of her mother, began to weep while testifying on direct examination, where the daughter's testimony was elicited not as a family impact statement but to prove the conditions at the crime scene. *Ladner v. State*, 584 So. 2d 743, 1991 Miss. LEXIS 434 (Miss.), cert. denied, 502 U.S. 1015, 112 S. Ct. 663, 116 L. Ed. 2d 754, 1991 U.S. LEXIS 7261 (U.S. 1991).

A trial court erred in not permitting a murder defendant himself to make an opening statement even though the judge had not been forewarned that the defendant wished to make the opening statement himself. A defense attorney who is made aware by his or her client that the client wishes to personally conduct his or her own defense first has an obligation to fully advise the client of the constitutional right to represent himself or herself, and also of the responsibility and risk entailed. The defense counsel also has an obligation to inform the judge prior to exercise of the right, of the client's desire to do so, in order to give the judge an opportunity to instruct as well as warn the defendant outside the presence of the jury of his or her rights and responsibilities. *Bevill v. State*, 556 So. 2d 699, 1990 Miss. LEXIS 27 (Miss. 1990).

Defendant was not denied right to a speedy trial where, although almost 7 years elapsed between his indictment on charges of murder and aggravated assault and his arraignment, substantially all of the delay was due to defendant's confinement in a state mental institution pursuant to court order, issued shortly after the indictment, finding defendant insane and not competent to stand trial, and trial was set in less than 6 weeks after the court was notified by institution's staff of defendant's competence to stand trial. *Smith v. State*, 489 So. 2d 1389, 1986 Miss. LEXIS 2482 (Miss. 1986).

Judge is not disqualified from hearing homicide case on basis of fact that homi-

cide defendant's former attorney, against whom defendant has filed bar complaint, has at one time been law partner of judge. *Ruffin v. State*, 481 So. 2d 312, 1985 Miss. LEXIS 2432 (Miss. 1985).

Refusal to provide indigent criminal defendant with free transcript of prior trial which ended in mistrial does not violate equal protection where defendant makes no showing that transcript would be useful or necessary to case or that alternative devices are unavailable. *Ruffin v. State*, 481 So. 2d 312, 1985 Miss. LEXIS 2432 (Miss. 1985).

Defendant in capital murder case is not entitled to compulsory process, attendance fees, and travel expenses for out of state prospective character witnesses, particularly in case in which only thing presented to judge as to testimony of proposed witnesses is summary by counsel, not sworn to, as to what witnesses might testify. *Johnson v. State*, 477 So. 2d 196, 1985 Miss. LEXIS 2072 (Miss. 1985), cert. denied, 476 U.S. 1109, 106 S. Ct. 1958, 90 L. Ed. 2d 366 (U.S. 1986).

Refusal to grant capital murder defendant's request for change of venue impermissibly deprives defendant of right to impartial jury where defendant has made prima facie showing of community prejudice by submitting affidavit signed by 2 witnesses with knowledge; furthermore, testimony of 15 defense witnesses who state specific reasons why defendant cannot receive fair trial in county in which offense has been committed raises irrebuttable presumption of prejudice. *Johnson v. State*, 476 So. 2d 1195, 1985 Miss. LEXIS 2257 (Miss. 1985).

Trial court's refusal to summon prisoners to testify in capital murder case, as requested by defendant, does not violate defendant's right to compulsory process where testimony by prisoners would be inadmissible hearsay. *Gray v. State*, 472 So. 2d 409 (Miss. 1985), rev'd on other grounds, 481 U.S. 648, 107 S. Ct. 2045, 95 L. Ed. 2d 622 (1987), and see *Willie v. State*, 585 So. 2d 660, 1991 Miss. LEXIS 454 (Miss. 1991).

One on trial for life or liberty may be handcuffed or otherwise shackled in presence of jury only by reason of clear and present danger to order or security. *Hick-*

son v. State, 472 So. 2d 379, 1985 Miss. LEXIS 2132 (Miss. 1985).

Presence of law enforcement officers behind bar of court during trial of capital murder defendant is permissible so long as trial judge takes care to avoid appearance of intimidation. *Lancaster v. State*, 472 So. 2d 363, 1985 Miss. LEXIS 2115 (Miss. 1985).

When trial court improperly refuses to order production of clearly discoverable witness statements which to the heart of credibility of state's principal witness in murder prosecution, reviewing court does not engage in nice calculations regarding amount of resulting prejudice but reverses and remands for new trial. *Barnes v. State*, 471 So. 2d 1218, 1985 Miss. LEXIS 2138 (Miss. 1985).

Where a physician had made a sufficient examination of the body on the morning following the assault so as to be able to testify that whoever had inflicted the wounds was the person who had killed the deceased, and according to the testimony of the sheriff and undertaker the deceased had suffered approximately 21 wounds inflicted by a blunt instrument, his skull had been cracked and considerable blood was found at the scene of the assault, the trial court did not err in overruling defendant's motion for an autopsy. *Upshaw v. State*, 231 Miss. 158, 94 So. 2d 337, 1957 Miss. LEXIS 500 (Miss. 1957).

Trial court in murder prosecution has right to give his reasons for rulings during course of trial and to show why, in his opinion, reasons advanced for contrary ruling are unsound, provided he does not encroach upon province of jury or try to influence their verdict. *Price v. State*, 207 Miss. 111, 41 So. 2d 37, 1949 Miss. LEXIS 321 (Miss.), cert. denied, 338 U.S. 844, 70 S. Ct. 92, 94 L. Ed. 516, 1949 U.S. LEXIS 1836 (U.S. 1949).

Remark of trial court in ruling on right of prosecution to cross-examine accused in murder case concerning insurance on victim that matter of insurance was wholly immaterial and that nothing about insurance is to be considered in any way derogatory to defendant, or derogatory to anybody else, is not equivalent to oral instruction to jury upon law of case con-

trary to express provisions of Code 1942, § 1530, Code requiring all jury instructions upon the law to be in writing, and is not prejudicial to defendant. *Price v. State*, 207 Miss. 111, 41 So. 2d 37, 1949 Miss. LEXIS 321 (Miss.), cert. denied, 338 U.S. 844, 70 S. Ct. 92, 94 L. Ed. 516, 1949 U.S. LEXIS 1836 (U.S. 1949).

27. —Prosecutorial misconduct.

Defendant's conviction for murder under Miss. Code Ann. § 97-3-19(1)(b) was proper, in part because defendant failed to prove any prosecutorial misconduct. The prosecutor was permitted to summarize the police investigation and the comment was not a comment on defendant's failure to testify; further, the prosecutor was not vouching for a witness's credibility but instead simply gave a summation of the evidence and inferred that the trial testimony was false. *Franklin v. State*, 72 So. 3d 1129, 2011 Miss. App. LEXIS 125 (Miss. Ct. App.), cert. denied, 71 So. 3d 1207, 2011 Miss. LEXIS 508 (Miss. 2011).

In a capital murder trial, defendant failed to prove that the prosecutor committed misconduct by identifying the victim as a police officer; the information was not admitted as victim-characteristic evidence at the sentencing phase, but, rather, was an integral part of the proof necessary to establish the capital offense, Miss. Code Ann. § 97-3-19(2)(a). *Maye v. State*, 49 So. 3d 1140, 2009 Miss. App. LEXIS 807 (Miss. Ct. App. 2009), vacated, 49 So. 3d 1124, 2010 Miss. LEXIS 622 (Miss. 2010).

Defendant cited seven instances of misconduct by the State in its closing argument, including references to the victim's family and their attendance at the trial, the State's actions as the "last voice" for the victim, references to the victim's last thoughts, and the grief of the victim's family members. However, the trial court alleviated any prejudice in properly sustaining the objections of counsel and admonishing the jury and the appellate court could not say that the improper arguments led to a verdict that was based upon prejudice and not upon the evidence so as to have justified a mistrial. *Smith v. State*, 911 So. 2d 541, 2004 Miss. App. LEXIS 1104 (Miss. Ct. App. 2004), cert. denied, 920 So. 2d 1008, 2005 Miss. LEXIS 634 (Miss. 2005).

Prosecutor did not overstep his bounds when he asked the jury not to let the defendant get away with the murder with which he was charged. Furthermore, the trial court instructed the jury that arguments and statements of counsel were not evidence and that if any argument, statement or remark had no basis in the evidence, then the jury was to disregard that argument, statement or remark; in any event, there was no prosecutorial misconduct and no grounds for reversal in light of said instructions. *Davis v. State*, 904 So. 2d 1212, 2004 Miss. App. LEXIS 1053 (Miss. Ct. App. 2004), cert. denied, 898 So. 2d 679, 2005 Miss. LEXIS 269 (Miss. 2005).

Prosecutor's closing argument that defendant's accomplices were not being tried because they had been exonerated in prior judicial hearing was proper response to defense counsel's references to the fact that no action was being taken against defendant's accomplices. *Blue v. State*, 674 So. 2d 1184, 1996 Miss. LEXIS 304 (Miss.), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517, 1996 U.S. LEXIS 7523 (U.S. 1996).

Prosecutor's closing argument during guilt phase that "This man deserves everything that he can get for the most brutal murder" and "He's guilty" were not personal opinion comments, as prosecutor never said that she believed that defendant was guilty or that she believed that defendant deserved the death penalty. *Blue v. State*, 674 So. 2d 1184, 1996 Miss. LEXIS 304 (Miss.), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517, 1996 U.S. LEXIS 7523 (U.S. 1996).

Prosecutors are afforded the right to argue anything in the State's closing argument that was presented as evidence, but arguing statements of fact which are not in evidence or necessarily inferable from it and which are prejudicial to the defendant is error. *Blue v. State*, 674 So. 2d 1184, 1996 Miss. LEXIS 304 (Miss.), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517, 1996 U.S. LEXIS 7523 (U.S. 1996).

Prosecuting attorney should refrain from commenting upon appearance of defendant when he has not been introduced as a witness. *Blue v. State*, 674 So. 2d

1184, 1996 Miss. LEXIS 304 (Miss.), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517, 1996 U.S. LEXIS 7523 (U.S. 1996).

Prosecuting attorney should refrain from doing anything or saying anything that would tend to cause jury to disfavor defendant due to matters other than evidence relative to the crime. *Blue v. State*, 674 So. 2d 1184, 1996 Miss. LEXIS 304 (Miss.), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517, 1996 U.S. LEXIS 7523 (U.S. 1996).

Prosecutor's comment on defendant's demeanor and appearance may have highlighted his failure to testify, which is plainly prohibited, and the remark should not have been made. *Blue v. State*, 674 So. 2d 1184, 1996 Miss. LEXIS 304 (Miss.), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517, 1996 U.S. LEXIS 7523 (U.S. 1996).

Prosecution did not improperly comment on capital murder defendant's failure to testify, when he stated that accomplice's testimony regarding a ripped shirt was the "only testimony" and the "only reliable information" made available; reading of full remarks made it plain that prosecutor was simply summarizing account of night's events as told by accomplice and rebutting defense efforts to show that accomplice was lying. *Walker v. State*, 671 So. 2d 581, 1995 Miss. LEXIS 494 (Miss. 1995), cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406, 1996 U.S. LEXIS 7236 (U.S. 1996).

Capital murder defendant was not prejudiced by comment of prosecution, during guilt phase closing argument, inviting jury to notice that on each of several situations in which state was prepared to go forward with proof "that the defense would just as soon not be before you," a stipulation was entered into; immediately thereafter the court instructed prosecutor "don't raise a comment on why the stipulations were made," and defense counsel did not request any further action. *Walker v. State*, 671 So. 2d 581, 1995 Miss. LEXIS 494 (Miss. 1995), cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406, 1996 U.S. LEXIS 7236 (U.S. 1996).

The prosecutor's closing argument in the guilt phase of a capital murder pros-

ecution did not constitute an improper comment on the defendant's right to remain silent following arrest where the prosecutor, while discussing a county jail inmate's testimony as to statements made by the defendant while he was in the jail, referred to the relationship between the defendant and the witness, and described the circumstances under which the statements were made. *Carr v. State*, 655 So. 2d 824, 1995 Miss. LEXIS 56 (Miss. 1995), cert. denied, 516 U.S. 1077, 116 S. Ct. 783, 133 L. Ed. 2d 734, 1996 U.S. LEXIS 547 (U.S. 1996).

A prosecutor's closing argument in a capital murder case did not constitute a comment on the defendant's failure to testify at trial, in spite of the defendant's argument that the prosecutor's comments highlighted the fact that the only people alive who could have testified as to the events surrounding the murders were the defendant and his accomplice, where the prosecutor merely stated that the defendant and his accomplice saw to it that there were no eyewitnesses, and that "people who kill their victims and kill their eyewitnesses cannot be set free." *Carr v. State*, 655 So. 2d 824, 1995 Miss. LEXIS 56 (Miss. 1995), cert. denied, 516 U.S. 1077, 116 S. Ct. 783, 133 L. Ed. 2d 734, 1996 U.S. LEXIS 547 (U.S. 1996).

A prosecutor's biblical references during closing argument at the sentencing phase of a capital murder prosecution did not deprive the defendant of a fair trial, as the comments were within the "broad latitude" afforded counsel in closing argument. *Carr v. State*, 655 So. 2d 824, 1995 Miss. LEXIS 56 (Miss. 1995), cert. denied, 516 U.S. 1077, 116 S. Ct. 783, 133 L. Ed. 2d 734, 1996 U.S. LEXIS 547 (U.S. 1996).

A prosecutor improperly commented during closing argument on a capital murder defendant's failure to testify where the prosecutor stated that the defendant "hasn't told you the whole truth yet," that "you still don't know the whole story," and that the defendant was the only person alive who could give the whole story. *Butler v. State*, 608 So. 2d 314, 1992 Miss. LEXIS 588 (Miss. 1992).

In a capital murder prosecution, the prosecutor's statement that there had not been any testimony that the defendant

acted in self-defense did not constitute an impermissible comment upon the failure of the defendant to testify, where the prosecutor's statement was made in connection with his argument that the State had proved the required element that the defendant's actions were not done in necessary self-defense. *Ladner v. State*, 584 So. 2d 743, 1991 Miss. LEXIS 434 (Miss.), cert. denied, 502 U.S. 1015, 112 S. Ct. 663, 116 L. Ed. 2d 754, 1991 U.S. LEXIS 7261 (U.S. 1991).

In a capital murder prosecution, the prosecutor's references to a second victim did not violate the Eighth and Fourteenth Amendments, since these references were necessary to tell the complete story of the crime where both victims were killed in the same mobile home with the same gun. *Ladner v. State*, 584 So. 2d 743, 1991 Miss. LEXIS 434 (Miss.), cert. denied, 502 U.S. 1015, 112 S. Ct. 663, 116 L. Ed. 2d 754, 1991 U.S. LEXIS 7261 (U.S. 1991).

Comments made by a prosecutor during his closing argument in a capital murder prosecution did not constitute prosecutorial misconduct, where the prosecutor stated that the victim was a human being and had a right to be protected by the law even though he may not have been wealthy or prominent or a leader in his community, in spite of the defendant's argument that the "value" of the victim's life should not be a factor in considering whether the defendant should live or die and that such a consideration introduces an arbitrary factor into the process, since the prosecutor's statement was innocuous. *Mackbee v. State*, 575 So. 2d 16, 1990 Miss. LEXIS 831 (Miss. 1990).

In a capital murder prosecution in which the defense counsel had argued that "there is only one person who can tell you if a reasonable doubt exists insofar as this case, and that's each and every one of you," the prosecutor's rebuttal constituted an improper comment on the defendant's failure to testify where it included a statement that "they tell you, there's one man alive today who can tell you what happened, and I agree with that. There is one person who could tell you what happened and we have . . . a statement from him. We have a confession, an oral confession, we have a written confession" Such

remarks directed the jury's attention to the failure of the defendant to take the stand and admit or deny the contents of the confession. *Griffin v. State*, 557 So. 2d 542, 1990 Miss. LEXIS 50 (Miss. 1990).

Closing argument in which prosecuting attorney attempts to describe for jury in less than complimentary terms sort of person who would commit sort of crime involved in capital murder case is perfectly legitimate. *Fisher v. State*, 481 So. 2d 203, 1985 Miss. LEXIS 2281 (Miss. 1985).

Complaint regarding prosecution's argument which includes calling upon diety, making reference to personal friendship of district attorney and homicide victim, personal remarks directed to defense counsel, personal belief in defendant's guilt, and frustration in prosecuting homicide cases can quickly be dissipated by contemporaneous objection and ruling by circuit judge; if defense counsel chooses to wait until conclusion of argument to object, error may not be assigned on basis of argument. *Johnson v. State*, 477 So. 2d 196, 1985 Miss. LEXIS 2072 (Miss. 1985), cert. denied, 476 U.S. 1109, 106 S. Ct. 1958, 90 L. Ed. 2d 366 (U.S. 1986).

Presence of daughter of murder victim at counsel table and open display of emotion by daughter which presents jury with image of prosecution acting on behalf of daughter is impermissible. *Fuselier v. State*, 468 So. 2d 45, 1985 Miss. LEXIS 2035 (Miss. 1985).

Supreme court will not, on appeal from murder conviction, consider objection to remarks made by district attorney in his argument to jury, when no objection was offered to remarks at the time they were made, no bill of exceptions was taken, no motion for mistrial was asked by defendant, and trial judge was not asked for ruling. *Woods v. State*, 37 So. 2d 319 (Miss. 1948).

28. —Selection and removal of jurors.

Issue raised at trial and on direct appeal from an inmate's capital murder conviction concerning the exclusion of a juror for failing to meet the qualifications of Miss. Code Ann. § 13-5-1 was found to be without merit, and the issue was therefore barred pursuant to Miss. Code Ann. § 99-

39-21(2); because the trial court committed no error in excusing this juror and another juror for not meeting the qualifications under Miss. Code Ann. § 13-5-1, then the attorneys were not ineffective for failing to object to the jurors' dismissal, and in any event, the attorneys' decisions regarding the final composition of the jury were generally determined to be matters of trial strategy. *Smith v. State*, 877 So. 2d 369, 2004 Miss. LEXIS 547 (Miss. 2004).

Prosecutor's question to potential jurors asking whether they could conceive of imposing death penalty in murder case with no eyewitness was proper means of probing into their prejudices to get insight into their thoughts. *Taylor v. State*, 672 So. 2d 1246, 1996 Miss. LEXIS 193 (Miss.), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379, 1996 U.S. LEXIS 7020 (U.S. 1996).

Trial court acted within its discretion in excusing 4 potential jurors who stated that they probably could not impose death penalty when there were no eyewitnesses or fingerprints linking defendant to crime, and stated that they would need "a lot stronger proof" to change their position. *Taylor v. State*, 672 So. 2d 1246, 1996 Miss. LEXIS 193 (Miss.), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379, 1996 U.S. LEXIS 7020 (U.S. 1996).

Decision of whether or not to excuse potential juror based on bias against death penalty is left to trial judge's discretion. *Taylor v. State*, 672 So. 2d 1246, 1996 Miss. LEXIS 193 (Miss.), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379, 1996 U.S. LEXIS 7020 (U.S. 1996).

For trial court to excuse potential juror for bias against death penalty, juror need not expressly state that he or she absolutely refuses to consider death penalty; equivalent response made in any reasonable manner indicating juror's firm position will suffice. *Taylor v. State*, 672 So. 2d 1246, 1996 Miss. LEXIS 193 (Miss.), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379, 1996 U.S. LEXIS 7020 (U.S. 1996).

Prospective jurors in capital cases may only be excluded for cause based upon their views on capital punishment when those views would prevent or substantially impair performance of their duties

as jurors in accordance with their instructions and oath. *Taylor v. State*, 672 So. 2d 1246, 1996 Miss. LEXIS 193 (Miss.), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379, 1996 U.S. LEXIS 7020 (U.S. 1996).

If prospective juror who is opposed to death penalty indicates that, if convinced of defendant's guilt, he or she could return verdict of guilty which might result in death penalty, juror cannot be struck from jury. *Taylor v. State*, 672 So. 2d 1246, 1996 Miss. LEXIS 193 (Miss.), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379, 1996 U.S. LEXIS 7020 (U.S. 1996).

If prospective juror is irrevocably committed to vote against death penalty regardless of facts and circumstances, juror can be struck from jury. *Taylor v. State*, 672 So. 2d 1246, 1996 Miss. LEXIS 193 (Miss.), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379, 1996 U.S. LEXIS 7020 (U.S. 1996).

Four prospective jurors in capital murder case were properly excused after stating their inability to impose death penalty. *Taylor v. State*, 672 So. 2d 1246, 1996 Miss. LEXIS 193 (Miss.), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379, 1996 U.S. LEXIS 7020 (U.S. 1996).

Dismissal of doctor and 2 attorneys from jury did not deny defendant his rights to due process and to fair cross section of community; doctor was an emergency room physician who was working night shift, and attorneys were excused because they operated small businesses that could not afford to be closed. *Taylor v. State*, 672 So. 2d 1246, 1996 Miss. LEXIS 193 (Miss.), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379, 1996 U.S. LEXIS 7020 (U.S. 1996).

Trial court's questioning and dismissal of 6 venire members who expressed opposition to the death penalty was adequate, even though defense counsel was not allowed to repeat questions in his own words to prospective jurors during court's voir dire, where the trial court rephrased questions as requested, defense did not request permission to ask further questions, and there was no showing that further questioning would have rehabilitated dismissed venire members. *Jackson v. State*, 672 So. 2d 468, 1996 Miss. LEXIS 718 (Miss. 1996).

Under the Batson test, the prosecutor satisfied the burden of articulating a non-discriminatory reason for striking a black juror where he explained that he struck the juror because the juror had long unkempt hair, a mustache and a beard, since the wearing of beards and long unkempt hair are not characteristics that are particular to any race. *Purkett v. Elem*, 514 U.S. 765, 115 S. Ct. 1769, 131 L. Ed. 2d 834, 1995 U.S. LEXIS 3181 (U.S. 1995).

Defense counsel's extensive voir dire of venire members regarding attitudes toward death penalty precluded claim on appeal that trial court's inadequate voir dire questioning permitted seating of jurors with bias in favor of death penalty. *Jackson v. State*, 672 So. 2d 468, 1996 Miss. LEXIS 718 (Miss. 1996).

Fact that 10 of 14 jurors and alternates were women precluded claim that prosecution engaged in improper gender based discrimination when exercising peremptory challenges. *Jackson v. State*, 672 So. 2d 468, 1996 Miss. LEXIS 718 (Miss. 1996).

Trial court could excuse prospective juror from serving on panel hearing capital murder case, on grounds that prospect was mother of 8-year-old boy and that she would feel apprehensive and be distracted if required to be away from child in event jury was sequestered. *Walker v. State*, 671 So. 2d 581, 1995 Miss. LEXIS 494 (Miss. 1995), cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406, 1996 U.S. LEXIS 7236 (U.S. 1996).

Trial court did not improperly excuse prospective juror from service in capital murder case; prospect tailored her response to question whether she could follow the law at both phases of trial to whichever counsel was questioning her, and she indicated she did not want to be involved in jury service and only "guessed" that she would "try" to listen to evidence and be fair to both sides. *Walker v. State*, 671 So. 2d 581, 1995 Miss. LEXIS 494 (Miss. 1995), cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406, 1996 U.S. LEXIS 7236 (U.S. 1996).

Any juror who would impose death sentence regardless of facts and circumstances of capital murder conviction cannot follow dictates of law and is subject to

be removed through use of complementary challenge for cause. *Walker v. State*, 671 So. 2d 581, 1995 Miss. LEXIS 494 (Miss. 1995), cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406, 1996 U.S. LEXIS 7236 (U.S. 1996).

Police officer was not required to be removed from capital murder jury panel, even though during general voir dire of venire he had stated that due to seriousness of charge of capital murder guilty verdict should be followed by death penalty, and officer admitted to knowing some details of case; officer had further stated that he believed his decision whether to impose death penalty would be based on circumstances and that he could be fair and impartial, and there was no automatic rule that law enforcement officers or their relatives could be challenged for cause. *Walker v. State*, 671 So. 2d 581, 1995 Miss. LEXIS 494 (Miss. 1995), cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406, 1996 U.S. LEXIS 7236 (U.S. 1996).

Prospective juror was not required to be removed from capital murder panel, even though during initial voir dire he had raised his hand and commented, regarding death penalty, that "if the jury reached a decision of guilty, I would automatically vote" for death; when questioned individually, prospect stated that he would weigh evidence and that he could put aside his views and listen to evidence and instructions. *Walker v. State*, 671 So. 2d 581, 1995 Miss. LEXIS 494 (Miss. 1995), cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406, 1996 U.S. LEXIS 7236 (U.S. 1996).

Prospective juror was not required to be removed from capital murder jury panel, even though he nodded his head affirmatively during group voir dire when asked whether he would automatically vote for death penalty, whether he believed in death penalty, and whether he would vote with majority of other jurors as to sentence; under further questioning he stated that he would evaluate the evidence and impose penalty which seemed most logical, and when informed that his vote was an individual choice prospect replied that he would vote whichever way evidence pointed, would be fair and impartial and

would follow law. *Walker v. State*, 671 So. 2d 581, 1995 Miss. LEXIS 494 (Miss. 1995), cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406, 1996 U.S. LEXIS 7236 (U.S. 1996).

Prospective juror was not required to be removed for cause from jury panel in capital murder case, even though he initially stated he would vote for death penalty upon capital conviction, and later that he would be predisposed to vote for death all things being equal; prospect also stated that he would follow instructions given by court and review facts before reaching decision, and that his decision would be based upon how evidence "came about" in penalty phase of trial. *Walker v. State*, 671 So. 2d 581, 1995 Miss. LEXIS 494 (Miss. 1995), cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406, 1996 U.S. LEXIS 7236 (U.S. 1996).

Trial court was not required to grant capital murder defendant additional peremptory challenges, for use in eliminating prospective jurors that trial court refused to remove for cause despite their avowed favoritism toward death penalty; defendant had not supported his claim that there were an unusual number of persons favoring death penalty among venirepersons, those that court had declined to remove for cause had been rehabilitated and those whose views on subject remained "unwavering" had been removed. *Walker v. State*, 671 So. 2d 581, 1995 Miss. LEXIS 494 (Miss. 1995), cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406, 1996 U.S. LEXIS 7236 (U.S. 1996).

Prosecution presented race-neutral reason for peremptory strike of prospective juror in capital murder case; prospect had teenage daughter, and manner in which she responded to questions led prosecutor to feel that she was dealing with some problem prosecutor was unable to reach, and court indicated that prospect's demeanor was different from that of other prospects who had children. *Walker v. State*, 671 So. 2d 581, 1995 Miss. LEXIS 494 (Miss. 1995), cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406, 1996 U.S. LEXIS 7236 (U.S. 1996).

Prosecution provided race-neutral reason for peremptory strike of black pro-

spective juror in capital murder case; prospect took care of approximately 30 hogs and between 30 or 40 chickens, and would not be able to maintain her responsibilities if jury was required to be sequestered. *Walker v. State*, 671 So. 2d 581, 1995 Miss. LEXIS 494 (Miss. 1995), cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406, 1996 U.S. LEXIS 7236 (U.S. 1996).

Prosecution gave race-neutral reason for peremptorily striking black prospective juror in capital murder case; juror had indicated unwillingness to serve and had stated that she might have difficulty in coming to any definite conclusion. *Walker v. State*, 671 So. 2d 581, 1995 Miss. LEXIS 494 (Miss. 1995), cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406, 1996 U.S. LEXIS 7236 (U.S. 1996).

Prosecution provided race-neutral reason for peremptory challenge of black prospective juror in capital murder case; prospect was on board of directors of organization devoted to providing back-up for defense attorneys in capital cases. *Walker v. State*, 671 So. 2d 581, 1995 Miss. LEXIS 494 (Miss. 1995), cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406, 1996 U.S. LEXIS 7236 (U.S. 1996).

Court could strike for cause prospective juror in capital murder case who repeatedly stated that she was disposed to return life sentence, rather than death sentence, and did not know if she could base her decision on evidence and law. *Walker v. State*, 671 So. 2d 581, 1995 Miss. LEXIS 494 (Miss. 1995), cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406, 1996 U.S. LEXIS 7236 (U.S. 1996).

Circuit court should take substantial role in conducting voir dire to determine whether prospective jurors would vote automatically for death penalty regardless of aggravating and mitigating circumstances. *Ballenger v. State*, 667 So. 2d 1242, 1995 Miss. LEXIS 451 (Miss. 1995), cert. denied, 518 U.S. 1025, 116 S. Ct. 2565, 135 L. Ed. 2d 1082, 1996 U.S. LEXIS 4177 (U.S. 1996).

In a prosecution for capital murder and conspiracy to commit capital murder, the trial court committed reversible error in failing to place the initial burden on the

State to establish a prima facie case of racial discrimination in the defendant's use of his peremptory challenges, before concluding that the defendant failed to offer a race-neutral reason for challenging one of the jurors, since the defendant was arbitrarily and erroneously denied the use of one of his peremptory challenges, and the composition of the jury was directly altered as a result. *Colosimo v. Senatobia Motor Inn*, 662 So. 2d 552, 1995 Miss. LEXIS 479 (Miss. 1995).

A prosecutor's race-neutral explanation for peremptorily striking a potential juror need not rise to the level of justifying the exercise of a challenge for cause. *Davis v. State*, 660 So. 2d 1228, 1995 Miss. LEXIS 287 (Miss. 1995), cert. denied, 517 U.S. 1192, 116 S. Ct. 1684, 134 L. Ed. 2d 785, 1996 U.S. LEXIS 3101 (U.S. 1996).

A trial judge in a capital murder prosecution did not abuse his discretion by excusing a potential juror who initially indicated that she could not impose the death penalty, even though she subsequently indicated that there were some circumstances under which she could impose the death penalty, where she failed to clearly indicate that she was willing to set aside her own beliefs and follow the instructions and law as to the death penalty. *Davis v. State*, 660 So. 2d 1228, 1995 Miss. LEXIS 287 (Miss. 1995), cert. denied, 517 U.S. 1192, 116 S. Ct. 1684, 134 L. Ed. 2d 785, 1996 U.S. LEXIS 3101 (U.S. 1996).

In a capital murder prosecution in which a black defendant was convicted and sentenced by an all-white jury for the murders of 4 white victims, the trial court did not err by allowing the State to peremptorily strike the sole potential black juror, since the reason stated by the prosecution for the peremptory challenge—that the juror indicated she would have difficulty finding suitable child care during the trial—was sufficiently race-neutral. *Carr v. State*, 655 So. 2d 824, 1995 Miss. LEXIS 56 (Miss. 1995), cert. denied, 516 U.S. 1077, 116 S. Ct. 783, 133 L. Ed. 2d 734, 1996 U.S. LEXIS 547 (U.S. 1996).

The trial court in a capital murder prosecution erred by not requiring the State to give racially-neutral reasons for exercising peremptory challenges against 7 out of 13 black jurors on the venire, even though

there was no showing that the defendant was of a minority class, and therefore the case would be remanded for a hearing on whether the Batson criteria were violated by the State's exercise of its peremptory challenges. *Thorson v. State*, 653 So. 2d 876, 1994 Miss. LEXIS 600 (Miss. 1994).

A prosecutor's request of jurors during individual voir dire to give the particular circumstances that each would require in order to return a death sentence were not improperly designed to extract a promise from the jurors that they would certainly vote in favor of the death penalty given a specific set of circumstances, and therefore did not violate the defendant's constitutional rights. *Foster v. State*, 639 So. 2d 1263, 1994 Miss. LEXIS 670 (Miss. 1994), cert. denied, 514 U.S. 1019, 115 S. Ct. 1365, 131 L. Ed. 2d 221, 1995 U.S. LEXIS 2061 (U.S. 1995).

A trial court in a capital murder prosecution did not err in excusing a juror for cause where the juror stated that she opposed the death penalty and would not impose the death penalty under any circumstances. *Russell v. State*, 607 So. 2d 1107, 1992 Miss. LEXIS 474 (Miss. 1992).

A murder defendant was not denied a fair trial on the ground that the trial court refused to accept his challenges for cause to 3 potential jurors where the defendant used peremptory challenges to remove those jurors, since the loss of a peremptory challenge does not constitute a violation of the constitutional right to an impartial jury; so long as the jury that sits is impartial, the fact that the defendant had to use peremptory challenges to achieve that result does not mean that the defendant was denied his or her constitutional rights. *Mettetal v. State*, 602 So. 2d 864, 1992 Miss. LEXIS 413 (Miss. 1992).

The denial of a challenge for cause is not error where it is not shown that the defense has exhausted peremptory challenges and is thus forced to accept the juror. Thus, a trial court's refusal to remove 6 jurors for cause did not deprive the defendant of a fair trial where only one of the 6 actually served on the jury and she was not challenged at a time when the defense had 12 peremptory challenges, the defense still had one challenge left as well as an alternate challenge at the

completion of the selection process, and the defense counsel never raised any objection to the other 5 jurors. *Berry v. State*, 575 So. 2d 1, 1990 Miss. LEXIS 849 (Miss. 1990), cert. denied, 500 U.S. 928, 111 S. Ct. 2042, 114 L. Ed. 2d 126, 1991 U.S. LEXIS 2673 (U.S. 1991).

A capital murder defendant was not entitled to have a separate jury impaneled to hear the evidence at the penalty phase. *Minnick v. State*, 551 So. 2d 77, 1988 Miss. LEXIS 612 (Miss. 1988), rev'd, 498 U.S. 146, 111 S. Ct. 486, 112 L. Ed. 2d 489, 1990 U.S. LEXIS 6118 (U.S. 1990), overruled, *Willie v. State*, 585 So. 2d 660, 1991 Miss. LEXIS 454 (Miss. 1991).

"Death qualification" of jurors prior to the guilt phase in a capital murder prosecution did not deprive the defendant of a jury composed of a fair cross section of the community. *Minnick v. State*, 551 So. 2d 77, 1988 Miss. LEXIS 612 (Miss. 1988), rev'd, 498 U.S. 146, 111 S. Ct. 486, 112 L. Ed. 2d 489, 1990 U.S. LEXIS 6118 (U.S. 1990), overruled, *Willie v. State*, 585 So. 2d 660, 1991 Miss. LEXIS 454 (Miss. 1991).

Statute Supreme Court's judgment cannot stand insofar as it imposes the death sentence. The State Supreme Court's analysis is rejected if and to the extent it is based on the reasoning that the trial judge restored one of the State's peremptory challenges by determining that he had erred in denying one of the "Witherspoon" motions, and that erroneous removal of juror for cause was therefore harmless since the State would have used its restored challenge to remove her in any case. "Unexercised peremptory" argument wrongly assumes that crucial question is whether a particular prospective juror is excluded due to the court's erroneous ruling. Rather, relevant inquiry is whether the composition of the jury panel as a whole could possibly have been affected by the error. However, jury selection process requires a series of on-the-spot decisions weighing the relative objectionableness of a particular venire member against the number of peremptory challenges available at that time. Thus, the nature of the selection process defies any attempt to establish that an erroneous "Witherspoon" exclusion is

harmless. Further, State's argument that jurors exclusion was a single technical error that should be considered harmless because it did not have any prejudicial effect is unavailing, under *Davis v. Georgia*, regarding application of Witherspoon decision. *Gray v. Mississippi*, 481 U.S. 648, 107 S. Ct. 2045, 95 L. Ed. 2d 622, 1987 U.S. LEXIS 2057 (U.S. 1987), limited, *Ross v. Oklahoma*, 487 U.S. 81, 108 S. Ct. 2273, 101 L. Ed. 2d 80, 1988 U.S. LEXIS 2871 (U.S. 1988).

Any prejudice resulting from judge's reading of wrong indictment during voir dire of jury in homicide prosecution is removed when judge immediately admonishes jury to disregard such indictment. *Johnson v. State*, 475 So. 2d 1136, 1985 Miss. LEXIS 2238 (Miss. 1985).

Jurors who indicate inability to vote for death penalty under any circumstances may be excluded from guilt phase of capital murder prosecution. *Cabello v. State*, 471 So. 2d 332, 1985 Miss. LEXIS 2059 (Miss. 1985), cert. denied, 476 U.S. 1164, 106 S. Ct. 2291, 90 L. Ed. 2d 732, 1986 U.S. LEXIS 1720 (U.S. 1986).

When bailiff excuses juror on last day of murder trial on basis of death of juror's grandmother, rather than escorting juror back to court and informing trial judge of situation so judge can determine whether juror is unable to perform duty and order excusal, and trial court subsequently impanels alternate juror without objection by defense, and defendant fails to show prejudice resulting from impaneling of alternate, conviction is not subject to reversal on basis of improper excusal of original juror. *Fuller v. State*, 468 So. 2d 68, 1985 Miss. LEXIS 2055 (Miss. 1985).

Merely because potential jurors in capital murder case would be hesitant to inflict death penalty in case based entirely on circumstantial evidence does not constitute grounds to excuse jurors for cause. *Fuselier v. State*, 468 So. 2d 45, 1985 Miss. LEXIS 2035 (Miss. 1985).

The trial court did not commit reversible error in overruling defendant's motion for a mistrial, or that a new panel of jurors be tendered to the defendant, where, after ten jurors had been finally accepted to try the defendant, the court, out of the presence of defendant or his counsel, excused

on of the jurors because illness required the juror's presence at home, where the court had allowed the defendant one additional peremptory challenge. *Upshaw v. State*, 231 Miss. 158, 94 So. 2d 337, 1957 Miss. LEXIS 500 (Miss. 1957).

29. —Ineffective assistance of counsel.

Trial counsel did not err in failing to request a jury instruction on culpable negligence or on accident or misfortune during defendant's trial for depraved-heart murder because the facts did not support any of those instruction; evidence was presented, and defendant admitted, that she fired at least three shots directly at the victim, and the trial court instructed this jury on defendant's theories of defense, which had an evidentiary basis. *Swanagan v. State*, 229 So. 3d 698, 2017 Miss. LEXIS 191 (Miss. 2017).

Defendant was properly convicted of murder because the trial record, standing alone, did not validate his claim that trial counsel rendered assistance was ineffective by failing to request a suppression hearing on his statements to police; it was plausible that counsel's decision was a part of his trial strategy given that counsel did not object to the admission of defendant's confessions. *Reed v. State*, 204 So. 3d 785, 2016 Miss. App. LEXIS 766 (Miss. Ct. App. 2016).

In a capital murder trial, a defendant's claim of ineffective assistance of trial counsel based on false arrest, failure to interview alibi witnesses, failure to view alleged evidence, and failure to object to the prosecutor's closing argument could be raised on direct appeal because the facts were fully apparent from the record. *Scott v. State*, 8 So. 3d 855, 2008 Miss. LEXIS 589 (Miss. 2008), cert. denied, 559 U.S. 941, 130 S. Ct. 1500, 176 L. Ed. 2d 117, 2010 U.S. LEXIS 1205 (U.S. 2010).

Denial of the appellant inmate's request for post-conviction relief after he was convicted of capital murder (murder during the commission of sexual battery) was appropriate because he failed to prove that he received the ineffective assistance of counsel. Even if counsel had procured a DNA expert who testified that the inmate's DNA was not present, that did not

exonerate the inmate of the sexual battery charge because sexual penetration could be by insertion of any object into the genital or anal opening of another person's body. *Havard v. State*, 988 So. 2d 322, 2008 Miss. LEXIS 264 (Miss. 2008).

Defendant's claim of ineffective counsel in a murder trial failed because the jury instructions were proper and requesting a jury instruction on manslaughter that was commonly given on the prosecution's request was permissible trial strategy to try to ensure that the jury knew they were not required to find murder, and that a lesser offense was available when there was strong evidence that defendant shot the victim. *Mullen v. State*, 986 So. 2d 320, 2007 Miss. App. LEXIS 605 (Miss. Ct. App. 2007), cert. denied, 987 So. 2d 451, 2008 Miss. LEXIS 559 (Miss. 2008).

As to his conviction for murder, defendant did not demonstrate that the outcome of his trial would have been different if his counsel had objected to the district attorney's leading questions to deputies and the district attorney's eliciting of prior bad acts testimony from the victim's family members (eyewitnesses), and a neighbor. He merely asserted that had counsel been as diligent with objections on said matters, he would have received a fair trial, and that statement did not satisfy the prejudice prong of *Strickland*; defendant's account of the events that led to the victim's death was not corroborated by any of the eyewitnesses, the physical evidence refuted his account that the victim was shot accidentally during a close struggle, and because he was hopelessly guilty, he was not entitled to a new trial on grounds counsel was ineffective. *Jones v. State*, 911 So. 2d 556, 2005 Miss. App. LEXIS 231 (Miss. Ct. App.), cert. denied, 920 So. 2d 1008, 2005 Miss. LEXIS 599 (Miss. 2005).

Even if defendant's trial counsel was deficient in allegedly failing to make numerous potential objections to hearsay and other improper evidence, there was no reasonable probability that the proceeding would have been different given the plethora of evidence against defendant, including his confession that he "killed the bitch." While trial counsel's performance might have been less than

perfect, there was nothing in the record that proved that trial counsel's performance was not in the "wide range of reasonable professional assistance." *Gibson v. State*, 895 So. 2d 185, 2004 Miss. App. LEXIS 1142 (Miss. Ct. App. 2004).

Claims that defense counsel was unprepared because he only had two meetings with defendant were rejected, as counsel filed pretrial motions, conducted voir dire, offered challenges for cause, provided compelling opening and closing statements, objected to the admission of certain evidence, and cross-examined witnesses. Under the Sixth Amendment, defendant was entitled to and received minimum competence and loyal assistance. *Rinehart v. State*, 883 So. 2d 573, 2004 Miss. LEXIS 1228 (Miss. 2004).

Court found no ineffective assistance of counsel in the failure of attorneys for an inmate to object to the State's use of peremptory strikes in connection with the inmate's capital murder trial because (1) the inmate failed to show any prejudice, and (2) the attorneys could well have thought that the State had adequate race neutral reasons for the State's strikes, and there was no requirement that the attorneys had to make motions that they did not believe would succeed. *Smith v. State*, 877 So. 2d 369, 2004 Miss. LEXIS 547 (Miss. 2004).

Inmate's attorney was not ineffective, in connection with the inmate's capital murder trial, for failing to impeach a material witness with an alleged prior inconsistent statement concerning the inmate's height because (1) there was little room for impeachment in the relative heights of the inmate, co-defendant, and the witness, and (2) it was a matter of trial strategy not to ask the witness additional questions on cross-examination. *Smith v. State*, 877 So. 2d 369, 2004 Miss. LEXIS 547 (Miss. 2004).

Inmate's attorney was not ineffective, in connection with the inmate's capital murder trial, for not objecting to the presence of a county sheriff during trial proceedings because (1) the inmate cited no authority to support the claim that the sheriff was able to tailor the sheriff's testimony after hearing other witnesses and (2) there was no abuse of discretion in

the trial court's decision to permit the sheriff to remain in the courtroom. *Smith v. State*, 877 So. 2d 369, 2004 Miss. LEXIS 547 (Miss. 2004).

Inmate's attorney was not ineffective, in connection with the inmate's capital murder trial, for allowing the inmate to be tried jointly with co-defendant at both the guilt and penalty phases because (1) this issue was substantially addressed on direct appeal, and thus was barred in post-conviction proceedings under Miss. Code Ann. § 99-39-21(2), and (2) in any event, the issue was without merit because the inmate and co-defendant insisted on being tried together. *Smith v. State*, 877 So. 2d 369, 2004 Miss. LEXIS 547 (Miss. 2004).

Inmate's attorneys were not ineffective, in connection with the inmate's capital murder trial, for not objecting to the trial judge's decision to excuse potential jurors after unrecorded bench conferences because even though the bench conferences should have been recorded, and even if the attorneys were negligent in failing to see that the conferences were recorded, there was no showing of prejudice to the inmate and the reasons for the excusal of the jurors were clearly in the record. *Smith v. State*, 877 So. 2d 369, 2004 Miss. LEXIS 547 (Miss. 2004).

Inmate's attorneys were not ineffective, in connection with the inmate's capital murder trial, for failing to object to certain prosecutorial statements made during closing argument at the guilt phase because (1) the issue was raised on direct appeal and was found to be without merit, and thus the issue was barred under Miss. Code Ann. § 99-39-21(2), and (2) in any event, the comments made were within the wide latitude granted in an attorney's closing argument. *Smith v. State*, 877 So. 2d 369, 2004 Miss. LEXIS 547 (Miss. 2004).

Counsel for capital murder defendant was not ineffective for failing to investigate and develop fact of defendant's low intelligence quotient, where absence of that evidence did not reasonably undermine confidence in outcome of trial, in that it was merely additional evidence of defendant's mental aptitude, since counsel argued that defendant had very minimal education and deprived childhood.

Cole v. State, 666 So. 2d 767, 1995 Miss. LEXIS 595 (Miss. 1995).

Counsel for capital murder defendant was not ineffective for failing to request continuance after prosecution called so-called "surprise" witness who subsequently identified defendant, where counsel interviewed witness for 25 minutes during recess called specifically for that purpose, and defendant showed nothing that continuance would have further gained. *Cole v. State*, 666 So. 2d 767, 1995 Miss. LEXIS 595 (Miss. 1995).

Counsel for capital murder defendant was not ineffective for failing to file certain motions, call certain witnesses, ask certain questions, and make certain objections, where counsel's actions fell within ambit of trial strategy. *Cole v. State*, 666 So. 2d 767, 1995 Miss. LEXIS 595 (Miss. 1995).

Counsel for capital murder defendant was not ineffective for failing to request continuance after State introduced into evidence during sentencing phase 2 prior convictions for manslaughter and attempted rape, where there was no prejudice to defendant, in that the prior convictions were valid and not subject to collateral attack. *Cole v. State*, 666 So. 2d 767, 1995 Miss. LEXIS 595 (Miss. 1995).

Counsel for capital murder defendant was not ineffective for failing to object to transitional jury instruction stating that jury should not consider instruction defining lesser included offense of murder unless it found that defendant was not guilty of capital murder, where defendant was granted lesser included offense instruction defining crime of murder less than capital, and defendant showed no prejudice flowing from transitional instruction. *Cole v. State*, 666 So. 2d 767, 1995 Miss. LEXIS 595 (Miss. 1995).

Counsel for capital murder defendant was not ineffective for failing to object to introduction of defendant's prior convictions of grand larceny and simple robbery, where both were relevant to aggravating circumstances set forth under capital sentencing statute, and thus objection would have been futile. *Cole v. State*, 666 So. 2d 767, 1995 Miss. LEXIS 595 (Miss. 1995).

Counsel for capital murder defendant was not ineffective for failing to make

offer of proof concerning excluded mitigation-of-sentence testimony about defendant's religious convictions and effect on him of death of his stepchild, where the evidence was adequately established via testimony of other witnesses. *Cole v. State*, 666 So. 2d 767, 1995 Miss. LEXIS 595 (Miss. 1995).

Counsel for capital murder defendant was not ineffective for failing to object to jury instruction that the murder was "especially heinous, atrocious and cruel," where, at time of trial, there was no viable basis under state law for objecting to this instruction. *Cole v. State*, 666 So. 2d 767, 1995 Miss. LEXIS 595 (Miss. 1995).

Counsel for capital murder defendant was not ineffective for conducting cross-examination of witness that produced responses which allegedly strongly suggested to jury that defendant could not be rehabilitated, where most of the cross-examination was in abstract and was not related directly to defendant, and defendant had previous convictions for rape, manslaughter, robbery and grand larceny based upon which jury could have easily reached conclusion that there was little hope for defendant's rehabilitation. *Cole v. State*, 666 So. 2d 767, 1995 Miss. LEXIS 595 (Miss. 1995).

Mere fact that counsel for capital murder defendant shared office space with prosecutor who prosecuted defendant's preliminary hearing was not sufficient to demonstrate actual conflict of interest causing prejudice to defendant in violation of defendant's right to counsel. *Cole v. State*, 666 So. 2d 767, 1995 Miss. LEXIS 595 (Miss. 1995).

A murder defendant was not denied her Sixth Amendment right to the effective assistance of counsel by her attorney's refusal of a manslaughter instruction, even though there was a strong evidentiary basis for the submission of such an instruction, where the attorney's decision to refuse a manslaughter instruction coupled with his decision to employ a defense based entirely on self-defense was a calculated trial strategy. *Hiter v. State*, 660 So. 2d 961, 1995 Miss. LEXIS 333 (Miss. 1995).

A murder defendant was not denied her Sixth Amendment right to the effective

assistance of counsel due to her attorney's failure to object to statements made by the prosecution in their closing argument, referring to the fact that the victim was not present at trial to explain the events surrounding the killing, since it was reasonable for the prosecution to argue that the victim was no longer in existence in a murder trial in which the jury was required to determine whether the killing was justified. *Hiter v. State*, 660 So. 2d 961, 1995 Miss. LEXIS 333 (Miss. 1995).

A murder defendant was not denied effective assistance of counsel by his attorney's admission of his guilt of the crime where the evidence of guilt was overwhelming, and the attorney admitted that the defendant was guilty of simple murder, not capital murder, and submitted a lesser-included offense instruction in accordance with the argument. *Woodward v. State*, 635 So. 2d 805, 1993 Miss. LEXIS 442 (Miss. 1993).

A capital murder defendant was denied effective assistance of counsel at the penalty phase where his attorneys presented almost no facts in mitigation upon which the jury could have acted to spare the defendant's life, they failed to make the most of the available evidence in mitigation, and in closing argument one of the defendant's attorneys stated that the only way the jury could spare the defendant's life was on "redeeming love," which was not one of the factors which the jury could have considered under the court's instructions. *Woodward v. State*, 635 So. 2d 805, 1993 Miss. LEXIS 442 (Miss. 1993).

A defendant's counsel was not ineffective at the guilt phase of a capital murder trial where the defense counsel adequately investigated, filing discovery motions and obtaining the State's entire file, and there was no reasonable probability that the outcome of the trial would have been different had evidence been presented that the defendant's accomplice, rather than the defendant, delivered the fatal injuries, because it was clearly established that the defendant was present at the planning and execution of the murder and was therefore a principal. *State v. Tokman*, 564 So. 2d 1339, 1990 Miss. LEXIS 232 (Miss. 1990).

In order to prove that he received ineffective assistance of counsel during the

guilt phase of a capital murder prosecution, the defendant was required to show deficient performance and that his counsel's errors were so serious as to deprive him of a fair trial with a reliable result; unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that rendered the result unreliable. *State v. Tokman*, 564 So. 2d 1339, 1990 Miss. LEXIS 232 (Miss. 1990).

Defendant convicted of capital murder is not entitled to reversal on basis of refusal of trial court to appoint experienced trial counsel where defendant is unable to point to specific lapses by trial counsel. *Johnson v. State*, 476 So. 2d 1195, 1985 Miss. LEXIS 2257 (Miss. 1985).

30. —Continuance.

At the beginning of defendant's trial for murder in violation of Miss. Code Ann. § 97-3-19, the court did not abuse its discretion in denying defendant's motion for a continuance so that he could obtain the results of the toxicology screen on the victim's blood. The fact that the victim was using cocaine did not indicate that he was the aggressor. *Jackson v. State*, 689 So. 2d 760, 1997 Miss. LEXIS 39 (Miss. 1997), superseded, *Monroe v. Monroe*, 745 So. 2d 249, 1999 Miss. LEXIS 229 (Miss. 1999).

Trial judge did not abuse his discretion in refusing defendants request for a continuance which was made at 4:30 p.m., where there was no evidence of undue burden upon counsel in continuing the case to conclusion and no indication in the record that the jury, which returned a verdict at 10:10 p.m., had difficulty in proceeding with their deliberations. *Dye v. State*, 498 So. 2d 343, 1986 Miss. LEXIS 2776 (Miss. 1986).

It is contemptuous of obligation every trial counsel owes court to wait until 10 days before predetermined trial date in capital murder case to inform circuit judge of unavailability of defense expert witnesses in case in which at least 30 pretrial motions are made by thorough and aggressive defense counsel; in such case, motion for continuance on basis of absence of witnesses is properly denied.

Johnson v. State, 477 So. 2d 196, 1985 Miss. LEXIS 2072 (Miss. 1985), cert. denied, 476 U.S. 1109, 106 S. Ct. 1958, 90 L. Ed. 2d 366 (U.S. 1986).

Trial court may deny capital murder defendant's request for continuance due to unavailability of defense fingerprint expert where court concludes that fingerprint expert would testify that fingerprints of murder victim and no one else had been found at scene of crime. *Cabello v. State*, 471 So. 2d 332, 1985 Miss. LEXIS 2059 (Miss. 1985), cert. denied, 476 U.S. 1164, 106 S. Ct. 2291, 90 L. Ed. 2d 732, 1986 U.S. LEXIS 1720 (U.S. 1986).

31. Prejudicial or harmless error; generally.

Inmate's cumulative effect argument in connection with the inmate's capital murder trial was procedurally barred under Miss. Code Ann. § 99-39-21(3) as res judicata, and in any event, the issue was without merit because the cumulative errors, in any, did not require relief. *Smith v. State*, 877 So. 2d 369, 2004 Miss. LEXIS 547 (Miss. 2004).

In capital cases, although there is no error which, standing alone, requires reversal, aggregate effect of various errors may create such an atmosphere of bias, passion, and prejudice that they effectively deny defendant a fundamentally fair trial. *Blue v. State*, 674 So. 2d 1184, 1996 Miss. LEXIS 304 (Miss.), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517, 1996 U.S. LEXIS 7523 (U.S. 1996).

A washcloth found at the site where the defendant had buried the victim's body should not have been admitted into evidence in a murder prosecution, where the washcloth was not identified as belonging to the defendant or deriving from the defendant's home; absent a sufficient connection between the cloth and the defendant and/or the crime, it should have been excluded. However, admission of the cloth was harmless in view of the overwhelming evidence of guilt presented. *Holland v. State*, 587 So. 2d 848, 1991 Miss. LEXIS 648 (Miss. 1991).

In a homicide prosecution, the prosecution's failure to disclose 2 tape-recordings pertaining to the homicide which had

been made on the morning of the homicide by the police department radio dispatcher was harmless error where the recordings did not contain any exculpatory information. *Fowler v. State*, 566 So. 2d 1194, 1990 Miss. LEXIS 439 (Miss. 1990).

Permitting murder weapon, which has not been introduced in evidence, into jury room is harmless error beyond reasonable doubt where it is manifest that parties, court officials and court have overlooked fact that weapon has not been again offered in evidence after chain of custody has been established in response to defense objection and has been referred to throughout trial without objection by defense and defense does not object to weapon being taken as part of exhibits to jury room. *Williams v. State*, 481 So. 2d 839, 1985 Miss. LEXIS 2332 (Miss. 1985).

When trial court improperly refuses to order production of clearly discoverable witness statements which to heart of credibility of state's principal witness in murder prosecution, reviewing court does not engage in nice calculations regarding amount of resulting prejudice but reverses and remands for new trial. *Barnes v. State*, 471 So. 2d 1218, 1985 Miss. LEXIS 2138 (Miss. 1985).

Although, in the prosecution of a state penitentiary trustee for murder in connection with the death of a prisoner allegedly beaten by the defendant and another, it was improper to permit a member of the coroner's jury to testify, the admission of that testimony as to what he had seen and as to what the penitentiary physician had stated, that the prisoner had died of heat stroke as shown on the death certificate, was harmless error, where the only issue in the case was the cause of death, and that issue was presented squarely to the jury, which found that death was caused by trauma. *McLaurin v. State*, 260 So. 2d 845, 1972 Miss. LEXIS 1581 (Miss. 1972).

In prosecution for murder, on preliminary hearing to determine competency of alleged confession, it is error for court to limit defendant to cross-examination of state's witnesses, as failure to hear defendant and his witness imposes upon him an extra and unfair burden. *Morroco v. State*, 204 Miss. 498, 37 So. 2d 751, 1948 Miss. LEXIS 384 (Miss. 1948).

Asking accused if he testified at committal trial which he answered in negative, while improper, was harmless. *Wells v. State*, 96 Miss. 500, 51 So. 209, 1910 Miss. LEXIS 162 (Miss. 1910).

32. —Comment or act of counsel.

Any error in prosecutor's comment on defendant's demeanor, which might have been taken as a comment on failure to testify, was cured by instructions to jurors to disregard remarks of counsel which have no basis in the evidence and to not draw any unfavorable inference against defendant because of his failure to testify. *Blue v. State*, 674 So. 2d 1184, 1996 Miss. LEXIS 304 (Miss.), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517, 1996 U.S. LEXIS 7523 (U.S. 1996).

In a prosecution for capital murder committed during the commission of a rape, the conviction and sentence would be reversed where, in response to the defendant's request for disclosure of expert reports or statements, the prosecution responded only by providing a copy of the pathologist's autopsy report, and the undisclosed opinion of the pathologist that the victim was raped was the only evidence offered to prove this critical aspect of the State's case. In re the Reinstatement of *Turner*, 635 So. 2d 894, 1994 Miss. LEXIS 197 (Miss. 1994).

The production of accomplices' statements at a murder trial during the cross-examination of a police officer who investigated the accomplices was not sufficient since receipt of these statements during trial did not give the defendant a "meaningful opportunity" to make use of them. Defense counsel was entitled to have access prior to trial, and since he was not given such access, a reversal of the defendant's conviction was warranted. *Welch v. State*, 566 So. 2d 680, 1990 Miss. LEXIS 152 (Miss. 1990).

In a murder prosecution, the prosecutor's comment during closing argument that the defendant was "clothed in the full protection of the Constitution of the United States and he has got what [the victim] never got. And that is a jury of 12 good people to decide his fate," did not warrant reversal of the jury's verdict where the comment was an isolated state-

ment and no other portion of the closing argument focused on the exercise of constitutional rights by the defendant. *Shell v. State*, 554 So. 2d 887, 1989 Miss. LEXIS 492 (Miss. 1989), rev'd, in part, 498 U.S. 1, 111 S. Ct. 313, 112 L. Ed. 2d 1, 1990 U.S. LEXIS 5501 (U.S. 1990).

Although the trial court properly condemned the conduct of a district attorney in asking jurors during voir dire whether or not they would vote guilty if the state proved its case and whether they would vote for death if the state proved that the aggravating circumstances outweighed the mitigating circumstances, the district attorney's conduct did not constitute reversible error where, in context with the jury instructions given to the jury by the trial judge, it was clear that the jurors were aware of their proper role in determining guilt and sentence. *Williams v. State*, 544 So. 2d 782, 1987 Miss. LEXIS 2843 (Miss. 1987).

In a capital murder prosecution arising out of the murder of a husband and wife, on appeal from conviction and death sentence for the murder of the husband by defendant, who previously had been convicted and sentenced to life for the killing of wife, conviction was affirmed but death sentence was reversed and remanded where defendant did not receive a fair sentencing hearing due to admission of photographs of wife's body during trial and during closing argument, state's attempt to prevent defendant from calling a co-indictee as a witness, prosecutor's attempt during voir dire to get commitment from jury to exclude certain mitigating factors from its consideration of the death penalty, and prosecutor's comment on defendant's failure to testify. *Stringer v. State*, 500 So. 2d 928, 1986 Miss. LEXIS 2609 (Miss. 1986).

On the cross-examination of a capital murder defendant who had testified that the trouble between victim and him had arisen over a named woman whom defendant regarded as being his wife, question posed to the defendant as to why had killed the named woman, was reversible error, despite court's admonishments to the jury, where, at the time the question was asked, there was no evidence in the record concerning the killing or death of

the named woman, nor was there any evidence in the record that the defendant had ever been convicted of a previous crime. *Smith v. State*, 499 So. 2d 750, 1986 Miss. LEXIS 2853 (Miss. 1986).

At trial of murder charge to which defendant's sole defense was self-defense, remarks by prosecutor, in closing argument, that the only reason defendant married his wife because he wanted to marry the only eyewitness to the murder he had committed, constituted an impermissible comment upon defendant's failure to call his wife to testify, and the trial court's refusal to sustain objections to such remarks was reversible error. *Simpson v. State*, 497 So. 2d 424, 1986 Miss. LEXIS 2724 (Miss. 1986).

An accused sentenced to death on a capital murder charge was denied a fair trial by prosecutor's comments in closing argument as to accused's failure to testify, and by defense counsel's attempted "explanation" in closing argument as to the reason his client had failed to testify. *West v. State*, 485 So. 2d 681, 1985 Miss. LEXIS 2445 (Miss. 1985), cert. denied, 479 U.S. 983, 107 S. Ct. 570, 93 L. Ed. 2d 574, 1986 U.S. LEXIS 4897 (U.S. 1986).

An accused who had failed to testify or to put on proof at his capital murder trial was not entitled to a mistrial because of remarks by prosecutor in closing argument asking jury to recall defense's assertion in opening statement as to witnesses to be called. *West v. State*, 485 So. 2d 681, 1985 Miss. LEXIS 2445 (Miss. 1985), cert. denied, 479 U.S. 983, 107 S. Ct. 570, 93 L. Ed. 2d 574, 1986 U.S. LEXIS 4897 (U.S. 1986).

Failure of district attorney to produce statement of homicide defendant for inspection and use by defendant and defendant's counsel does not prejudice defendant where statement, made to deputy sheriff, admitting killing of deceased, is not admission of guilt or inconsistent with defendant's plea of self-defense, and circumstances surrounding statement do not indicate that defendant was fleeing or acting in manner inconsistent with defense. *Buckhalter v. State*, 480 So. 2d 1128, 1985 Miss. LEXIS 2395 (Miss. 1985).

Testimony from prosecution investigator concerning record of collect telephone

call from murder victim to third party is inadmissible where state makes no effort to introduce telephone records and offers no explanation for absence of records; where admission of testimony has strong potential for prejudice in that it allows official endorsement of third party's already damaging testimony regarding telephone calls, admission of testimony is harmful error requiring reversal. *Flanagin v. State*, 473 So. 2d 482, 1985 Miss. LEXIS 2168 (Miss. 1985).

Single reference by prosecution witness to capital murder defendant's intention to remain silent which is neither repeated nor linked with defendant's exculpatory statement is harmless error where there is overwhelming evidence of guilt and trial judge charges jury at conclusion of trial that no adverse inference may be drawn by invocation of right to remain silent. *Gray v. State*, 472 So. 2d 409 (Miss. 1985), rev'd on other grounds, 481 U.S. 648, 107 S. Ct. 2045, 95 L. Ed. 2d 622 (1987), and see *Willie v. State*, 585 So. 2d 660, 1991 Miss. LEXIS 454 (Miss. 1991).

Prosecutor's comment during closing argument in murder prosecution that he is not going to apologize for striking plea bargain deal with witness against defendant because murder victim is friend of prosecutor do not constitute such egregious error as to necessitate reversal of conviction where judge admonishes jury to disregard comments and there is no indication that comments prejudiced jury. *Fairley v. State*, 467 So. 2d 894, 1985 Miss. LEXIS 1902 (Miss.), cert. denied, 474 U.S. 855, 106 S. Ct. 160, 88 L. Ed. 2d 133, 1985 U.S. LEXIS 3725 (U.S. 1985).

Arguments of prosecuting attorney, approved by the court, in a murder prosecution that there was no use for the jury to return a manslaughter verdict, or one for a life sentence, because of the fact that the defendant was then serving a life sentence in the state penitentiary, was reversible error. *Hartfield v. State*, 186 Miss. 75, 189 So. 530, 1939 Miss. LEXIS 220 (Miss. 1939).

33. —Instructions.

Regarding defendant's claim that a trial court erred during his capital murder trial in denying his attempt to argue self-de-

fense in his closing argument in light of the capital murder jury instruction, although the portion of the capital murder jury instruction reading, "not in necessary self-defense," was inappropriate, it was harmless error because it was clear beyond a reasonable doubt that it did not contribute to the verdict. Defendant was properly precluded from arguing self-defense at trial, as he was charged under the capital murder statute. *Beale v. State*, 2 So. 3d 693, 2008 Miss. App. LEXIS 548 (Miss. Ct. App. 2008), cert. denied, 999 So. 2d 1280, 2009 Miss. LEXIS 90 (Miss. 2009).

In a case in which defendant was convicted of murder, the trial court properly refused defendant's requested jury instructions on manslaughter, as there was insufficient evidence in the record to support the elements of manslaughter. There was no evidence in the record from which the jury could have determined the killing occurred during heat of passion. *Alford v. State*, 5 So. 3d 1138, 2008 Miss. App. LEXIS 512 (Miss. Ct. App. 2008), cert. denied, 11 So. 3d 1250, 2009 Miss. LEXIS 185 (Miss. 2009).

Defendant, citing *Tran v. State*, 681 So. 2d 514 (Miss. 1996), argued that the circuit court erred in giving the jury written instruction which stated: "the court instructs the jury that if wounds are inflicted upon a person with a deadly weapon in a manner calculated to destroy life then intent may be inferred from the use of the weapon." The instruction did not run afoul of the condemned instruction in *Tran*, but even if it did, any error was harmless, for based on defendant's admissions to two witnesses (family members), there was no doubt that the State proved that he committed the murder with deliberate design. *Gibson v. State*, 895 So. 2d 185, 2004 Miss. App. LEXIS 1142 (Miss. Ct. App. 2004).

Supreme Court ruled that there was no merit to defendants' argument that the trial court failed to instruct the jury on the element "without authority of law," even though an acceptable synonym of that phrase did not appear in a separate enumerated paragraph; when the instructions are read in their entirety, it becomes clear that the trial court properly charged

the jury on the issues of law that defendants claimed were omitted. Although the exact language from the statute was not used, this oversight was forgiven because the jury was adequately instructed through other language and the the trial court adequately covered the issue of self-defense. *Harris v. State*, 861 So. 2d 1003, 2003 Miss. LEXIS 872 (Miss. 2003).

Instructing jury on armed robbery, after indictment charged robbery, constituted formal rather than substantive amendment to indictment, and thus any variance which existed between indictment and proof was harmless error, where all defenses and evidence available to defendant remained equally applicable, and jury could not have convicted defendant of armed robbery and found him not guilty of robbery, inasmuch as armed robbery is simply robbery with weapon. *Davis v. State*, 684 So. 2d 643, 1996 Miss. LEXIS 292 (Miss. 1996), cert. denied, 520 U.S. 1170, 117 S. Ct. 1437, 137 L. Ed. 2d 544, 1997 U.S. LEXIS 2295 (U.S. 1997).

Defendant convicted of murder is in no position to argue that prejudice has resulted from court's giving of manslaughter by culpable negligence instruction. *Flanagin v. State*, 473 So. 2d 482, 1985 Miss. LEXIS 2168 (Miss. 1985).

Jury instruction which contains surplus language serving only to raise state's burden of proof does not prejudice capital murder defendant. *Swanier v. State*, 473 So. 2d 180, 1985 Miss. LEXIS 2155 (Miss. 1985).

Self-defense instruction which states that party acting upon mere fear, apprehension or belief, however sincerely entertained acts at own peril in taking life is improper and constitutes reversible prejudicial error where case is close factually and instruction has previously been condemned by Supreme Court of Mississippi number of times. *Flowers v. State*, 473 So. 2d 164, 1985 Miss. LEXIS 2140 (Miss. 1985).

Erroneous instruction as to manslaughter held not prejudicial to accused who was convicted of murder. *Busby v. State*, 177 Miss. 68, 170 So. 140, 1936 Miss. LEXIS 233 (Miss. 1936).

Erroneous instruction held not prejudicial where defendant could not be con-

victed of manslaughter. *Dye v. State*, 127 Miss. 492, 90 So. 180, 1921 Miss. LEXIS 249 (Miss. 1921).

Refusal of instruction that malice aforethought was necessary element of murder, and where there was reasonable doubt of its existence jury should find not guilty, was reversible error. *Burnett v. State*, 92 Miss. 826, 46 So. 248, 1908 Miss. LEXIS 225 (Miss. 1908).

34. —Self-defense.

Under claim of self-defense, it was prejudicial error to admit evidence that a man wearing clothes similar to defendant's was seen watching place where decedent worked the night before killing. *Leverett v. State*, 112 Miss. 394, 73 So. 273, 1916 Miss. LEXIS 123 (Miss. 1916).

Where self-defense claimed, and defendant testified he did not know deceased's position when he shot last three times because of smoke, instruction to find accused guilty if he fired after deceased turned his back and accused was in no danger at his hands, is prejudicial error. *Leverett v. State*, 112 Miss. 394, 73 So. 273, 1916 Miss. LEXIS 123 (Miss. 1916).

Refusal to give instruction that jury might consider previous threat by decedent to kill accused next time they met was prejudicial error. *Leverett v. State*, 112 Miss. 394, 73 So. 273, 1916 Miss. LEXIS 123 (Miss. 1916).

Exclusion of threats by decedent held reversible error. *Burks v. State*, 101 Miss. 87, 57 So. 367, 1911 Miss. LEXIS 102 (Miss. 1911).

II. EVIDENTIARY MATTERS.

35. — Death certificate.

Defendant's capital murder conviction was appropriate because his right to confrontation was not violated by the admission of the victim's death certificate into evidence. The death certificate was admissible as a public record under Miss. R. Evid. 902(4) and, while the trial court erred in allowing the death certificate into evidence showing the purported time of injury under Miss. R. Evid. 803(9), the error was harmless because witnesses testified that they could not be positive of the time of injury or the time of death. *Birk-*

head v. State, 2009 Miss. LEXIS 73 (Miss. Feb. 19, 2009).

36. Evidence; generally.

Jury's verdicts finding defendant guilty of murder, aggravated assault, and possession of a firearm by a felon were not contrary to the overwhelming weight of the evidence because the victim, who identified defendant as the shooter, had just finished speaking with defendant when he was shot in the arm; the victim testified, and the jury obviously believed, that he was unable to identify the shooter while he was in the hospital because he was on Morphine and in a lot of pain. *Johnson v. State*, 281 So. 3d 1221, 2019 Miss. App. LEXIS 206 (Miss. Ct. App. 2019).

Trial court did not abuse its discretion in denying defendant's motion for a new trial because the jury was presented ample evidence defendant committed the murder; the overwhelming weight of the evidence was consistent with, not contrary to, the jury's guilty verdict because not only did defendant confess, but his confession was consistent with the other evidence presented. *Gary v. State*, 237 So. 3d 140, 2018 Miss. LEXIS 58 (Miss. 2018).

Defendant's conviction for depraved-heart murder was not against the overwhelming weight of the evidence because defendant admitted she shot the victim at least three times, and she did not stop firing until the victim fled. *Swanagan v. State*, 229 So. 3d 698, 2017 Miss. LEXIS 191 (Miss. 2017).

In a murder case, defendant's motion for a new trial was properly denied as the evidence did not weigh heavily against the jury's verdict because the uncontroverted time stamp from a store's security videotape was 10:18 p.m.; the first witness's testimony that she, her sister, and defendant gathered at 10:00 p.m. or 10:18 p.m. prior to leaving for a casino was sequentially impossible; while the second witness did not see a passenger in the victim's car when she looked out the window, the testimony of the pathologist was consistent with the shooter firing the fatal shots while standing outside the front-seat passenger window of the vehicle or sitting in the passenger seat; and defendant allegedly intimidated a third witness. *Johnson*

v. State, 224 So. 3d 66, 2016 Miss. LEXIS 521 (Miss. 2016).

Guilty verdict in a murder case was not so contrary to the overwhelming weight of the evidence that allowing it to stand would have sanctioned an unconscionable injustice; a reasonable juror could have inferred that defendant and the victim were arguing over defendant's drinking. This information, coupled with the physical evidence that contradicted an accidental discharge of a pistol, supported the jury's verdict of murder over manslaughter. *McGuire v. State*, 170 So. 3d 570, 2014 Miss. App. LEXIS 578 (Miss. Ct. App. 2014).

Because the Weathersby doctrine should have been applied, based on the fact that the accounts of defendant and a witness of the events leading up to the stabbing and its aftermath were reasonable and not substantially contradicted, a circuit court was required to accept the accounts as true and should have acquitted defendant. *Johnson v. State*, 987 So. 2d 420, 2008 Miss. LEXIS 353 (Miss. 2008).

Where defendant admitted to stabbing the victim, any error in the admission of expert testimony concerning blood spatter evidence did not warrant the reversal of defendant's conviction for murder under Miss. Code Ann. § 97-3-19(1); there was sufficient evidence to show that defendant did not act in self-defense. *Flaggs v. State*, 999 So. 2d 393, 2008 Miss. App. LEXIS 333 (Miss. Ct. App. 2008), cert. dismissed, dismissed without prejudice, cert. denied, 2009 Miss. LEXIS 37 (Miss. Jan. 22, 2009), cert. denied, 999 So. 2d 852, 2009 Miss. LEXIS 53 (Miss. 2009).

Defendant's convictions for murder and aggravated assault, under Miss. Code Ann. §§ 97-3-19(1), 97-3-7(2), were not against the weight of the evidence because allowing the verdict to stand would not have sanctioned an unconscionable injustice because there was nothing that would have led an appellate court to disagree with a jury's assessment of the conflicting testimony with which it was presented. *Readus v. State*, 997 So. 2d 941, 2008 Miss. App. LEXIS 249 (Miss. Ct. App. 2008), cert. denied, 999 So. 2d 852, 2009 Miss. LEXIS 27 (Miss. 2009).

Defendant's conviction for capital murder and arson were proper; the evidence was sufficient because defendant intended to severely beat the victim, and then moved and burned his body. *Fuqua v. State*, 938 So. 2d 277, 2006 Miss. App. LEXIS 164 (Miss. Ct. App.), cert. denied, 937 So. 2d 450, 2006 Miss. LEXIS 541 (Miss. 2006), cert. denied, 549 U.S. 1344, 127 S. Ct. 2037, 167 L. Ed. 2d 774, 2007 U.S. LEXIS 4043 (U.S. 2007).

Where defendant was charged with murder, the State's witnesses all testified that defendant approached the victim from behind and began shooting at him. The evidence was sufficient to enable a reasonable juror to reject defendant's self-defense theory and find him guilty of murder. *Amos v. State*, 911 So. 2d 644, 2005 Miss. App. LEXIS 652 (Miss. Ct. App. 2005).

In defendant's trial for capital murder, it was error for the trial court to have prevented defendant from using a State witness' recent grand larceny conviction for impeachment on the basis that said offense was not a "crimen falsi crime." Said conviction could have been used to impeach the witness under Miss. R. Evid. 609, since said crime was punishable by imprisonment in excess of one year, and because the probative value of that evidence was not substantially outweighed by the danger of unfair prejudice. On the other hand, because the evidence against defendant was overwhelming, and because said witness' testimony was cumulative to that of another witness, the trial court's error was harmless. *Hammons v. State*, 918 So. 2d 62, 2005 Miss. LEXIS 515 (Miss. 2005).

State did not fail to prove beyond a reasonable doubt defendant's involvement in the crime; the testimony was undisputed that the victim and defendant had encountered one another at the nightclub early in the night and that the victim shook hands with all of defendant's friends; evidence was presented that the exact type of spent shell casings found in the parking lot area of the nightclub where defendant fired the weapon, were found at defendant's residence. *Smith v. State*, 904 So. 2d 1217, 2004 Miss. App. LEXIS 1186 (Miss. Ct. App. 2004).

Defendant admitted that he took crystal methamphetamine earlier that evening, and he testified that the drug made him paranoid. Defendant hit the victim (who was trying to intervene), in the head with a "mag light" twice without saying a word to him, and after defendant and the victim's friend (who was the real object of defendant's wrath), argued about defendant's wife, defendant immediately pulled a loaded gun and shot the victim who was then disabled; such an act was a depraved heart act and defendant's conviction for first degree murder was supported by the evidence. *Conway v. State*, 915 So. 2d 521, 2005 Miss. App. LEXIS 979 (Miss. Ct. App. 2005), cert. denied, 927 So. 2d 750, 2006 Miss. LEXIS 217 (Miss. 2006).

In defendant's murder trial, the presence of fingerprints on the beer bottle and the "mag light" defendant used to attack the victim with, were irrelevant as to whether he acted in self-defense. Before trial, several witnesses had proffered testimony as to how the attack occurred, and there was no question that defendant struck the victim before shooting him moments later; thus, the circuit court judge did not abuse his discretion in denying defendant's motion for discovery and a continuance in that respect. *Conway v. State*, 915 So. 2d 521, 2005 Miss. App. LEXIS 979 (Miss. Ct. App. 2005), cert. denied, 927 So. 2d 750, 2006 Miss. LEXIS 217 (Miss. 2006).

Defendant's convictions for murder and for being a felon in the possession of a firearm were proper where he admitted during cross-examination that he had lied when he was interrogated by police. Further, the State produced witnesses who testified that defendant had a gun in his possession before the shooting and that defendant was angry and desired to get even with the victim. *Hayes v. State*, 907 So. 2d 385, 2005 Miss. App. LEXIS 114 (Miss. Ct. App.), cert. denied, 910 So. 2d 574, 2005 Miss. LEXIS 451 (Miss. 2005).

Even if the jury had believed defendant's story that the gun went off by accident, they could have found him responsible for his wife's murder using a deadly weapon in a manner likely to kill or seriously injure his victim. Hitting a person in the head with a loaded gun was

enough to indicate an intent to act in an extremely dangerous manner and the use of a pistol, a deadly weapon, in such a manner could have produced injury or even death without it's necessarily being fired; thus, defendant's motions for directed verdict and for a new trial were properly denied. *Marbra v. State*, 904 So. 2d 1169, 2004 Miss. App. LEXIS 1040 (Miss. Ct. App. 2004).

In defendant's murder trial, where the victim had been found in a burned out car, the primary investigator did not have to be an expert in analyzing desoxyribonucleic acid (DNA), to testify as to whether DNA would have been present on objects found at such a crime scene. Further, since the investigator was first questioned about DNA by the defense attorney during cross-examination (opening the door), the district attorney was entitled to elaborate on the matter in rebuttal. *Davis v. State*, 904 So. 2d 1212, 2004 Miss. App. LEXIS 1053 (Miss. Ct. App. 2004), cert. denied, 898 So. 2d 679, 2005 Miss. LEXIS 269 (Miss. 2005).

Denial of defendant's motion for directed verdict was proper as sufficient evidence existed to justify his murder conviction; an eyewitness saw the shooting, another witness heard defendant admit to committing the crime, three other witnesses saw defendant kick the victim after the shooting, and a doctor's testimony corroborated the eyewitness testimony that the victim had been shot at close range. *Hall v. State*, 892 So. 2d 261, 2004 Miss. App. LEXIS 907 (Miss. Ct. App. 2004), cert. denied, 892 So. 2d 824, 2005 Miss. LEXIS 61 (Miss. 2005).

Where defendant's wife testified that defendant killed her ex-boyfriend, set his house on fire, and threw the pistol into the Tennessee River, the evidence was sufficient to convict defendant of murder, arson, and possession of a firearm by a felon. The trial court properly denied defendant's motion for judgment notwithstanding the verdict. *Roland v. State*, 882 So. 2d 262, 2004 Miss. App. LEXIS 911 (Miss. Ct. App. 2004).

Defendant's capital murder convictions and death sentence were proper where the killings occurred within a few hours and were all part of the common scheme to rob

his ex-father-in-law and eliminate any witnesses, *Miss. Code Ann. § 97-3-19(2)(f)*; further, shooting his child fit the description of felony child abuse in that it was a strike to the child in such a manner as to cause serious bodily harm, *Miss. Code Ann. § 97-5-39*. *Brawner v. State*, 872 So. 2d 1, 2004 Miss. LEXIS 458 (Miss. 2004).

Where defendant was charged with capital murder, defendant testified at trial that defendant was not promised, threatened or coerced to give the videotaped statement, and also testified to giving the statement of defendant's own free will, even though defendant's father told defendant not to speak to anyone until a lawyer arrived. Based on the totality of the circumstances, defendant's constitutional rights were not violated because defendant's statement was given freely without coercion, and the fact that defendant was 18 years old at the time of the arrest had no bearing on defendant's ability to comprehend the questions and waive defendant's rights. *Jacobs v. State*, 870 So. 2d 1202, 2004 Miss. LEXIS 410 (Miss. 2004).

Evidence did not support murder defendant's proposed instructions on culpable negligence; defendant went to convenience store where former paramour worked, the two argued, former paramour locked herself in office, defendant became belligerent and former paramour refused to open door, defendant went to automobile and returned with shotgun, defendant shot door several times in attempt to enter room, defendant shot door knob off with first shot, and defendant then loaded and fired three more shots through door while former paramour screamed and frantically attempted to summon help. *Clark v. State*, 693 So. 2d 927, 1997 Miss. LEXIS 162 (Miss. 1997).

State established proper chain of custody of handgun, live rounds of ammunition, and spent cartridges, despite fact that there may have been inconsistent statements by officer concerning number of live and spent shells exchanged, where there was no inference that evidence that was admitted had been tampered with or substituted, there was testimony from officers and crime lab concerning chain of custody, and defense counsel never asked

that evidence be withdrawn or stricken from record. *Brown v. State*, 682 So. 2d 340, 1996 Miss. LEXIS 427 (Miss. 1996), cert. denied, 520 U.S. 1127, 117 S. Ct. 1271, 137 L. Ed. 2d 348, 1997 U.S. LEXIS 1821 (U.S. 1997).

Although suggested procedure to limit prejudicial effect of evidence of defendant's prior conviction would have been to allow defendant to stipulate to prior conviction and sentence when state sought capital murder conviction based on fact that defendant was under sentence of life imprisonment when he committed murder, introduction of evidence of prior conviction did not require reversal. *Taylor v. State*, 672 So. 2d 1246, 1996 Miss. LEXIS 193 (Miss.), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379, 1996 U.S. LEXIS 7020 (U.S. 1996).

There was no violation of the statute concerning spousal competency, § 13-1-5, or the evidence rule concerning the husband-wife privilege, Rule 504, Miss. R. Ev., where a defendant's wife told the police where to locate certain items which were subsequently used as physical evidence in the prosecution of the defendant for capital murder committed during the commission of a robbery, since the location of the items did not fall within any protected class of communication, and no out-of-court statements or trial testimony of the wife was admitted against the defendant. *Ladner v. State*, 584 So. 2d 743, 1991 Miss. LEXIS 434 (Miss.), cert. denied, 502 U.S. 1015, 112 S. Ct. 663, 116 L. Ed. 2d 754, 1991 U.S. LEXIS 7261 (U.S. 1991).

A state's witness was not incompetent to testify at a capital murder trial on the basis that he was a conceded perjurer where he had not been convicted of perjury. *White v. State*, 532 So. 2d 1207, 1988 Miss. LEXIS 365 (Miss. 1988).

In a murder prosecution, a State medical examiner should have been permitted to give his expert opinion that the decedent's cause of death was due to the accidental ingestion of rubbing alcohol since his opinion would have been helpful to the jury in determining that the decedent drank the rubbing alcohol of his own accord, that the defendant was not responsible for the decedent's actions, and that

she was not guilty of murder. *Kniep v. State*, 525 So. 2d 385, 1988 Miss. LEXIS 11 (Miss. 1988).

At trial of capital murder charge arising out of death of victim during the course of a burglary, defendant was not entitled to a directed verdict on the ground of the state's failure to prove that there was a "breaking", a necessary element of burglary, in view of witness' testimony that defendant had entered her house trailer through the front door over her protest after overpowering her by knocking her down as she tried to block his way and prevent his entry. *Smith v. State*, 499 So. 2d 750, 1986 Miss. LEXIS 2853 (Miss. 1986).

Defendant and counsel in death penalty case may not sit idly by and make no objection to questionable testimony, exacerbate matter still further by ignoring testimony in motion for new trial, and argue against admission of testimony for first time on appeal, especially where there has been change in defense counsel on appeal. *Johnson v. State*, 477 So. 2d 196, 1985 Miss. LEXIS 2072 (Miss. 1985), cert. denied, 476 U.S. 1109, 106 S. Ct. 1958, 90 L. Ed. 2d 366 (U.S. 1986).

If defense counsel wishes to withhold from jury in capital murder case fact that coindictor testifying for state has pleaded guilty and received lesser sentence, counsel has duty to object to testimony offered by state and failure to object waives any assignment of error on appeal. *Johnson v. State*, 477 So. 2d 196, 1985 Miss. LEXIS 2072 (Miss. 1985), cert. denied, 476 U.S. 1109, 106 S. Ct. 1958, 90 L. Ed. 2d 366 (U.S. 1986).

State's case in murder prosecution is unusually strong where supported by testimony of two disinterested eye witnesses. *Holmes v. State*, 475 So. 2d 434, 1985 Miss. LEXIS 2194 (Miss. 1985).

While prosecutor's remark that he did not expect state witness to lie while testifying is improper, trial judge may correct matter by instantly admonishing jury to disregard comment. *Gray v. State*, 472 So. 2d 409 (Miss. 1985), rev'd on other grounds, 481 U.S. 648, 107 S. Ct. 2045, 95 L. Ed. 2d 622 (1987), and see *Willie v. State*, 585 So. 2d 660, 1991 Miss. LEXIS 454 (Miss. 1991).

Prosecuting attorney's display to jury of deformed hands of murder victim, pickled in jar of formaldehyde, is so prejudicial as to deprive defendant of fair trial. *Hickson v. State*, 472 So. 2d 379, 1985 Miss. LEXIS 2132 (Miss. 1985).

Testimony which not only places murder defendant at scene of murder but involves defendant in procuring butcher knife with which assault on murdered police officer was initiated and which further shows participation of defendant in beating up officer so that officer's weapon could be taken from him and subsequently used to murder him is sufficient to support conviction for murder. *Fairley v. State*, 467 So. 2d 894, 1985 Miss. LEXIS 1902 (Miss.), cert. denied, 474 U.S. 855, 106 S. Ct. 160, 88 L. Ed. 2d 133, 1985 U.S. LEXIS 3725 (U.S. 1985).

Relevance of lead projectile removed from murder victim is adequately established by showing that projectile came out of metal jacketing which has been positively traced to murder weapon. *Fairley v. State*, 467 So. 2d 894, 1985 Miss. LEXIS 1902 (Miss.), cert. denied, 474 U.S. 855, 106 S. Ct. 160, 88 L. Ed. 2d 133, 1985 U.S. LEXIS 3725 (U.S. 1985).

In a prosecution for capital murder, the verdict in the guilt phase was within the law and the weight of the evidence, despite defendant's contention that the record did not show which of two co-felons wielded the blows causing the victim's death; capital murder is defined as an act done by any person engaged in committing robbery, and thus rendered unnecessary a factual determination of which co-felon caused the death. *Rigdon v. Russell Anaconda Aluminum Co.*, 381 So. 2d 983, 1980 Miss. LEXIS 2065 (Miss.), cert. denied, 449 U.S. 864, 101 S. Ct. 170, 66 L. Ed. 2d 81, 1980 U.S. LEXIS 3144 (U.S. 1980).

Although the prosecution is required to prove beyond a reasonable doubt the commission of the homicidal act, there is no obligation to prove a cause or reason that induced the accused to commit the act, if, without such proof, the evidence is sufficient to show that the act was done by him. *Freeman v. State*, 228 Miss. 687, 89 So. 2d 716, 1956 Miss. LEXIS 564 (Miss. 1956).

In prosecution for murder, state is required to carry burden of proving defendant guilty, by competent evidence, beyond reasonable doubt, and competency of evidence is solely the responsibility and power of judge. *Morroco v. State*, 204 Miss. 498, 37 So. 2d 751, 1948 Miss. LEXIS 384 (Miss. 1948).

The killing with a deadly weapon is assumed to be malicious, and therefore murder, and before the presumption disappears the facts of the killing must appear in the evidence and must change the character of the killing, either showing justification or necessity, before it is reduced from murder; if the facts relied upon to change such presumption are unreasonable and improbable, or if they are contradicted by physical facts and circumstances in evidence, then the jury may find a verdict either of murder or manslaughter according to the circumstances and facts in evidence. *Crockerham v. State*, 202 Miss. 25, 30 So. 2d 417, 1947 Miss. LEXIS 236 (Miss. 1947).

Accused charged with murder held not entitled to bail where facts disclosed that accused leveled gun and shot and mortally wounded father with whom he had been conversing while father's hands were held up, and no justification or explanation of killing was made. *Motley v. Smith*, 172 Miss. 148, 159 So. 553, 1935 Miss. LEXIS 122 (Miss. 1935).

37. Witnesses—defendant as only witness to offense.

Sufficiency of the evidence argument based on *Weathersby v. State*, 165 Miss. 207, 147 So. 481 (1933), was procedurally barred in a murder case because defendant never argued that his directed verdict should have been granted based on that case; procedural bar notwithstanding, the case was inapplicable because defendant's version of the evidence was contradicted by the physical facts. *McGuire v. State*, 170 So. 3d 570, 2014 Miss. App. LEXIS 578 (Miss. Ct. App. 2014).

In a murder case where defendant was the only eyewitness to the fatal shooting of his wife, because his statement to his mistress that his wife had committed suicide contradicted his assertion at trial

that he had shot her accidentally, he was not entitled to a judgment of acquittal under *Weathersby v. State*, 147 So. 481 (1933). *Parvin v. State*, 113 So. 3d 1243, 2013 Miss. LEXIS 145 (Miss. 2013).

Murder defendant was not entitled to protection of the *Weathersby* rule—under which his version of the killing, if reasonable, would be accepted as true—because his account of the killing was contradicted by a subsequent account of his, and forensic evidence concerning the trajectory of the bullet at least partially contradicted his account. *Williams v. State*, 973 So. 2d 1012, 2008 Miss. App. LEXIS 69 (Miss. Ct. App. 2008).

Weathersby rule, requiring that, if defendant is the only eyewitness, and if his version is reasonable, it must be accepted as true unless substantially contradicted in material particulars by credible witness or witnesses, or by physical facts or facts of common knowledge, was inapplicable in murder prosecution in which defendant claimed self-defense; defendant's version was contradicted by codefendant's testimony as to whether victim was drawing gun or merely had his hand on gun while in his pants, there was contradictory testimony from state's witness as to whether defendant was in front or back seat when he fired gun, and there was contradictory testimony from state's witness and defense witness as to whether victim was alone or with another person. *Tran v. State*, 681 So. 2d 514, 1996 Miss. LEXIS 432 (Miss. 1996).

Weathersby rule, requiring directed verdict for defendant under particular circumstances, does not apply to situations where defendant's version has been contradicted, or where defendants were not the only eyewitnesses. *Tran v. State*, 681 So. 2d 514, 1996 Miss. LEXIS 432 (Miss. 1996).

The *Weathersby* rule was not applicable in a murder prosecution where the defendant's contention that he was guilty only of an excusable homicide was refuted when the statutory definition of that offense was considered, and many physical facts and circumstances contradicted or failed to support his version of the incident. *Thibodeaux v. State*, 652 So. 2d 153, 1995 Miss. LEXIS 134 (Miss. 1995).

A murder defendant was not entitled to a *Weathersby* instruction where the defendant's argument that his version of the facts was not contradicted by any credible evidence was based on his discounting the testimony of an eyewitness because her trial testimony differed from the initial statement she gave police and because of her "substantial bias" as the former wife of the victim, the eyewitness' testimony clearly conflicted with the defendant's version of the facts, and statements made by the defendant after the homicide were not consistent with his testimony at trial. *Green v. State*, 631 So. 2d 167, 1994 Miss. LEXIS 13 (Miss. 1994).

The *Weathersby* Rule is applicable only in the context of whether or not the defendant killed with malice or intent, i.e., whether there is sufficient evidence to prove that the defendant killed with malice or intent where his or her version of the incident as the only eyewitness, says otherwise. Where the trial on a capital offense has reached the sentencing phase, the defendant's guilt has been found and *Weathersby* considerations are no longer applicable. *Minnick v. State*, 551 So. 2d 77, 1988 Miss. LEXIS 612 (Miss. 1988), rev'd, 498 U.S. 146, 111 S. Ct. 486, 112 L. Ed. 2d 489, 1990 U.S. LEXIS 6118 (U.S. 1990), overruled, *Willie v. State*, 585 So. 2d 660, 1991 Miss. LEXIS 454 (Miss. 1991).

Where the accused, following the slaying, gives conflicting versions of how the killing took place, or initially denies the act, the *Weathersby* rule does not apply. *Blanks v. State*, 547 So. 2d 29, 1989 Miss. LEXIS 322 (Miss. 1989).

Rule that where defendant or his witnesses are only eyewitnesses to homicide, their version of what occurred if reasonable and not substantially contradicted in material particulars by credible evidence, physical facts, or facts of common knowledge, does not apply in case where there were eyewitnesses who supported both state's theory and defendant's theory with conflicting testimony; also physical facts substantially contradicted defendant's version. *Fairman v. State*, 513 So. 2d 910, 1987 Miss. LEXIS 2791 (Miss. 1987).

Where accused in murder prosecution is only witness, and his version is reason-

able, and is not contradicted by credible witness, or by physical facts, or facts of common knowledge, such version must be accepted as true. *Simmons v. State*, 208 Miss. 586, 45 So. 2d 149, 1950 Miss. LEXIS 276 (Miss. 1950).

Where defendant or defendant's witnesses are the only eyewitnesses to homicide, their version, if reasonable, must be accepted as true, unless substantially contradicted in material particulars by credible witness or witnesses for state, or by physical facts or by facts of common knowledge. *Seals v. State*, 208 Miss. 236, 44 So. 2d 61, 1950 Miss. LEXIS 242 (Miss. 1950).

Where the defendant is the only surviving witness to a homicide his version of what occurred must, if reasonable, be accepted as true unless substantially contradicted in material particulars by the physical facts or by the facts of common knowledge, and it is not enough to contradict that version in mere matters of detail which do not go to the controlling substance. *Westbrook v. State*, 202 Miss. 426, 32 So. 2d 251, 1947 Miss. LEXIS 294 (Miss. 1947).

In prosecution for murder incident to defendant's alleged battering of infant, defendant's testimony as only witness to baby's death was materially contradicted by physical facts and circumstances in evidence, as indicated by photographs and medical testimony and, under *Weathersby v. State* (1933) 164 Miss 898, 147 So. 2d 481, matter became question for jury and court was not required to direct verdict for defendant. *Wetz v. State*, 503 So. 2d 803, 1987 Miss. LEXIS 2362 (Miss. 1987).

38. —Defendant's family members.

In his murder trial, defendant's defense was that he had accidentally shot his wife. Defendant's son's testimony regarding defendant and his wife's history of domestic violence contradicted defendant's defense by showing no accident and a common scheme of physical violence; as such, there was no error in admitting the son's testimony. *Marbra v. State*, 904 So. 2d 1169, 2004 Miss. App. LEXIS 1040 (Miss. Ct. App. 2004).

State is not prohibited from calling children of defendant in capital murder case

as witnesses; furthermore, state may be permitted to use leading questions in examining child who is primary witness against parent. *Cabello v. State*, 471 So. 2d 332, 1985 Miss. LEXIS 2059 (Miss. 1985), cert. denied, 476 U.S. 1164, 106 S. Ct. 2291, 90 L. Ed. 2d 732, 1986 U.S. LEXIS 1720 (U.S. 1986).

State may be permitted to call son of defendant in capital murder case as witness notwithstanding failure of state to comply with discovery rule requiring prior disclosure of witnesses expected to be called where defendant is given opportunity to interview newly discovered witness, defendant has made no request for continuance on basis of unfair surprise, and where, additionally, defense counsel has been notified that witness has previously testified against another person involved in crime, and in normal flow of legal events would be expected to testify against father as to fact arising out of same crime. *Cabello v. State*, 471 So. 2d 332, 1985 Miss. LEXIS 2059 (Miss. 1985), cert. denied, 476 U.S. 1164, 106 S. Ct. 2291, 90 L. Ed. 2d 732, 1986 U.S. LEXIS 1720 (U.S. 1986).

39. Admissibility; generally.

Although an investigator testified to what he learned about the shooting from his interview with the victim's children, they testified at trial regarding the shooting and death of their mother, and the statements did not prejudice the defense or violated defendant's right to a fair trial. *Blanden v. State*, 276 So. 3d 1204, 2018 Miss. App. LEXIS 450 (Miss. Ct. App. 2018).

Circuit court did not abuse its discretion in excluding the victim's toxicology results because defendant, throughout trial, maintained that defendant killed the victim in the heat of passion. Therefore, the victim's toxicology results were irrelevant. *Bradshaw v. State*, 138 So. 3d 199, 2013 Miss. App. LEXIS 858 (Miss. Ct. App. 2013).

In a case in which defendant appealed his sentence of death by lethal injection for violating Miss. Code Ann. § 97-3-19(2)(f), he argued unsuccessfully that when the prosecutor asked the victim's grandfather what he believed defendant's

punishment should be, that action violated his rights under the Sixth, Eighth, and Fourteenth Amendments of the U.S. Constitution and under Article 3, Sections 14, 25, and 28 of the Mississippi Constitution. It was highly unlikely that the grandfather's statement, when read as a whole and taken in context with all the evidence before the sentencing judge, was the reason the judge imposed the death penalty; in fact, the trial judge's sentencing order, in which he made findings of facts as to the various aggravating and mitigating factors, did not even mention the grandfather's testimony. *Wilson v. State*, 21 So. 3d 572, 2009 Miss. LEXIS 450 (Miss. 2009), cert. denied, 560 U.S. 909, 130 S. Ct. 3282, 176 L. Ed. 2d 1191, 2010 U.S. LEXIS 3966 (U.S. 2010).

In a case in which defendant appealed his sentence of death by lethal injection for violating Miss. Code Ann. § 97-3-19(2)(f), he argued unsuccessfully that the prosecution committed misconduct by improperly cross-examining a mitigation witness, thereby depriving him of a fundamentally fair sentencing. The witness, a former teacher, was questioned about defendant's drinking habits and illegal drug use, and, while defendant argued that there was no evidentiary basis for that line of questioning, the questioning was based on a mental health evaluation that was properly before the court; since the questioning of the witness was to test her knowledge of defendant's habits, there was no battle of opinions between the doctor who prepared the report and the witness such that the doctor had to be called as a witness to avoid a violation of the Confrontation Clause. *Wilson v. State*, 21 So. 3d 572, 2009 Miss. LEXIS 450 (Miss. 2009), cert. denied, 560 U.S. 909, 130 S. Ct. 3282, 176 L. Ed. 2d 1191, 2010 U.S. LEXIS 3966 (U.S. 2010).

In the sentencing portion of petitioner inmate's bifurcated trial for capital murder, pursuant to Miss. Code Ann. § 99-19-101(1), the inmate did not have the right to present evidence—specifically evidence that he did not commit rape—that was inconsistent with the verdict of the guilt-phase jury. Under Miss. Code Ann. § 97-3-19(2)(e), of which the inmate was convicted, the commission of the crime of rape

was an element of capital murder. *Holland v. Anderson*, 583 F.3d 267, 2009 U.S. App. LEXIS 20769 (5th Cir. Miss. 2009), cert. denied, 559 U.S. 1073, 130 S. Ct. 2100, 176 L. Ed. 2d 731, 2010 U.S. LEXIS 3429 (U.S. 2010).

In a case in which defendant was convicted on two counts of capital murder, in violation of Miss. Code Ann. § 97-3-19(2)(e), the trial court did not err when it excluded evidence that he attempted to commit suicide after he shot the two murder victims because evidence of his attempted suicide was not relevant. Defendant argued that his attempted suicide relevant to his state of mind and bolstered his argument that he acted in the heat of passion; while his attempted suicide could arguably be viewed as evidence that he regretted his actions, under the circumstances, it did not tend to make it more probable that he acted in the heat of passion when he killed the two victims. *Williams v. State*, 29 So. 3d 53, 2009 Miss. App. LEXIS 532 (Miss. Ct. App. 2009), cert. denied, 29 So. 3d 774, 2010 Miss. LEXIS 116 (Miss. 2010).

In defendant's trial for capital murder of defendant's five-year-old child, a recording of defendant's phone call made from the jail in which defendant admitted to killing the child was admissible because the recording was sufficiently authenticated under Miss. R. Evid. 901 when a detective testified that he recognized defendant's voice and defendant identified herself during the phone call. Even if there were any error on the trial court's part in admitting the tape, that error would be harmless because it was debatable whether the audio recording in question contained any more incriminating information than what defendant gave in her statement to police and on the stand at trial. *Broadhead v. State*, 981 So. 2d 320, 2007 Miss. App. LEXIS 809 (Miss. Ct. App. 2007), cert. denied, 981 So. 2d 298, 2008 Miss. LEXIS 210 (Miss. 2008).

Defendant murdered the victim, a relative, outside his home some four years after the subject drive-by shooting. Furthermore, neither defendant nor his wife knew the identity of the individuals involved in the drive-by, but both merely associated the incident with the victim;

although that information may shed light on why defendant owned the gun, it had little relevance for explaining why defendant approached the victim, who was not associated with the drive-by shooting, and the trial judge did not abuse his discretion in excluding it. *Smith v. State*, 911 So. 2d 541, 2004 Miss. App. LEXIS 1104 (Miss. Ct. App. 2004), cert. denied, 920 So. 2d 1008, 2005 Miss. LEXIS 634 (Miss. 2005).

In a murder trial, the investigating police officer testified that if a pistol had been fired when held by the handle, no gunpowder residue would have been present on one's hand, while if one fired a pistol and held it the way defendant claimed he had held the pistol, there would have been powder burns on one's person or clothing; while the officer was not designated as an expert, the latter testimony was admissible as it was based on his experience and perception as a law enforcement officer and he did not state his opinion of whether or not defendant held the pistol in the manner he claimed. *Marbra v. State*, 904 So. 2d 1169, 2004 Miss. App. LEXIS 1040 (Miss. Ct. App. 2004).

Defendant's capital murder trial was not a case where co-indictee was called as State's witness and defendant sought to use co-indictee's guilty plea to the lesser offense of manslaughter as a method of impeachment during cross-examination, nor was it a case where co-indictee was called by defendant and the State introduced co-indictee's plea as impeachment evidence. In either of those situations, the co-indictee's guilty plea would have been admissible as relevant evidence that might have affected the co-indictee's credibility in the eyes of the jury; however, defendant could not simply take advantage of co-indictee's plea to manslaughter and use this as substantive evidence that defendant had not committed capital murder. *Stewart v. State*, 881 So. 2d 919, 2004 Miss. App. LEXIS 556 (Miss. Ct. App. 2004).

Where defendant was tried for murdering his wife, having 2 out of more than the 20 witnesses who testified at trial briefly mention that the victim had bruises at various times prior to death did not violate Miss. R. Evid. 404(a)(1). Defendant

never objected to the substance of the testimony, but only asked that the State show a time frame in which the bruises had occurred; the State did so and the trial court properly found the testimony was relevant and admissible. *Ross v. State*, 883 So. 2d 1181, 2004 Miss. App. LEXIS 557 (Miss. Ct. App.), cert. denied, 883 So. 2d 1180, 2004 Miss. LEXIS 1274 (Miss. 2004).

Because the laboratory director testified to having trained the technician who performed the DNA testing, having examined the technician's proficiency, and having checked the protocols and checked and signed all DNA test results, the laboratory director's testimony as to the DNA test results was properly admitted; further, where the trial court found the laboratory followed the guidelines on the admissibility of DNA evidence as outlined in *Polk v. State*, there was no due process violation simply because the laboratory had not gained national certification at the time of the first set of tests. *Morris v. State*, 887 So. 2d 804, 2004 Miss. App. LEXIS 447 (Miss. Ct. App. 2004), cert. denied, 896 So. 2d 373, 2005 Miss. LEXIS 158 (Miss. 2005).

State clearly produced the two officers who were present when defendant was questioned and the confession was signed as caselaw mandated; thus, the trial judge did not find defendant's claim that defendant was forced to give a statement that defendant had committed murder of the child while in the commission of felonious abuse and/or battery of the child because the officers beat defendant. *Seeling v. State*, 844 So. 2d 439, 2003 Miss. LEXIS 119 (Miss. 2003).

Defense's objection in murder prosecution attacking authenticity of transcript of earlier prosecution of same murder, based on affidavit of defense team from that trial stating that transcript was hastily prepared and full of errors, was insufficient to raise genuine issue as to authenticity of transcript, especially where objection was not raised during trial, but only after state rested its case-in-chief. *De La Beckwith v. State*, 707 So. 2d 547, 1997 Miss. LEXIS 749 (Miss. 1997), cert. denied, 525 U.S. 880, 119 S. Ct. 187, 142 L. Ed. 2d 153, 1998 U.S. LEXIS 5751 (U.S. 1998).

Former testimony of unavailable witnesses read from transcript of earlier prosecution of same offense was admissible in murder prosecution under former testimony rule, despite alleged lack of meaningful opportunity to develop testimony of prosecution witnesses on cross-examination by use of impeachment material available to defense counsel in current trial; transcript of the former testimony of unavailable prosecution witnesses reflected extensive cross-examination. *De La Beckwith v. State*, 707 So. 2d 547, 1997 Miss. LEXIS 749 (Miss. 1997), cert. denied, 525 U.S. 880, 119 S. Ct. 187, 142 L. Ed. 2d 153, 1998 U.S. LEXIS 5751 (U.S. 1998).

In capital murder prosecution, fellow inmate of defendant was properly allowed to testify regarding inculpatory statements defendant made to him while both were in jail, where inmate testified that he received no favorable treatment in exchange for his testimony, there was no indication that inmate's testimony was inherently unreliable, and defendant did not cross-examine inmate. *Brown v. State*, 682 So. 2d 340, 1996 Miss. LEXIS 427 (Miss. 1996), cert. denied, 520 U.S. 1127, 117 S. Ct. 1271, 137 L. Ed. 2d 348, 1997 U.S. LEXIS 1821 (U.S. 1997).

Trial court did not abuse its discretion in permitting testimony of witness who had violated invoked rule of sequestration; witness heard two or three minutes of trial testimony, witness did not deliberately attempt to circumvent rule, and trial court conducted investigation and permitted defendant "full bore" cross-examination regarding technical violation by witness, but defense counsel chose not to cross-examine witness at all. *Brown v. State*, 682 So. 2d 340, 1996 Miss. LEXIS 427 (Miss. 1996), cert. denied, 520 U.S. 1127, 117 S. Ct. 1271, 137 L. Ed. 2d 348, 1997 U.S. LEXIS 1821 (U.S. 1997).

Handgun was properly admitted into evidence in capital murder prosecution where accomplice testified that handgun was same as used during robbery, and although not definitive on issue of whether handgun in question fired projectiles that killed victim, testimony of ballistics expert linked handgun to victim's injuries. *Brown v. State*, 682 So. 2d 340,

1996 Miss. LEXIS 427 (Miss. 1996), cert. denied, 520 U.S. 1127, 117 S. Ct. 1271, 137 L. Ed. 2d 348, 1997 U.S. LEXIS 1821 (U.S. 1997).

Letters written by defendant to accomplice after he had asserted his constitutional rights to silence and to counsel were properly admitted into evidence in capital murder prosecution; accomplice did not produce letters in attempt to get favorable treatment from state given that state was not aware of their existence until after accomplice had pled guilty, there was no evidence that accomplice was acting as agent of state when letters were received, and there was no evidence that accomplice deliberately attempted to elicit incriminating statements from defendant. *Brown v. State*, 682 So. 2d 340, 1996 Miss. LEXIS 427 (Miss. 1996), cert. denied, 520 U.S. 1127, 117 S. Ct. 1271, 137 L. Ed. 2d 348, 1997 U.S. LEXIS 1821 (U.S. 1997).

At defendant's trial for murdering her husband, trial court acted within its discretion in admitting gun that had been retrieved from attic in home where victim was shot, even though gun could not be positively identified as gun that caused victim's death; gun could not be excluded as cause of death, and defendant had dominion and control over gun when she placed it in attic and thereafter requested that another individual retrieve gun and bring it to defendant. *Rhodes v. State*, 676 So. 2d 275, 1996 Miss. LEXIS 318 (Miss. 1996).

Evidence that defendant purchased life insurance on her husband before his death was relevant to state's theory that defendant intended to murder her husband and to profit from it by setting him up for an accident and then proceeded to kill him and make it appear to be a suicide when her plan failed; suicide exclusionary clause in policy did not render evidence irrelevant. *Rhodes v. State*, 676 So. 2d 275, 1996 Miss. LEXIS 318 (Miss. 1996).

A trial court in a murder prosecution correctly disallowed the viewing of a videotape of the defendant being interviewed while hypnotized where the defendant was present and able to testify before the jury. *Thibodeaux v. State*, 652 So. 2d 153, 1995 Miss. LEXIS 134 (Miss. 1995).

A trial court in a murder prosecution correctly disallowed the viewing of a vid-

eotape of the defendant being interviewed while under the influence of sodium amytal where the defendant was present and able to testify before the jury. *Thibodeaux v. State*, 652 So. 2d 153, 1995 Miss. LEXIS 134 (Miss. 1995).

The trial judge in a capital murder prosecution did not err by excluding laboratory results showing that semen found in the victim's body did not come from the defendant where the judge reasoned that the defendant was not charged with rape and that the result of the test would tend to confuse or mislead the jury, the defendant's confession was corroborated by extensive physical evidence, and the fact that the semen found in the victim's body did not come from the defendant was explainable in several ways other than the supposition that he did not rape her as he confessed to doing. *Thorson v. State*, 653 So. 2d 876, 1994 Miss. LEXIS 600 (Miss. 1994).

A murder victim's verbal identification of the defendant, which was made 5 or 6 hours before the victim died, was admissible under the dying declaration exception to the hearsay rule, even though there was nothing in the record which directly established the victim's consciousness of his impending death, since the fact that the victim was 76 years old and was shot in the heart indicated that his statements were made "while believing that his death was imminent." *Ellis v. State*, 558 So. 2d 826, 1990 Miss. LEXIS 58 (Miss. 1990).

It was proper for state to introduce pliers because there was competent evidence to show that blow by pliers could have caused type of injury pathologist observed on victim's head, despite claims by defendant that pliers were in his car, not on his person, and there was no proof that pliers were weapon which struck victim. *Stokes v. State*, 518 So. 2d 1224, 1988 Miss. LEXIS 36 (Miss. 1988).

Conversations recorded by undercover agent for State with defendant were admissible, despite contention that because tapes were subject to erasure or deletion and were partially inaudible they should not have been admitted into evidence. *Williamson v. State*, 512 So. 2d 868, 1987 Miss. LEXIS 2683 (Miss. 1987), *Walton v.*

State, 678 So. 2d 645, 1996 Miss. LEXIS 192 (Miss. 1996).

Trial judge did not abuse his discretion by permitting the introduction into evidence at a murder trial of a tape recording, along with a transcript of same, of an out-of-court statement made by the defendant with reference to the shooting, where, prior to the jury's hearing the tape, the court offered a cautionary instruction advising the jurors that the tape was primary evidence of what was or was not recorded and that the transcript was being furnished for their convenience in following the tape. *Dye v. State*, 498 So. 2d 343, 1986 Miss. LEXIS 2776 (Miss. 1986).

Testimony as to the clothes defendant was wearing on a certain date was admissible in murder trial, not as proof of a crime distinct from the one was charged, but to identify defendant. *Graves v. State*, 492 So. 2d 562, 1986 Miss. LEXIS 2514 (Miss. 1986).

Trial judge's finding that capital murder defendant's confession was voluntary was neither manifestly wrong nor against the overwhelming weight of the evidence where, at the hearing outside the presence of the jury, the defendant stated that he had signed confession to help his brother and father, who were implicated in the crime, and testified as to threats made by police officer, but the threats were denied by the officer alleged to have made them. *Cabello v. State*, 490 So. 2d 852, 1986 Miss. LEXIS 2479 (Miss. 1986).

A portion of defendant's statement confessing to the burglary of victim's trailer on the day previous to the murder was competent evidence since it was part of the circumstantial web implicating defendant. *Trunell v. State*, 487 So. 2d 820, 1986 Miss. LEXIS 2444 (Miss. 1986).

In capital murder prosecution of black defendant based on murder of white highway patrolman, court may deny defense permission to cross-examine state witness as to fact that patrolman had previously killed black man where defense makes no attempt to demonstrate relevancy of such killing, either before or during trial. *Johnson v. State*, 477 So. 2d 196, 1985 Miss. LEXIS 2072 (Miss. 1985), cert. denied, 476 U.S. 1109, 106 S. Ct. 1958, 90 L. Ed. 2d 366 (U.S. 1986).

Prior inconsistent statements of defense witness are inadmissible in capital murder prosecution where witness freely admits inconsistencies and asserts falsity of statements; error in admitting statements is compounded when district attorney argues them as substantive evidence of guilt during closing arguments. *Fuselier v. State*, 468 So. 2d 45, 1985 Miss. LEXIS 2035 (Miss. 1985).

In a prosecution against accused for the death of his brother through gunshot wounds, where a doctor had told deceased about 40 minutes before he died that he was critically ill, his chances were narrowing, he felt deceased's family should be notified, and then asked the deceased who had shot him, whereupon deceased replied that it was the accused, but that the shooting was accidental, the statement of the deceased was admissible as a dying declaration. *Powell v. State*, 238 Miss. 283, 118 So. 2d 304, 1960 Miss. LEXIS 403 (Miss. 1960).

In a prosecution of a husband for the killing of his wife, evidence that during an incident in a cafe some 30 or 40 minutes prior to the homicide, the accused had exhibited a knife similar in appearance to that found near the body of the deceased was competent as bearing upon the question as to who had the knife at the time of the fatal difficulty. *Murphy v. State*, 232 Miss. 424, 99 So. 2d 595, 1958 Miss. LEXIS 289 (Miss. 1958).

Statement of defendant that he hoped S would kill L held admissible as lending color to, and explaining, defendant's acts shortly thereafter borrowing gun and delivering it to S. *Fleming v. State*, 142 Miss. 872, 108 So. 143, 1926 Miss. LEXIS 134 (Miss. 1926).

Evidence of the intoxication of the accused shortly before the killing is admissible. *Huddleston v. State*, 134 Miss. 382, 98 So. 839, 1924 Miss. LEXIS 265 (Miss. 1924).

Evidence that several hours after killing, deceased's rifle was on safety, was admissible where no change in body shown. *Rester v. State*, 110 Miss. 689, 70 So. 881, 1916 Miss. LEXIS 191 (Miss. 1916), overruled, *Calicoat v. State*, 131 Miss. 169, 95 So. 318, 1922 Miss. LEXIS 296 (Miss. 1922).

Evidence that deceased was trying to procure pistol with which to shoot accused is improperly excluded. *Lucas v. State*, 109 Miss. 82, 67 So. 851, 1915 Miss. LEXIS 117 (Miss. 1915).

40. —Statement against interest.

In a case where defendant was convicted of the capital murder of a county sheriff, the trial court erred in excluding the statement of the other accused person that he was driving the truck that struck and killed the county sheriff because, had the jury heard the other accused person's statements against his interest and believed them, defendant could not have been found guilty of capital murder. *Williams v. State*, 174 So. 3d 275, 2014 Miss. App. LEXIS 694 (Miss. Ct. App. 2014), *aff'd*, 234 So. 3d 1278, 2017 Miss. LEXIS 388 (Miss. 2017).

In a case where defendant was convicted of the capital murder of a county sheriff, the trial court erred in excluding the statement of the other accused person that he was driving the truck that struck and killed the county sheriff because he was unavailable as a witness as he invoked his Fifth Amendment right not to testify; his statement to law enforcement was contrary to his own interest as no person would have admitted to the murder had they not actually killed someone; the statement tended to subject him to criminal liability for a capital-murder conviction; and there was corroborating evidence to indicate the trustworthiness of the statement as a witness put the other accused person behind the wheel of the truck, as did DNA evidence. *Williams v. State*, 174 So. 3d 275, 2014 Miss. App. LEXIS 694 (Miss. Ct. App. 2014), *aff'd*, 234 So. 3d 1278, 2017 Miss. LEXIS 388 (Miss. 2017).

41. —Res gestae; continuing acts.

Evidence as to whether defendant pulled wallet from victims pocket was admissible in murder trial because it was so closely related to the killing as to form a single transaction or closely related series of transactions. *Robinson v. State*, 497 So. 2d 440, 1986 Miss. LEXIS 2731 (Miss. 1986).

Telephone conversation between murder victim and third party in which victim

identifies killer and in which third party hears voice in background does not constitute direct evidence, for purposes of determining whether murder prosecution is based solely on circumstantial evidence, where third party is unable to identify voice in background; however, testimony of third party as to content of conversation is admissible under *res gestae* exception. *Flanagin v. State*, 473 So. 2d 482, 1985 Miss. LEXIS 2168 (Miss. 1985).

Where all of the matters complained of were admitted as part of the *res gestae* and the facts surrounding the homicide could not have been properly related without bringing the matters out, it was not error to admit evidence showing that the bullet that killed deceased also struck and injured the one-year-old baby deceased was holding at the time she was shot, that the defendant was engaged in selling liquor, or that he had been apparently living in adultery with the deceased. *Turner v. State*, 244 Miss. 206, 141 So. 2d 249, 1962 Miss. LEXIS 441 (Miss. 1962).

Evidence was held admissible in prosecution for murder committed for purpose of robbery, that within 5 minutes after the killing, the defendants, who were interrupted by a passing truck, returned to the scene and robbed the body, since the killing and robbery were continuing acts, and the robbery was supporting proof of the previously formed intention to rob by use of prepared weapons. *Shimniok v. State*, 197 Miss. 179, 19 So. 2d 760, 1944 Miss. LEXIS 289 (Miss. 1944).

42. —Admissions; confessions.

Defendant's confession was admitted in a murder case under Miss. Code Ann. § 97-3-19(1)(a) because there were no threats, promises, or inducements, despite the fact that defendant was a long-time acquaintance of the deputy taking the statement. Because defendant was a bail bondsman, he understood criminal procedure, knew of his right to remain silent, and knew to ask for an attorney. *Green v. State*, 982 So. 2d 471, 2008 Miss. App. LEXIS 62 (Miss. Ct. App. 2008).

State presented ample evidence that the statement made by defendant at booking, and before he was read his Miranda rights, was voluntary and was not in re-

sponse to express questioning or its functional equivalent. Defendant was simply present in the booking room when two officers were having a discussion about paperwork in order to book him, and defendant voluntarily responded to a question that was posed to one officer by the other officer, of how many charges of homicide were being filed against defendant; defendant independently volunteered the information that he had only shot one person, without compulsion or coercion. *Hammons v. State*, 918 So. 2d 62, 2005 Miss. LEXIS 515 (Miss. 2005).

In a capital murder case, defendant claimed that defendant's statements should have been excluded because defendant was denied the right to an initial appearance within 48 hours of arrest; however, the record showed defendant was given Miranda warnings, signed two waiver forms, and freely, voluntarily and intelligently gave the statements. The State's failure to provide an initial appearance within the time allowed was not, of itself, a reason to suppress defendant's confession. *Stewart v. State*, 881 So. 2d 919, 2004 Miss. App. LEXIS 556 (Miss. Ct. App. 2004).

State clearly produced the two officers who were present when defendant was questioned and the confession was signed as caselaw mandated; thus, the trial judge did not find defendant's claim that defendant's claim credible that defendant was forced to give a statement that defendant committed murder of the child while in the commission of felonious abuse and/or battery of the child because the officers beat defendant. *Seeling v. State*, 844 So. 2d 439, 2003 Miss. LEXIS 119 (Miss. 2003).

Finding that murder was committed during course of robbery, meeting statutory definition of capital murder, was supported by defendant's own statements to police and to newsman and by fact that he took victims' purses, jewelry, and car. *Wilcher v. State*, 697 So. 2d 1087, 1997 Miss. LEXIS 100 (Miss. 1997), cert. denied, 522 U.S. 1053, 118 S. Ct. 705, 139 L. Ed. 2d 647, 1998 U.S. LEXIS 149 (U.S. 1998).

State has burden of proving all facts prerequisite to admissibility of defen-

dant's confession beyond a reasonable doubt. *Blue v. State*, 674 So. 2d 1184, 1996 Miss. LEXIS 304 (Miss.), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517, 1996 U.S. LEXIS 7523 (U.S. 1996).

A murder defendant's confession was not the product of an illegal arrest, since conflicting statements regarding the events surrounding the killing related by the defendant to law enforcement officers provided probable cause for his arrest; moreover, the defendant's confession was not the product of the arrest, since he gave his confession only after incriminating physical evidence was found by the officers, and the discovery of the physical evidence was the result of separate questioning of another witness and was therefore unconnected with the arrest. *Thorson v. State*, 653 So. 2d 876, 1994 Miss. LEXIS 600 (Miss. 1994).

The delay from the time of a defendant's arrest until he was taken before a judicial officer did not violate Rule 1.04, Miss. Unif. Crim. R. Cir. Ct. Prac. and the 4th Amendment to the United States Constitution where his initial hearing was held within 48 hours of the time he was taken into custody for questioning, and there was no indication that the officers were purposely holding him in custody to gather sufficient evidence to justify his arrest; thus, his confession was not a product of any delay in taking him before a magistrate and was therefore admissible. *Thorson v. State*, 653 So. 2d 876, 1994 Miss. LEXIS 600 (Miss. 1994).

A defendant's confession was freely and voluntarily given, and was therefore admissible into evidence in his murder trial, where law enforcement officers testified that he was given all the Miranda warnings prior to giving his confession and that he did not ask for an attorney at any time, he was familiar with his constitutional rights as evidenced by his refusal to sign a waiver form and the fact that he had previously been convicted of a felony, and his videotaped confession did not suggest any coercion. *Thorson v. State*, 653 So. 2d 876, 1994 Miss. LEXIS 600 (Miss. 1994).

A murder defendant's initial refusal to sign a waiver of rights form did not constitute a demand for an attorney where he was not questioned again until more than

32 hours had lapsed when he was presented with incriminating physical evidence connecting him to the crime, and he was again advised of his rights before further questioning; thus, admission of his confession into evidence did not violate his constitutional right against compulsory self-incrimination or right to an attorney. *Thorson v. State*, 653 So. 2d 876, 1994 Miss. LEXIS 600 (Miss. 1994).

In order to establish the admissibility of a murder defendant's confession, the State was not required to offer as witnesses law enforcement officers who allegedly yelled at the defendant and were abusive when he was initially questioned, since the alleged statements made by the officers had no bearing on the defendant's confession which was made 2 days later after he was given the Miranda warnings. *Thorson v. State*, 653 So. 2d 876, 1994 Miss. LEXIS 600 (Miss. 1994).

Incriminating statements made by a murder defendant were properly admitted into evidence where the defendant was not under arrest at the time of the questioning, the law enforcement officers were merely seeking information about a missing person, the defendant voluntarily went with the officers to the sheriff's office, he was free to leave, and he was taken home by an officer when the questioning was over. *Thorson v. State*, 653 So. 2d 876, 1994 Miss. LEXIS 600 (Miss. 1994).

The trial court in a capital murder prosecution erred in refusing to suppress the defendant's confession as involuntary where a former teacher and retired minister was called in by the sheriff to meet privately with the defendant, the minister communicated to the defendant, at the sheriff's direction, the notion that there might be a chance for mercy if he volunteered to cooperate, the minister and the defendant discussed the death penalty and the religious ramifications of the defendant's action, a sheriff's deputy told the defendant that he thought it would look better if the defendant confessed, and an investigator who conducted the interrogation with the sheriff admitted that the defendant may have been given the impression by the investigator and the sheriff that cooperation could be of some benefit. *Abram v. State*, 606 So. 2d 1015, 1992

Miss. LEXIS 448 (Miss. 1992), overruled in part, *Foster v. State*, 961 So. 2d 670, 2007 Miss. LEXIS 315 (Miss. 2007), overruled in part, *Holly v. Mississippi*, 2011 U.S. App. LEXIS 24853 (5th Cir. Miss. Dec. 13, 2011).

A trial court erred in admitting accomplices' statements into evidence in a murder prosecution under Rule 106, Miss. R. Ev., which contemplates the introduction of a writing by a party and contemporaneous introduction of other parts of the statement to prevent the misleading of the jury, where the defense counsel was merely cross-examining the police officer who investigated the accomplices and he in no way introduced parts of these statements into evidence. Additionally, there were serious confrontation problems since the jury was unable to observe the demeanor of the accomplices when they made the unsworn statements and the statements were taken under the coercive atmosphere of police interrogation. *Welch v. State*, 566 So. 2d 680, 1990 Miss. LEXIS 152 (Miss. 1990).

Court did not err in admitting into evidence statement made by defendant, after getting in patrol car, telling officers where gun was and that he "didn't mean to do it, that it was only an accident," where officers gave defendant Miranda warnings prior to statement. *Tolbert v. State*, 511 So. 2d 1368, 1987 Miss. LEXIS 2681 (Miss. 1987), cert. denied, 484 U.S. 1016, 108 S. Ct. 723, 98 L. Ed. 2d 672, 1988 U.S. LEXIS 259 (U.S. 1988).

Statement of defendant that "I shot her" was admissible into evidence, falling within exclusion to Miranda which recognizes that where interrogation is part of "general on-the-scene investigation" Miranda warnings are not prerequisite to admissibility of statements. *Tolbert v. State*, 511 So. 2d 1368, 1987 Miss. LEXIS 2681 (Miss. 1987), cert. denied, 484 U.S. 1016, 108 S. Ct. 723, 98 L. Ed. 2d 672, 1988 U.S. LEXIS 259 (U.S. 1988).

Admission of photograph of victim's body in evidence at murder less-than-capital trial was not error since, even though the homicide was not denied, or contradicted, the photograph had probative value in corroborating testimony of police officer as to the position and condi-

tion of the body. *Hunter v. State*, 489 So. 2d 1086, 1986 Miss. LEXIS 2484 (Miss. 1986).

Notwithstanding defendant's claim that his request to consult an attorney had been refused, there was no error in admitting his written statement into evidence where the defendant, as well as 2 police officers attending the interrogation when the statement was given, testified that it was freely and voluntarily given, and the officers testified that there was strict adherence to the Miranda warnings. *Trunell v. State*, 487 So. 2d 820, 1986 Miss. LEXIS 2444 (Miss. 1986).

Fact that prosecuting attorney has threatened alleged accomplice of capital murder defendant with additional 65 years incarceration and possibility of death sentence if accomplice refuses to testify for state and instead testifies for defendant is admissible on issue of credibility of accomplice's testimony against defendant. *Fuselier v. State*, 468 So. 2d 45, 1985 Miss. LEXIS 2035 (Miss. 1985).

In a prosecution for capital murder based on a charge of committing murder while engaged in armed robbery, the trial court properly admitted into evidence the defendant's alleged confession, even though the corpus delicti of robbery had not been proven, where the corpus delicti of murder had been sufficiently proven, and therefore the robbery could then be proved entirely from the confession to make out a case of capital murder. *Gentry v. State*, 416 So. 2d 650, 1982 Miss. LEXIS 2031 (Miss. 1982).

Where accused, after having been arrested but before being formally charged with murder, voluntarily testified before a coroner's jury that he had accidentally killed his wife while shooting in self-defense at his father-in-law, and none of this testimony was admitted in the trial on the merits, accused's constitutional privilege not to incriminate himself was not violated. *Dykes v. State*, 232 Miss. 379, 99 So. 2d 602, 1957 Miss. LEXIS 484 (Miss. 1957).

The court did not err in admitting in evidence defendant's confession, which was fully corroborated by the state's evidence and was consistent with the physical facts and circumstances, where it ap-

peared that the confession was made to two members of the highway patrol on the day of defendant's arrest, and upon a preliminary inquiry into the admissibility of the confession, there was testimony by the highway patrolmen that the defendant was advised of his rights, and that the confession was not induced by fear, threat, or promise of reward; neither was the confession inadmissible for the reason that the defendant was unlawfully detained. *Thompson v. State*, 231 Miss. 624, 97 So. 2d 227, 1957 Miss. LEXIS 546 (Miss. 1957).

The trial court did not err in admitting accused's confession in a trial of a homicide prosecution where it appeared that the confession was voluntarily given without threats, promises or hope of reward, and the statement, which was written by the sheriff exactly in accordance with what the accused told him, was read to the accused before it was signed "his mark X" by a colored cook in the jail. *McCarty v. State*, 230 Miss. 330, 92 So. 2d 853, 1957 Miss. LEXIS 375 (Miss. 1957).

Since the state proved the corpus delicti, the accused's confessions and admissions were properly admitted in evidence. *Jackson v. State*, 228 Miss. 604, 89 So. 2d 626, 1956 Miss. LEXIS 552 (Miss. 1956).

Before admission in evidence of alleged confession of one on trial on charge of murder, court must decide on preliminary investigation whether there was a confession, and if so, whether it was free and voluntary. *Morocco v. State*, 204 Miss. 498, 37 So. 2d 751, 1948 Miss. LEXIS 384 (Miss. 1948).

If an alleged confessor, who is on trial for murder, did not sufficiently understand language of confession, or if person to whom confession was allegedly made did not accurately and certainly understand what confessor said, there was no lawful confession, and court should hear evidence of defendant and his witnesses on this issue on preliminary hearing. *Morocco v. State*, 204 Miss. 498, 37 So. 2d 751, 1948 Miss. LEXIS 384 (Miss. 1948).

43. —Motive; propensity for violence.

Evidence regarding victim's involvement as state's field secretary of national civil rights organization, his efforts to in-

tegrate schools, and his quest for equal rights for African American citizens was admissible in murder prosecution to show motive consistent with state's theory that murder was racially motivated. *De La Beckwith v. State*, 707 So. 2d 547, 1997 Miss. LEXIS 749 (Miss. 1997), cert. denied, 525 U.S. 880, 119 S. Ct. 187, 142 L. Ed. 2d 153, 1998 U.S. LEXIS 5751 (U.S. 1998).

In a murder prosecution involving a victim who died of smoke inhalation after receiving a blow to the head, the admission of facts concerning the murder of another victim who died from shotgun wounds did not violate the defendant's rights under the Eighth Amendment to the federal constitution or the due process clauses of the Mississippi Constitution and the federal constitution, where the revelation that a second person was missing was necessary in putting together the pieces of the case, evidence that the investigating officers discovered 2 bodies in the trunk of the victim's car was unavoidable, and the testimony of the other victim's mother was necessary in that she was the only witness who could testify to seeing the defendant near the victim's house, she was able to discuss what the victim was doing on the day he was killed, and she was able to give some important time frames. *Mackbee v. State*, 575 So. 2d 16, 1990 Miss. LEXIS 831 (Miss. 1990).

Trial court was not in error in allowing state to introduce evidence of murder male companion of defendant's ex-wife in trial for murder of ex-wife, under exception for admission of other crimes, motive, intent, preparation, and plan; evidence of second crime, when so closely related to the one being tried as to form one event, is admissible when necessary to give plausibility to testimony presented to jury. *Shaw v. State*, 513 So. 2d 916, 1987 Miss. LEXIS 2816 (Miss. 1987).

Circuit Court did not err in refusing testimony that victim had reputation for violence and for carrying weapon where all testimony heard prior to pro-offer of such testimony indicated that defendant was aggressor, and under Mississippi law at time of trial, character or reputation of deceased was not admissible in murder case unless there was doubt as to who was

aggressor. *Tolbert v. State*, 511 So. 2d 1368, 1987 Miss. LEXIS 2681 (Miss. 1987), cert. denied, 484 U.S. 1016, 108 S. Ct. 723, 98 L. Ed. 2d 672, 1988 U.S. LEXIS 259 (U.S. 1988).

Trial court erred in ruling that reputation testimony must originate in the community where victim resided, and in excluding testimony of witness as to victim's reputation, in the trucking industry, for violence, but the error was harmless in view of abundance of evidence as to victim's violent nature already admitted. *Mullins v. State*, 493 So. 2d 971, 1986 Miss. LEXIS 2591 (Miss. 1986).

Evidence that murder defendant may have been high on marijuana is admissible as tending to show that defendant was engaged in act eminently dangerous and evincing depraved heart; evidence of use of marijuana at time prior to date on which murder occurred is admissible if defendant has raised defense of insanity. *Johnson v. State*, 475 So. 2d 1136, 1985 Miss. LEXIS 2238 (Miss. 1985).

In capital murder case arising from killing of deputy sheriff while deputy was attempting to serve arrest warrant based on simple assault charge filed by defendant's spouse, testimony of spouse and of judge who issued warrant is admissible to shed light on motive for commission of crime and further to tell jury full story giving rise to deputy's death. *Lancaster v. State*, 472 So. 2d 363, 1985 Miss. LEXIS 2115 (Miss. 1985).

Evidence of marital discord occurring only days before wife is shot by husband is admissible in murder prosecution of husband as tending to prove motive, malice, premeditation and criminal intent. *Fuller v. State*, 468 So. 2d 68, 1985 Miss. LEXIS 2055 (Miss. 1985).

Evidence that defendant on trial for murder of wife had, 10 months prior to death of wife, unsuccessfully solicited someone to kill her, is not too remote to be admissible. *Hammond v. State*, 465 So. 2d 1031, 1985 Miss. LEXIS 1946 (Miss. 1985).

Evidence of killings committed in Georgia is inadmissible in guilt phase of capital murder prosecution for killing committed in Mississippi even though defendant was fleeing Georgia authorities and used

gun and handcuffs taken from Georgia victim in Mississippi killing. *West v. State*, 463 So. 2d 1048, 1985 Miss. LEXIS 1869 (Miss. 1985).

In prosecution for murder, evidence of other crimes is incompetent except to show identity, guilty knowledge, intent or motive, or where offense charged is so interwoven with other offenses that they cannot be separated. *May v. State*, 205 Miss. 295, 38 So. 2d 726, 1949 Miss. LEXIS 432 (Miss. 1949).

Evidence of events forming continuous and inseparable sequence culminating in murder is competent in murder prosecution to reveal motive and establish malice or deliberation in the homicide. *May v. State*, 205 Miss. 295, 38 So. 2d 726, 1949 Miss. LEXIS 432 (Miss. 1949).

Error, in murder trial, to admit evidence of various specific acts of violence committed by deceased at many different times and places as well as his general reputation for violence. *McCoy v. State*, 91 Miss. 257, 44 So. 814, 1907 Miss. LEXIS 147 (Miss. 1907).

44. —Photographs, other prejudicial evidence.

Trial court did not err in allowing the admission of crime scene photographs to show the condition of the victim's body where the victim had been dead for approximately two months before her body was discovered and the condition of the body was relevant to determining the date of death. *Smith v. State*, 835 So. 2d 927, 2002 Miss. LEXIS 298 (Miss. 2002).

Admission of photographs of victim's body in its casket taken at his funeral, introduced during testimony of victim's widow, was not unduly prejudicial to defendant in murder prosecution; widow's testimony, used in conjunction with photographs, established circumstances of killing and corpus delicti. *De La Beckwith v. State*, 707 So. 2d 547, 1997 Miss. LEXIS 749 (Miss. 1997), cert. denied, 525 U.S. 880, 119 S. Ct. 187, 142 L. Ed. 2d 153, 1998 U.S. LEXIS 5751 (U.S. 1998).

Admissibility of photographs rests within sound discretion of trial court which will be upheld unless there has been abuse of discretion. *Brown v. State*, 682 So. 2d 340, 1996 Miss. LEXIS 427

(Miss. 1996), cert. denied, 520 U.S. 1127, 117 S. Ct. 1271, 137 L. Ed. 2d 348, 1997 U.S. LEXIS 1821 (U.S. 1997).

In determining admissibility of photographs, court must keep in mind rule governing exclusion of relevant evidence and must consider whether proof is absolute or in doubt as to identity of guilty party and whether photographs are necessary evidence or simply ploy on part of prosecutor to arouse passion and prejudice of the jury; same standard is applicable in determining admissibility of photographs are applicable to videotapes. *Blue v. State*, 674 So. 2d 1184, 1996 Miss. LEXIS 304 (Miss.), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517, 1996 U.S. LEXIS 7523 (U.S. 1996).

Videotape of crime scene was not cumulative so as to be inadmissible where the only visual evidence submitted prior to the videotape was photograph of victim's face for the purpose of identification and where identity of victim's murderer was still in question prior to the admission of the videotape. *Blue v. State*, 674 So. 2d 1184, 1996 Miss. LEXIS 304 (Miss.), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517, 1996 U.S. LEXIS 7523 (U.S. 1996).

Videotape which depicted position of victim's body at the crime scene corroborated aspects of defendant's confession and aided prosecution in identifying him as the guilty party and was necessary to help jury to visualize bloody crime scene when hearing testimony regarding the injuries which the victim received, how and where she received them, and the force necessary to inflict her injuries. *Blue v. State*, 674 So. 2d 1184, 1996 Miss. LEXIS 304 (Miss.), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517, 1996 U.S. LEXIS 7523 (U.S. 1996).

Autopsy photographs may be admitted during sentencing phase of capital murder prosecution on issue of whether crime was especially heinous, atrocious or cruel, even if photographs were inadmissible during guilt phase. *Jackson v. State*, 672 So. 2d 468, 1996 Miss. LEXIS 718 (Miss. 1996).

Medical examiner could testify as to condition of capital murder victim's body at time of autopsy and on cause of death,

over complaint that prejudicial effect of testimony outweighed its probative value; evidence was admissible to establish death of human being, and criminal agency causing death, and trial court had sustained defendant's objection to repetitive nature of testimony. *Walker v. State*, 671 So. 2d 581, 1995 Miss. LEXIS 494 (Miss. 1995), cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406, 1996 U.S. LEXIS 7236 (U.S. 1996).

A videotape of the exhumation of the victim's body from the site where the defendant had buried it should not have been admitted into evidence in a murder prosecution against the defendant, where the videotape did not reveal more than that which was revealed through photographic evidence. However, admission of the videotape did not warrant reversal in view of the overwhelming evidence presented against the defendant. *Holland v. State*, 587 So. 2d 848, 1991 Miss. LEXIS 648 (Miss. 1991).

Even if photographs of a murder victim were cumulative or repetitive, the admission of the photographs into evidence was harmless where the photographs were not particularly gory and did not have a highly inflammatory effect on the jury. *Willie v. State*, 585 So. 2d 660, 1991 Miss. LEXIS 454 (Miss. 1991).

In a slaying in which the only eyewitness is the defendant, and it is argued that the slaying was something other than murder, the relevancy of photographs showing the scene and victim is increased. Photographs from different angles in such a case are for the jury to evaluate. However, there can be a limit both in the number of photographs and the manner in which they are displayed to the jury. The discretion afforded circuit judges is by no means unlimited, and they are strongly urged to curtail excess. *Griffin v. State*, 557 So. 2d 542, 1990 Miss. LEXIS 50 (Miss. 1990).

In a murder prosecution, extremely gruesome photographs of the victim's nude and partially decomposed body were improperly admitted into evidence since the probative value of the photographs was outweighed by their tendency to inflame and prejudice the jury; the State could have shown the angle and entry of

the bullet wound without a full-color, close-up view of the decomposed maggot-infested skull. When presented with such photographs, the trial judge should carefully consider all the facts and circumstances surrounding the admission of this particular type of evidence. More specifically, the trial court must consider: (1) whether the proof is absolute or in doubt as to identity of the guilty party, as well as, (2) whether the photographs are necessary evidence or simply a ploy on the part of the prosecutor to arouse the passion and prejudice of the jury. *McNeal v. State*, 551 So. 2d 151, 1989 Miss. LEXIS 333 (Miss. 1989).

In determining the admissibility of photographs, the discretion of the trial judge runs toward almost unlimited admissibility regardless of the gruesomeness, repetitiveness, and the extenuation of probative value; no meaningful limits exist in the balancing of the probative/prejudicial effect of photographs. *Williams v. State*, 544 So. 2d 782, 1987 Miss. LEXIS 2843 (Miss. 1987).

Error, if any, in admitting evidence alleged to be hearsay, that defendant had gun was harmless, where evidence was otherwise clear that defendant did have gun. *Alford v. State*, 508 So. 2d 1039, 1987 Miss. LEXIS 2425 (Miss. 1987).

Admission into evidence at a capital murder trial of portions of defendant's testimony at his father's earlier trial was reversible error, where the prior testimony, which could not be characterized as admissions, was offered as part of the state's case-in-chief, and not in an attempt to impeach defendant or to rebut his testimony at his trial. *Stringer v. State*, 491 So. 2d 837, 1986 Miss. LEXIS 2520 (Miss. 1986).

Testimony from prosecution investigator concerning record of collect telephone call from murder victim to third party is inadmissible where state makes no effort to introduce telephone records and offers no explanation for absence of records; where admission of testimony has strong potential for prejudice in that it allows official endorsement of third party's already damaging testimony regarding telephone calls, admission of testimony is harmful error requiring reversal.

Flanagin v. State, 473 So. 2d 482, 1985 Miss. LEXIS 2168 (Miss. 1985).

While wholesale introduction of gruesome photographs in capital murder prosecution is not endorsed, trial court may admit 5 photographs where each portrays some evidence not shown by others. *Caballo v. State*, 471 So. 2d 332, 1985 Miss. LEXIS 2059 (Miss. 1985), cert. denied, 476 U.S. 1164, 106 S. Ct. 2291, 90 L. Ed. 2d 732, 1986 U.S. LEXIS 1720 (U.S. 1986).

The admission into evidence of photographs of a slain victim was a matter resting within the sound discretion of the circuit judge, and where, in a prosecution under section 97-3-19(2)(e) for capital murder while in the commission of the crime of rape, the photographs had evidentiary value in proving the brutality of the slaying, they were proper evidence. *Ruffin v. State*, 447 So. 2d 113, 1984 Miss. LEXIS 1629 (Miss. 1984).

Prejudicial error was not committed in allowing a constable to testify that one accused of murder had lost the murder weapon while fleeing from the scene and that the accused, when not found in his father's home, was called by the latter from nearby bushes. *Vassar v. State*, 200 Miss. 412, 27 So. 2d 541, 1946 Miss. LEXIS 303 (Miss. 1946).

45. — —Photographs as admissible.

In defendant's murder case, Miss. Code Ann. § 97-3-19, although photographs of the victim's decomposing body and head surrounded by maggots were not pleasant, only some probative value was needed to support admission of the gruesome photographs, and the State did not include photographs that showed his arms and legs eaten away by scavengers. *Bonds v. State*, 168 So. 3d 1003, 2013 Miss. App. LEXIS 369 (Miss. Ct. App. 2013), rev'd, 138 So. 3d 914, 2014 Miss. LEXIS 256 (Miss. 2014).

Defendant's convictions for capital murder in violation of Miss. Code Ann. § 97-3-19(2)(e), aggravated assault in violation of Miss. Code Ann. § 97-3-7(2), and conspiracy to commit aggravated assault were appropriate because the victim's autopsy photographs were admissible since their probative value was not outweighed

by any danger of undue prejudice and since there was a meaningful evidentiary purpose. *Williams v. State*, 3 So. 3d 105, 2009 Miss. LEXIS 68 (Miss. 2009).

In defendant's trial for capital murder of defendant's five-year-old child, autopsy photographs were properly admitted because the photographs were of significant probative value when the photographs showed the severity of the beatings, which defendant denied, and corroborated the testimony of defendant's daughter and the findings of the coroner. The photographs' probative value clearly outweighed their prejudicial effect, and the trial court did not err in admitting them. *Broadhead v. State*, 981 So. 2d 320, 2007 Miss. App. LEXIS 809 (Miss. Ct. App. 2007), cert. denied, 981 So. 2d 298, 2008 Miss. LEXIS 210 (Miss. 2008).

In a case where defendant was charged with capital murder after he slammed his car into a patrol car that was blocking his path during a chase, a trial court did not err by allowing the introduction of pictures of the deceased officer since they were relevant and clarified the circumstances and manner of death for the jury. *White v. State*, 964 So. 2d 1181, 2007 Miss. App. LEXIS 576 (Miss. Ct. App. 2007).

In a capital murder case, autopsy photographs of a victim who was shot multiple times in the head, neck, and shoulder were admissible because their probative value outweighed the prejudice; they were used to corroborate the testimony of an officer who found the body and to support the theory that the victim had been thrown from a vehicle after the shooting. *Ramsey v. State*, 959 So. 2d 15, 2006 Miss. App. LEXIS 764 (Miss. Ct. App. 2006), cert. denied, 958 So. 2d 1232, 2007 Miss. LEXIS 588 (Miss. 2007).

In a murder case, photographs of the victim lying in a doorway and closeups of the victim's head were properly admitted under Miss. R. Evid. 403; they were not cumulative, nor did the potential for prejudice outweigh the probative value where the pictures were at different angles, and it was not possible to get all the information in a single picture. *Jones v. State*, 938 So. 2d 312, 2006 Miss. App. LEXIS 673 (Miss. Ct. App. 2006).

Admission of photographs of the victim in a murder case was not an abuse of

discretion because the photographs were not overly gruesome; they had evidentiary value, as they depicted the circumstances of the shooting, the location of the body, and the cause of death; and they supplemented and clarified testimony regarding the location of the wounds, the trajectory of the bullets, the number of the bullets, and the cause and manner of death. *Cotton v. State*, 933 So. 2d 1048, 2006 Miss. App. LEXIS 520 (Miss. Ct. App. 2006).

Pre-death photograph was shown to the victim's stepfather and the district attorney asked the stepfather whether the photograph fairly depicted the victim (who had been burned beyond recognition). The photograph served the legitimate, evidentiary purpose of identifying the victim and was properly admitted. *Davis v. State*, 904 So. 2d 1212, 2004 Miss. App. LEXIS 1053 (Miss. Ct. App. 2004), cert. denied, 898 So. 2d 679, 2005 Miss. LEXIS 269 (Miss. 2005).

In defendant's criminal prosecution for murdering his wife's ex-boyfriend, the trial court did not err in admitting photographs of the victim and crime scene. The photographs were probative and relevant, because they revealed the position and location of the victim's body. *Roland v. State*, 882 So. 2d 262, 2004 Miss. App. LEXIS 911 (Miss. Ct. App. 2004).

Trial judge did not abuse his discretion in admitting color photographs of murder victim during capital prosecution; photographs served to clarify and supplement testimony and to describe cause of victim's death. *Brown v. State*, 682 So. 2d 340, 1996 Miss. LEXIS 427 (Miss. 1996), cert. denied, 520 U.S. 1127, 117 S. Ct. 1271, 137 L. Ed. 2d 348, 1997 U.S. LEXIS 1821 (U.S. 1997).

Although photographs of crime scene were essentially the same evidence as videotape of the crime scene which had been admitted earlier, they were properly admitted because they were clearer than the video, and were used by physician in proving cause of death, and aided jury in determining heinous, atrocious, and cruel nature of the crime. *Blue v. State*, 674 So. 2d 1184, 1996 Miss. LEXIS 304 (Miss.), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517, 1996 U.S. LEXIS 7523 (U.S. 1996).

Color photographs of murder victim's body, taken from close range, that showed position of body in car, were admissible. *Taylor v. State*, 672 So. 2d 1246, 1996 Miss. LEXIS 193 (Miss.), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379, 1996 U.S. LEXIS 7020 (U.S. 1996).

Probative value of 6 color 4" x 6" autopsy photographs depicting fatal stab wounds to children, admitted during sentencing phase of capital murder prosecution to demonstrate location and extent of wounds as well as pain and suffering of victims, outweighed any prejudicial effect; photographs were taken after bodies had been cleaned up but before autopsies were performed. *Jackson v. State*, 672 So. 2d 468, 1996 Miss. LEXIS 718 (Miss. 1996).

Trial court did not abuse its discretion, in capital murder case, by admitting into evidence photograph of deceased; photograph had been shown to various witnesses, in order to verify identity of victim, prior to point at which defendant stipulated as to identity. *Walker v. State*, 671 So. 2d 581, 1995 Miss. LEXIS 494 (Miss. 1995), cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406, 1996 U.S. LEXIS 7236 (U.S. 1996).

Trial court had discretion to admit into evidence, in capital murder case, photograph showing defendant with 2 companions in his house, with one photograph depicting him bare chested, generally unkempt, holding beer can and sticking his tongue out; photograph corroborated testimony of one companion that defendant had been with her after he had allegedly committed crime and he was acting as if nothing had happened. *Walker v. State*, 671 So. 2d 581, 1995 Miss. LEXIS 494 (Miss. 1995), cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406, 1996 U.S. LEXIS 7236 (U.S. 1996).

Trial court could admit photographs showing capital murder victim after corpse had been burned by perpetrator, even though pictures were acknowledged to be "gruesome"; pictures could assist jury to infer that defendant decided to burn body to destroy fingerprint, pubic hair and clothing fiber identification evidence, cover his tracks and avoid apprehension. *Walker v. State*, 671 So. 2d 581, 1995 Miss. LEXIS 494 (Miss. 1995), cert.

denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406, 1996 U.S. LEXIS 7236 (U.S. 1996).

Trial court did not abuse its discretion in capital murder case in allowing into evidence photographs depicting victim's gunshot wounds; photographs served to clarify and supplement coroner's testimony and described cause of victim's death. *Holly v. State*, 671 So. 2d 32, 1996 Miss. LEXIS 15 (Miss.), cert. denied, 518 U.S. 1025, 116 S. Ct. 2565, 135 L. Ed. 2d 1082, 1996 U.S. LEXIS 4179 (U.S. 1996).

A trial court did not err in admitting gruesome photographs into evidence in a murder prosecution where they identified the victims, showed the effect resulting from the gunshot wounds inflicted by the defendant, and corroborated medical testimony. *Westbrook v. State*, 658 So. 2d 847, 1995 Miss. LEXIS 339 (Miss. 1995).

In the sentencing phase of a capital murder prosecution, the trial judge did not err in admitting photographs of the victim into evidence where he made a thorough examination of the photographs in chambers prior to admitting them into evidence, and a pathologist testified that they were probative and relevant on the issue of whether the murder was especially heinous and cruel. *Thorson v. State*, 653 So. 2d 876, 1994 Miss. LEXIS 600 (Miss. 1994).

Color photographs of a murder victim taken during a postmortem examination were properly admitted into evidence in the murder trial where the photographs depicted the location of the shotgun pellet wounds which caused the victim's death, and a forensic pathologist used the photographs to explain the location, trajectory, and angulation of multiple entrance and exit wounds. *Hart v. State*, 637 So. 2d 1329, 1994 Miss. LEXIS 115 (Miss. 1994).

In a murder prosecution, the admission of an autopsy photograph showing a close-up of the victim's neck cut open by the pathologist was not error since the photograph provided graphic evidence that the victim's trachea was lined with soot and therefore substantiated the State's theory that the defendant had knocked the victim unconscious and then poured gasoline over his body and ignited it, resulting in the victim's death due to

smoke inhalation. *Mackbee v. State*, 575 So. 2d 16, 1990 Miss. LEXIS 831 (Miss. 1990).

In a prosecution for a single murder, it was not error for the trial court to allow the admission of photographs showing the bodies of 2 victims in the trunk of a car where they were found, one of which graphically showed the intestines of the second victim exposed and hanging from his body, in spite of the defendant's argument that the photographs of the second victim were extraordinarily gruesome and were not necessary to establish the defendant's role in the murder of the first victim, where the photographs supplemented the investigating officers' testimonies concerning what they found in the trunk of the car, and the investigators could not have taken a picture of the first victim's body without also having the second victim in the photograph, unless they tampered with the evidence. *Mackbee v. State*, 575 So. 2d 16, 1990 Miss. LEXIS 831 (Miss. 1990).

A trial judge did not abuse his discretion in admitting photographs of a murder victim's body into evidence where the body was fully clothed, there was no large amount of blood, the body was not decomposed, and the photographs were used by a forensic pathologist to point out wounds and the effects of those wounds. *Turner v. State*, 573 So. 2d 657, 1990 Miss. LEXIS 792 (Miss. 1990), cert. denied, 500 U.S. 910, 111 S. Ct. 1695, 114 L. Ed. 2d 89, 1991 U.S. LEXIS 2522 (U.S. 1991).

Color photographs of the victim's body were admissible in a murder prosecution where the defendant claimed to have observed the victim's body only briefly after entering the victim's darkened living room behind a police officer, since the photographs were relevant to the issue of the defendant's detailed knowledge of the condition of the body. *Sudduth v. State*, 562 So. 2d 67, 1990 Miss. LEXIS 235 (Miss. 1990).

In a murder prosecution, a photograph of the victim's body which showed the extent of a wound to the head and showed brain tissue, blood and other unspecified fragments on the floor and the wall, was admissible where testimony indicated that the defendant was the only person at

the crime scene wielding a shotgun and the photograph accurately reflected "the force and violence" a shotgun would cause as opposed to a pistol or handgun, and the photograph corroborated the expert testimony of the doctor who testified that the photograph showed very clearly that brain and other tissue was splattered on the lower part of the door and the floor instead of on the ceiling or the upper portion of the wall, which corroborated earlier testimony to the effect that the victim was kneeling or crawling when she was shot. *Stringer v. State*, 548 So. 2d 125, 1989 Miss. LEXIS 354 (Miss. 1989).

In a murder prosecution in which the victim showed signs consistent with someone who had been choked or strangled, photographs of the victim's face and neck lying on an autopsy table, though grisly, were probative of the condition of the body, both as to the cause of death and to rebut the defendant's claim that he shot the victim in self-defense, and were therefore admissible. *Stokes v. State*, 548 So. 2d 118, 1989 Miss. LEXIS 357 (Miss. 1989), cert. denied, 493 U.S. 1029, 110 S. Ct. 742, 107 L. Ed. 2d 759, 1990 U.S. LEXIS 86 (U.S. 1990).

Autopsy pictures of a homicide victim clearly indicating the number and placement of stab wounds were admissible as evidence of the defendant's state of mind and to show the placement of the wounds. *Marks v. State*, 532 So. 2d 976, 1988 Miss. LEXIS 425 (Miss. 1988).

Photographs of a homicide victim as she was found at the scene of the crime were admissible since the jury was entitled to see the manner in which the deceased met her death, particularly since the defendant testified to having no memory of the immediate circumstances surrounding the killing. *Marks v. State*, 532 So. 2d 976, 1988 Miss. LEXIS 425 (Miss. 1988).

In a trial for capital murder of a 6-month-old child, photographs of the victim taken when she was in the hospital prior to her death were admissible in evidence where they accurately depicted bruises on her neck and chest and a cut on her inner lip, and consequently were of probative value, particularly in light of the defendant's assertion that the child simply went limp while he held her and

that no blood was present before the child was taken to the hospital. *Monk v. State*, 532 So. 2d 592, 1988 Miss. LEXIS 501 (Miss. 1988).

Photographs of the body of a gunshot victim showing bruises on the body, the wound caused by the bullet, and the general condition of the body and marks on it, were admissible in a murder prosecution where they contradicted the defendant's testimony that the decedent had committed suicide. *Jackson v. State*, 527 So. 2d 654, 1988 Miss. LEXIS 271 (Miss. 1988).

In a murder prosecution, photographs of the decedent's body were admissible where they showed the extent of the decedent's wounds and lacerations and were, therefore, essential to the main issue in the case, namely, whether the decedent died from blood loss or alcohol consumption. *Kniep v. State*, 525 So. 2d 385, 1988 Miss. LEXIS 11 (Miss. 1988).

Trial court did not abuse its discretion in admitting into evidence photographs depicting bullet holes at and around crime scene. *Alford v. State*, 508 So. 2d 1039, 1987 Miss. LEXIS 2425 (Miss. 1987).

Trial court did not abuse its discretion in allowing into evidence photographs depicting location of deceased's wounds, since it was evidence relevant to show that deceased was not facing direction from which shots were fired, thereby negating defense that deceased was aggressor from whom defendant had right to defend himself. *Alford v. State*, 508 So. 2d 1039, 1987 Miss. LEXIS 2425 (Miss. 1987).

At a murder less-than-capital trial, where defendant's experts had already testified that defendant was competent to stand trial, testimony by state's expert as to his and associate's finding on the issue was not inadmissible hearsay. *Hunter v. State*, 489 So. 2d 1086, 1986 Miss. LEXIS 2484 (Miss. 1986).

Photograph of scene of killing taken shortly after killing occurred, which is fair and accurate depiction of scene other than use of flash to light scene and presence of investigating officer, is admissible so long as presence of officer and additional light is carefully explained to jury each time photograph is used. *Holmes v. State*, 483 So. 2d 684, 1986 Miss. LEXIS 2365 (Miss. 1986).

Gruesome photograph of murder victim is admissible where it is probative of severity of victim's wounds and is clearer than photograph which has previously been introduced without objection. *Swanier v. State*, 473 So. 2d 180, 1985 Miss. LEXIS 2155 (Miss. 1985).

Color photographs of deceased and scene of crime are admissible into evidence at homicide trial, at which defendant is ultimately convicted of manslaughter, where photographs depict location of wound and tend to negate defendant's assertion that deceased had reached under shirt as if going for gun prior to shooting and where pictures of interior of bar in which shooting occurred tend to negate defendant's statement that he placed decedent in chair after shooting. *Kelly v. State*, 463 So. 2d 1070, 1985 Miss. LEXIS 1878 (Miss. 1985).

In prosecution for murder, photographs of deceased showing exact location, range and extent of wounds causing death of victim are relevant and competent as evidence, although photographs produce sympathetic emotions in jurors to prejudice of defendant. *Seals v. State*, 208 Miss. 236, 44 So. 2d 61, 1950 Miss. LEXIS 242 (Miss. 1950).

46. —Expert testimony; scientific techniques.

Where defendant claimed he accidentally shot his wife, his murder conviction was reversed because a crime scene analyst's computer-generated depiction of the shooting was improperly admitted, as it was based on mere speculation and possibilities. *Parvin v. State*, 113 So. 3d 1243, 2013 Miss. LEXIS 145 (Miss. 2013).

Where defendant claimed he accidentally shot his wife, his murder conviction was reversed because a forensic pathologist's measurements and a crime scene analyst's testimony about the shooting were inadmissible under Miss. R. Evid. 702, as the pathologist did not cite any scientific principle to explain how he calculated his distance and trajectory measurements, and the analyst testified that his theory was his "best approximation" of a "hypothesis" of how "maybe the incident happened." *Parvin v. State*, 113 So. 3d 1243, 2013 Miss. LEXIS 145 (Miss. 2013).

Expert testimony as to the cause and manner of the victim's death was permissible in defendant's murder trial because the trial court accepted, without objection from defendant, that the expert was qualified in the area of forensic pathology, and the expert did not testify that he was the State Medical Examiner, and, therefore, the expert was not required to be board certified by the American Board of Pathology. *Keys v. State*, 33 So. 3d 1143, 2009 Miss. App. LEXIS 697 (Miss. Ct. App. 2009), cert. denied, 34 So. 3d 1176, 2010 Miss. LEXIS 228 (Miss. 2010).

Expert testimony as to the type of bullet that killed a victim was permissible in defendant's murder trial because the trial court accepted that the expert was qualified in the area of forensic pathology, terminal ballistics was a subfield of forensic pathology, and defendant was procedurally barred from challenging the expert's qualifications because he failed to object to them at trial. *Keys v. State*, 33 So. 3d 1143, 2009 Miss. App. LEXIS 697 (Miss. Ct. App. 2009), cert. denied, 34 So. 3d 1176, 2010 Miss. LEXIS 228 (Miss. 2010).

In a case in which defendant appealed his sentence of death by lethal injection for violating Miss. Code Ann. § 97-3-19(2)(f), citing the Mississippi Supreme Court's reversal in the Edmonds decision, he argued unsuccessfully that the admission of testimony by an expert witness was improper and the result of ineffective assistance of counsel. The witness was an expert in forensic pathology, and the reversal in the Edmonds decision was not based on the witness's lack of expertise; it was based on the witness offering an off-the-cuff opinion. *Wilson v. State*, 21 So. 3d 572, 2009 Miss. LEXIS 450 (Miss. 2009), cert. denied, 560 U.S. 909, 130 S. Ct. 3282, 176 L. Ed. 2d 1191, 2010 U.S. LEXIS 3966 (U.S. 2010).

In a case where defendant was charged with capital murder after he slammed his car into a patrol car that was blocking his path during a chase, a trial court did not err by allowing a forensic pathologist to testify about an officer's location when he was killed because, under Miss. R. Evid. 702, the pathologist was allowed to testify as an expert that the wounds indicated that the officer was not inside the vehicle.

White v. State, 964 So. 2d 1181, 2007 Miss. App. LEXIS 576 (Miss. Ct. App. 2007).

Trial court did not err in admitting the forensic pathologist's testimony concerning the autopsy, bruises on the victim's body consistent with defensive posturing, the trajectory of the bullet, and the cause and manner of the victim's of death, where a foundation was laid showing the expert was well qualified; further, the issue of the quality of the autopsy photos went to their weight, not their admissibility. *Ross v. State*, 883 So. 2d 1181, 2004 Miss. App. LEXIS 557 (Miss. Ct. App.), cert. denied, 883 So. 2d 1180, 2004 Miss. LEXIS 1274 (Miss. 2004).

Pathologist's testimony was admissible to prove cause of victim's death, even though pathologist could not with certainty pinpoint cause of death of decomposed body, and even though pathologist had prepared 2 arguably inconsistent reports; pathologist's opinion tended to make cause of death more probable than it would have been without his testimony, and pathologist was subject to rigorous cross-examination. *Taylor v. State*, 672 So. 2d 1246, 1996 Miss. LEXIS 193 (Miss.), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379, 1996 U.S. LEXIS 7020 (U.S. 1996).

A trial court in a murder prosecution properly refused to permit a psychiatrist's opinion testimony that the defendant was telling the truth when he was interviewed while under the influence of hypnosis, since this field is not recognized as a reliable science and the physician's opinion would have been "improper bolstering" of testimony. *Thibodeaux v. State*, 652 So. 2d 153, 1995 Miss. LEXIS 134 (Miss. 1995).

A trial court in a murder prosecution properly refused to permit a psychiatrist's opinion testimony that the defendant was telling the truth when he was interviewed while under the influence of sodium amytal, since this field is not recognized as a reliable science and the physician's opinion would have been "improper bolstering" of testimony. *Thibodeaux v. State*, 652 So. 2d 153, 1995 Miss. LEXIS 134 (Miss. 1995).

The trial judge in a capital murder prosecution did not err in refusing to ad-

mit the results of polygraph tests, since the results of polygraph tests have not reached that stage in scientific reliability justifying their competency as substantive evidence. *Thorson v. State*, 653 So. 2d 876, 1994 Miss. LEXIS 600 (Miss. 1994).

A trial court in a murder prosecution did not err in excluding a psychologist's expert opinion testimony that the defendant suffered from "post-traumatic stress" syndrome and therefore had "reasonable grounds" to believe that the victim was going to kill him, which would have supported the defendant's claim of self-defense, since the question of whether a defendant has "reasonable grounds" to fear imminent death or serious bodily injury is governed by a "reasonable person" standard, and is a matter to be decided by the fact-finder alone. *Hart v. State*, 637 So. 2d 1329, 1994 Miss. LEXIS 115 (Miss. 1994).

The trial court in a murder prosecution properly allowed the admission of DNA "matching" evidence where the testing laboratory performed generally accepted scientific techniques without error in the performance or interpretation of the tests. *Polk v. State*, 612 So. 2d 381, 1992 Miss. LEXIS 820 (Miss. 1992).

A trial court in a murder prosecution did not abuse its discretion in admitting into evidence a plaster cast and photographs of footprints found near the victim's body, even though a forensic toxicologist with the Mississippi Crime Lab testified that the sample was insufficient to connect the defendant's shoes to the cast, where there was no dispute that the footprints were actually found at the scene of the crime. *Berry v. State*, 575 So. 2d 1, 1990 Miss. LEXIS 849 (Miss. 1990), cert. denied, 500 U.S. 928, 111 S. Ct. 2042, 114 L. Ed. 2d 126, 1991 U.S. LEXIS 2673 (U.S. 1991).

At the joint trial of 2 defendants charged with conspiracy to commit murder, admission, in prosecution's case-in-chief, of co-conspirators' post-arrest statements, wherein each co-defendant pointed a finger at the other, was reversible error, where these statements fell outside the co-conspirator's exemption from the hearsay rule, did not interlock in substantial particulars, and were not attended by

other indicia of reliability sufficient to satisfy the conspirators' rights under the confrontation of witnesses clauses of federal and state constitutions. *Mitchell v. State*, 495 So. 2d 5, 1986 Miss. LEXIS 2659 (Miss. 1986), overruled in part, *Smith v. State*, 986 So. 2d 290, 2008 Miss. LEXIS 339 (Miss. 2008).

Medical testimony of prior injuries to child tending to establish previous abuse by parent is admissible in murder prosecution of parent where sufficient predicate is laid of evidence showing parent to be in exclusive control of child prior to time that injuries occurred and of expert medical testimony contradicting parent's version of accidental causes of death. *Johnson v. State*, 475 So. 2d 1136, 1985 Miss. LEXIS 2238 (Miss. 1985).

Defendant in murder prosecution is not entitled to admission of testimony of psychiatrist as to defendant's grief following death of victim, especially where testimony of psychiatrist would be cumulative. *Flanagin v. State*, 473 So. 2d 482, 1985 Miss. LEXIS 2168 (Miss. 1985).

The trial court in a murder prosecution did not err in excluding testimony of psychologists as to defendant's state of mind at the time of the killing, where, as long as the complete defense of insanity was not at issue, expert psychiatric testimony was not available to either party to attempt to reduce the charge of murder under this section to one of manslaughter under § 97-3-35. *Taylor v. State*, 452 So. 2d 441, 1984 Miss. LEXIS 1705 (Miss. 1984), but see *May v. State*, 524 So. 2d 957, 1988 Miss. LEXIS 191 (Miss. 1988).

47. Circumstantial evidence.

Trial court did not err in convicting defendant of murdering her husband; the State proved deliberate-design murder, albeit by circumstantial evidence, because the use of a high-powered rifle was sufficient to supply the necessary ingredient of deliberate design. *Childs v. State*, 133 So. 3d 348, 2013 Miss. LEXIS 302 (Miss. 2013).

Defendant mainly took issue with the forensic pathologist's testimony, and claimed that a reasonable hypothesis of defendant's innocence was the possibility that the victim (defendant's wife) had shot

herself. However, all of the expert's testimony was based upon a reasonable medical certainty that the victim could not have fired the shot that killed the victim, and the expert's testimony was based upon physical facts: the location of the entrance wound, the resting place of the bullet, and the distance from the head to where the gun was fired; moreover, the victim had defensive wounds and the State met its burden of proof through strong circumstantial evidence. *Ross v. State*, 883 So. 2d 1181, 2004 Miss. App. LEXIS 557 (Miss. Ct. App.), cert. denied, 883 So. 2d 1180, 2004 Miss. LEXIS 1274 (Miss. 2004).

Where defendant was charged with murder in the shooting death of his wife, after forensic experts determined that she was killed by two gunshots instead of one, and because there was only one entrance wound and evidence of two bullet trajectories, suicide was excluded because the victim would not have had sufficient motor skills to fire a second shot, a jury could conclude that defendant's defense of suicide did not constitute a reasonable hypothesis of innocence, and the circumstantial evidence used to convict defendant was sufficient to establish guilt beyond a reasonable doubt. *Jones v. State*, 857 So. 2d 740, 2003 Miss. LEXIS 554 (Miss. 2003).

Crediting all the evidence and all reasonable inferences most favorable to the State, a jury could reasonably exclude the hypothesis that the victim committed suicide; the circumstantial evidence used to convict defendant of murder was sufficient to establish guilt beyond a reasonable doubt. *Cox v. State*, 849 So. 2d 1257, 2003 Miss. LEXIS 337 (Miss. 2003).

Evidence that a defendant who was charged with the murder of a woman whose badly decomposed body was found in Mississippi in an area where defendant had relatives, that the defendant had left New Mexico with the victim to visit the father of the victim's infant child in Texas shortly before the probable time of the victim's death, that defendant was seen with the victim's child in Memphis shortly after the date of the victim's death and heard telling people that the child's mother was either on tour as an enter-

tainer or was in jail, that defendant was in possession of a gun and ammunition similar to those used to kill the victim, that defendant used a false name when contacted by police in Florida, as well as other circumstantial and scientific evidence linking the defendant to the crime, was sufficient to support the defendant's conviction of the crime of murder. *Smith v. State*, 835 So. 2d 927, 2002 Miss. LEXIS 298 (Miss. 2002).

Because case was largely circumstantial, jury was required to believe defendant guilty beyond all reasonable doubt and to exclusion of every reasonable hypothesis other than that of guilt. Evidence showed that defendant, convicted of murder, had started walking home with victim, was gone some 30 to 40 minutes, returned alone, told individuals upon return that "somebody done got" victim, was wet to waist and trembling or shivering; defendant and others found victim's body in ditch filled approximately waist deep with water, and "beggar's lice" were found on clothes of victim and defendant. *Stokes v. State*, 518 So. 2d 1224, 1988 Miss. LEXIS 36 (Miss. 1988).

When its case is based entirely upon circumstantial evidence, state is required to prove defendants guilty not only beyond reasonable doubt, but also to exclusion of every reasonable hypothesis consistent with innocence; circumstantial evidence need not exclude every possible doubt, but only every other reasonable hypothesis of guilt, and mere fanciful, farfetched, or unreasonable hypothesis of innocence is not sufficient to require acquittal. *Montgomery v. State*, 515 So. 2d 845, 1987 Miss. LEXIS 2697 (Miss. 1987).

Circumstantial evidence was sufficient to sustain conviction for murder where: (1) motive existed; (2) serial number of rifle was listed in ledger found in defendant's room; (3) defendant's diary contained schedule of victim's morning procedure and whereabouts; (4) bullets extracted from victim's body plus those found in defendant's drawer, door facing, and those remaining in clip were of same type, accounting for all 15 bullets missing from box of ammunition found nearby; (5) defendant was in area of murder on morning of murder; (6) defendant admitted

smoking brand of cigarettes found in victim's office commode; and, (7) defendant's fingerprints were on door facing of back door. *Montgomery v. State*, 515 So. 2d 845, 1987 Miss. LEXIS 2697 (Miss. 1987).

Knife was admissible in evidence, notwithstanding defendant's objection based on fact that one witness did not remember the knife as having a leather handle, where other witnesses testified that the knife in question was found at the stabbing scene, established the chain of custody thereof, and described the weapon. *Graves v. State*, 492 So. 2d 562, 1986 Miss. LEXIS 2514 (Miss. 1986).

On a coram nobis proceeding, defendant, under death sentence, was not entitled to a new trial, where, even though state's 2 identification witnesses had committed perjury at his trial, the circumstantial evidence that defendant murdered victim was so overwhelming that there was not a reasonable probability that a different result would be reached even without the perjured testimony. *Smith v. State*, 492 So. 2d 260, 1986 Miss. LEXIS 2884 (Miss. 1986).

Although proof in a circumstantial evidence murder case was weak, evidence was sufficient to go to jury on issue of defendant's guilt. *Trunell v. State*, 487 So. 2d 820, 1986 Miss. LEXIS 2444 (Miss. 1986).

Telephone conversation between murder victim and third party in which victim identifies killer and in which third party hears voice in background does not constitute direct evidence, for purposes of determining whether murder prosecution is based solely on circumstantial evidence, where third party is unable to identify voice in background; however, testimony of third party as to content of conversation is admissible under *res gestae* exception. *Flanagin v. State*, 473 So. 2d 482, 1985 Miss. LEXIS 2168 (Miss. 1985).

Evidence that murder victim died in interval between victim's departure from bar with defendant and defendant's return to bar in upset and disheveled condition is insufficient to exclude reasonable hypothesis asserted by defendant that, outside bar, victim and defendant parted ways, that victim met death at hands of third party, and that defendant's condition

upon return to bar was due to unrelated incident. *Hester v. State*, 463 So. 2d 1087, 1985 Miss. LEXIS 1896 (Miss. 1985).

Where the most that could be said for the evidence of the state in a murder prosecution was that the knife of the defendant with blood and hair upon it was found in his automobile approximately $\frac{1}{2}$ to $\frac{3}{4}$ of a mile from the body of the victim, and there was no evidence of motive, no evidence that the defendant and the deceased had ever been together or evidence that they were acquainted, and moreover, at the time of his arrest, the defendant did not appear to be emotionally upset, and no blood or bloodstains were found upon his person or clothing or even in his car, a weak case based totally upon circumstantial evidence was presented and justice required another jury to pass upon the guilt or innocence of the defendant. *Shore v. State*, 287 So. 2d 766, 1974 Miss. LEXIS 1833 (Miss. 1974).

The proof must show beyond a reasonable doubt that the person killed is the person charged in the indictment to have been killed, though circumstantial evidence may be sufficient. *Dooley v. State*, 238 Miss. 16, 116 So. 2d 820, 1960 Miss. LEXIS 370 (Miss. 1960).

While state's evidence to establish identity of the accused as the perpetrator of the crime must be such as to leave no reasonable doubt as to his identity, it is not essential that this proof be made by testimony of witnesses, since circumstantial evidence may be sufficient, and, where there is both direct and circumstantial evidence, a mere conflict in testimony of the witnesses does not necessarily mean that the testimony is insufficient to sustain a conviction. *Freeman v. State*, 228 Miss. 687, 89 So. 2d 716, 1956 Miss. LEXIS 564 (Miss. 1956).

Where conviction depends upon circumstantial evidence, legal test of its sufficiency for that end is its power to satisfy understanding and conscience of jury and it is sufficient if circumstances produce moral certainty, to exclusion of every reasonable doubt. *Dickins v. State*, 208 Miss. 69, 43 So. 2d 366, 1949 Miss. LEXIS 409 (Miss. 1949).

When state relies upon circumstantial evidence to establish any essential ele-

ment of crime charged, that evidence must rise sufficiently high to exclude every reasonable doubt of guilt and every reasonable hypothesis of innocence. *Barclay v. State*, 43 So. 2d 213 (Miss. 1949).

Where the shooting of a husband and wife in their home followed one immediately after the other, the two shootings were so integrated as to make it impractical to segregate the evidence concerning each. *Walker v. State*, 201 Miss. 780, 30 So. 2d 239, 1947 Miss. LEXIS 445 (Miss. 1947).

48. Prior difficulty.

In a murder prosecution, evidence that the defendant had previously run a car that he was driving into a car that his girlfriend was driving was improperly admitted. *Edlin v. State*, 533 So. 2d 403, 1988 Miss. LEXIS 420 (Miss. 1988), cert. denied, 489 U.S. 1086, 109 S. Ct. 1547, 103 L. Ed. 2d 851, 1989 U.S. LEXIS 1410 (U.S. 1989).

In a murder prosecution against the husband of the victim, a note handwritten by the victim which indicated that she intended to file for divorce on grounds of mental cruelty and that the defendant had threatened to kill her was admissible as evidence of prior difficulties between the victim and the defendant. *Jackson v. State*, 527 So. 2d 654, 1988 Miss. LEXIS 271 (Miss. 1988).

State's soliciting of testimony of prior difficulties between defendant and his ex-wife was legitimate means of revealing criminal intent where defendant waived his right against self-incrimination and took stand for purpose of showing that his former wife was killed in apparent attempt by him to defend her from unknown attacker; threats apparently took place only about one month prior to murder. *Shaw v. State*, 513 So. 2d 916, 1987 Miss. LEXIS 2816 (Miss. 1987).

A defendant has the constitutional right to make an opening statement pro se without being put under oath and subject to cross examination, and action of trial court preventing him from doing so is reversible error. *Trunell v. State*, 487 So. 2d 820, 1986 Miss. LEXIS 2444 (Miss. 1986).

Evidence of prior difficulties occurring close to the date of the commission of the

crime between the defendant and her deceased husband was admissible to show motive and intent. *Pendergraft v. State*, 213 So. 2d 560, 1968 Miss. LEXIS 1293 (Miss. 1968), cert. denied, 394 U.S. 715, 89 S. Ct. 1453, 22 L. Ed. 2d 671, 1969 U.S. LEXIS 1875 (U.S. 1969).

Evidence of a previous difficulty is admissible. *Hardy v. State*, 143 Miss. 352, 108 So. 727, 1926 Miss. LEXIS 272 (Miss. 1926).

In murder prosecution admission of details of previous altercation, held prejudicial error. *Hardy v. State*, 143 Miss. 352, 108 So. 727, 1926 Miss. LEXIS 272 (Miss. 1926).

Evidence of previous difficulty, held harmless error where not prejudicial to defendant. *Lewis v. State*, 132 Miss. 200, 96 So. 169, 1923 Miss. LEXIS 44 (Miss. 1923).

Details of previous disconnected difficulty between parties, inadmissible in trial of subsequent offense. *Rich v. State*, 124 Miss. 272, 86 So. 770, 1920 Miss. LEXIS 506 (Miss. 1920).

Language used by third person in prior difficulty with deceased held improperly admitted. *Marley v. State*, 109 Miss. 717, 69 So. 210, 1915 Miss. LEXIS 215 (Miss. 1915).

Where defendant was aggressor, evidence that deceased was aggressor in former difficulty was properly excluded. *Huggins v. State*, 103 Miss. 227, 60 So. 209, 1912 Miss. LEXIS 160 (Miss. 1912).

In homicide, details of previous difficulty on same day of killing between defendant's brother and deceased are inadmissible. *McCoy v. State*, 91 Miss. 257, 44 So. 814, 1907 Miss. LEXIS 147 (Miss. 1907).

In homicide prosecution it is competent to prove what was said and done in difficulty just prior to killing, where whole constitutes one continuous difficulty. In such case, it is error to exclude details of prior difficulty. *Brown v. State*, 87 Miss. 800, 40 So. 1009, 1905 Miss. LEXIS 220 (Miss. 1905).

Exclusion of defendant's testimony as to whereabouts at time of woman about whom and at whose house difficulty occurred just prior to killing, was error. *Brown v. State*, 87 Miss. 800, 40 So. 1009, 1905 Miss. LEXIS 220 (Miss. 1905).

49. Threats.

In a capital murder prosecution arising from a prison inmate's stabbing of a correction officer, the trial court did not err in excluding evidence of threats against the defendant made by organized gangs in the prison. *Russell v. State*, 607 So. 2d 1107, 1992 Miss. LEXIS 474 (Miss. 1992).

During a murder prosecution arising from the shooting death of the defendant's wife, the trial erred when it excluded evidence of the wife's prior threats with a butcher knife which she had made toward the defendant 2 weeks before her death, where the defendant claimed self-defense, since the evidence was relevant on the issue of the defendant's state of mind at the time of the shooting and on the issue of whether the victim may have been the initial aggressor. *Heidel v. State*, 587 So. 2d 835, 1991 Miss. LEXIS 646 (Miss. 1991).

In a murder prosecution, testimony concerning prior murder threats made by the defendant against the victim were admissible where the threats were made from 10 months prior to the murder until less than one week before the victim's death. *May v. State*, 524 So. 2d 957, 1988 Miss. LEXIS 191 (Miss. 1988).

Since the determination of whether a threat is too remote to be admissible is addressed to the sound discretion of the trial judge, the trial judge presiding at a murder trial did not commit reversible error in permitting prosecution witness to testify, over defense objection, in rebuttal, that she had seen defendant threaten deceased with a gun on 3 different occasions, one of which allegedly occurred a year before, and the other 2 some 6 months prior to, the murder. *Higgins v. State*, 502 So. 2d 332, 1987 Miss. LEXIS 2320 (Miss. 1987).

In a prosecution of a husband for the killing of his wife, evidence of the exchange of remarks between the accused and the deceased, and the accused's threat to kill the deceased, which had occurred only 30 or 40 minutes prior to the homicide, was competent as tending to show the state of the mind of the accused and deceased, and as bearing upon the question of who was the aggressor. *Murphy v. State*, 232 Miss. 424, 99 So. 2d 595, 1958 Miss. LEXIS 289 (Miss. 1958).

Admission in evidence of statement of defendant in homicide prosecution made by him three or four hours before the homicide that he was going to kill somebody was proper as tending to show that the killing was with malice aforethought. *Jones v. State*, 192 So. 342 (Miss. 1939).

Previous difficulty and threats made at time are admissible. *Hardy v. State*, 143 Miss. 352, 108 So. 727, 1926 Miss. LEXIS 272 (Miss. 1926).

Evidence that shortly before killing accused stated he intended to kill unnamed man is admissible. *Huddleston v. State*, 134 Miss. 382, 98 So. 839, 1924 Miss. LEXIS 265 (Miss. 1924).

Exclusion of threats by decedent held reversible error. *Burks v. State*, 101 Miss. 87, 57 So. 367, 1911 Miss. LEXIS 102 (Miss. 1911).

Threat of defendant to do violence to deceased for having instigated, as he claimed, a quarrel which resulted in death of friend of defendant, is admissible, but details of quarrel are not. *Clemens v. State*, 92 Miss. 244, 45 So. 834, 1908 Miss. LEXIS 179 (Miss. 1908).

50. Self-defense.

Defendant was properly convicted of depraved-heart murder because the evidence was sufficient for a rational jury to find beyond a reasonable doubt that she shot the victim with a depraved heart to kill him and not in necessary self-defense; the victim was unarmed at the time defendant shot and killed him, and defendant admitted she shot the victim at least three times. *Swanagan v. State*, 229 So. 3d 698, 2017 Miss. LEXIS 191 (Miss. 2017).

Evidence that a defendant was "retarded and slow," suffered from epilepsy, and took the drug Dilantin was not admissible in a murder prosecution where the only possible defense to the slaying was that the defendant shot the victim in necessary defense of himself or his brother, and the defendant's own intelligence had no bearing on whether he reasonably had ground to fear for his own or his brother's life or safety. *Barnett v. State*, 563 So. 2d 1377, 1990 Miss. LEXIS 284 (Miss. 1990).

Defendant presented evidence sufficient to warrant granting of self-defense in-

struction where he testified he was in fear for his life because victim was threatening him with wine bottle, at which point defendant drew gun, which misfired once and then delivered fatal bullet. *Turnage v. State*, 518 So. 2d 1217, 1988 Miss. LEXIS 33 (Miss. 1988).

In a murder trial, where defendant asserted self-defense against a homosexual attack, while credible evidence that victim was a homosexual would have been admissible, the exclusion of evidence that victim was frequently seen at a public highway rest stop was within trial court's discretion. *Harveston v. State*, 493 So. 2d 365, 1986 Miss. LEXIS 2589 (Miss. 1986).

Where defendant or defendant's witnesses are the only eyewitnesses to a homicide, their version of what happened, if reasonable, must be accepted as true, unless substantially contradicted in material particular by credible evidence, physical facts or facts of common knowledge; but where there are circumstances shown in the evidence which materially contradict the defendant's version of self-defense, the jury is not required to accept his version, but may, in determining guilt or innocence, consider his version of self-defense along with the conflicting evidence and any unfavorable inferences therefrom. *Harveston v. State*, 493 So. 2d 365, 1986 Miss. LEXIS 2589 (Miss. 1986).

There is no basis upon which to give self-defense instruction when evidence, considered most favorably to capital murder defendant, initial aggressor and ultimate victim of defendant fled after firing shot at defendant, defendant then became aggressor seeking victim out, emptying one gun on victim, striking victim at least 3 times, then obtaining more powerful rifle and firing 3 additional shots, with intent to kill victim. *Lancaster v. State*, 472 So. 2d 363, 1985 Miss. LEXIS 2115 (Miss. 1985).

Where the defendant admitted threatening the victim two weeks before a homicide, the defendant left a cafe immediately following the victim, no weapon of any description was found on the body of the victim, and, after the shooting, defendant went home and went to bed telling no one of the altercation, the defendant, who claimed the shooting was in self-defense,

was not entitled to a directed verdict on the basis of a rule requiring the court and the jury to accept self-defense testimony where there is no evidence to the contrary. *Gordon v. State*, 258 So. 2d 752, 1972 Miss. LEXIS 1510 (Miss. 1972).

The Weathersby Rule makes it mandatory for the court and the jury to accept the testimony of the defendant and his witnesses who testify that the defendant acted in self-defense, where there is no testimony contradicting their version of the homicide, and where there are no physical facts or evidentiary circumstances on which a contrary finding could be reasonably predicted. *Gordon v. State*, 258 So. 2d 752, 1972 Miss. LEXIS 1510 (Miss. 1972).

A new trial was required where, in a murder prosecution, the verdict of the jury convicting the accused of manslaughter was predicated on statements of the deceased, admitted as dying declarations, to the effect that the deceased was shot in the back, which statements were contradicted by the undisputed facts, and the testimony of the accused and the only other eye-witness showed that the accused had shot in self-defense, and it further appeared that at the time of the trial, sentiment in the community was hostile to the accused. *Cannon v. State*, 244 Miss. 199, 141 So. 2d 251, 1962 Miss. LEXIS 440 (Miss. 1962).

Evidence that, at the time the accused shot and killed the deceased, the deceased was pursuing the accused with pistol in hand and threatening to kill him, failed to sustain a manslaughter conviction. *Pickens v. State*, 229 Miss. 409, 90 So. 2d 852, 1956 Miss. LEXIS 619 (Miss. 1956).

The jury had the right in a murder prosecution to reject defendant's testimony that he killed deceased in self-defense, where the proof of the state and the evidence of the only witness for the defendant, except that given by himself, showed that the killing was deliberate murder. *Flowers v. State*, 29 So. 2d 653 (Miss. 1947).

Under claim of self-defense, it was prejudicial error to admit evidence that a man wearing clothes similar to defendant's was seen watching place where decedent worked the night before killing.

Leverett v. State, 112 Miss. 394, 73 So. 273, 1916 Miss. LEXIS 123 (Miss. 1916).

Where self-defense claimed, and defendant testified he did not know deceased's position when he shot last three time because of smoke, instruction to find accused guilty if he fired after deceased turned his back and accused was in no danger at his hands, is prejudicial error. *Leverett v. State*, 112 Miss. 394, 73 So. 273, 1916 Miss. LEXIS 123 (Miss. 1916).

Refusal to give instruction that jury might consider previous threat by decedent to kill accused next time they met was prejudicial error. *Leverett v. State*, 112 Miss. 394, 73 So. 273, 1916 Miss. LEXIS 123 (Miss. 1916).

Defendant pleading self-defense has right to show deceased was under influence of cocaine. *Moseley v. State*, 89 Miss. 802, 41 So. 384, 1906 Miss. LEXIS 3 (Miss. 1906).

Where evidence conflicting as to who was aggressor, statement of prosecuting witness immediately after assault that he was sorry he did not kill defendant and that he went to place of conflict for that purpose, is admissible. *Shields v. State*, 87 Miss. 429, 39 So. 1010, 1905 Miss. LEXIS 153 (Miss. 1905).

Where self-defense interposed in homicide it is incompetent for state to show deceased was unarmed. *Moore v. State*, 86 Miss. 160, 38 So. 504, 1905 Miss. LEXIS 55 (Miss. 1905).

Where plea of self-defense interposed in homicide, it was error to refuse to allow defendant to show that his shirt was cut in front during difficulty with deceased. *Street v. Smith*, 85 Miss. 359, 37 So. 837, 1904 Miss. LEXIS 159 (Miss. 1904).

51. Insanity.

Under Miss. Code Ann. § 99-13-7, if the jury had acquitted defendant on both counts and had found him not to have been restored to reason, but had not found that he was a danger to the community, commitment under that statute would not have been mandatory. Despite the unusual circumstances of the sentencing order, the trial court properly exercised its discretion in requiring defendant to first to serve his mandatory life sentence before his term of an indefinite confinement

in a mental institution. *Sanders v. State*, 63 So. 3d 497, 2011 Miss. LEXIS 193 (Miss. 2011).

Defendant's conviction on Count II for murder was proper because, when analyzing the weight of the evidence that supported the jury's verdict, the appellate court was prohibited from considering what the jury did on the Count I murder indictment where defendant was found not guilty of by reason of insanity; it was irrelevant and immaterial. *Sanders v. State*, 63 So. 3d 554, 2010 Miss. App. LEXIS 130 (Miss. Ct. App. 2010), *aff'd*, 63 So. 3d 497, 2011 Miss. LEXIS 193 (Miss. 2011).

Defendant's conviction on Count II for murder was proper because, when analyzing the weight of the evidence that supported the jury's verdict, the appellate court was prohibited from considering what the jury did on the Count I murder indictment where defendant was found not guilty of by reason of insanity; it was irrelevant and immaterial. *Sanders v. State*, 63 So. 3d 554, 2010 Miss. App. LEXIS 130 (Miss. Ct. App. 2010), *aff'd*, 63 So. 3d 497, 2011 Miss. LEXIS 193 (Miss. 2011).

In a murder case under Miss. Code Ann. § 97-3-19(1)(a), a trial court properly refused to instruct a jury on insanity where the evidence showed that defendant did not have a medical condition that contributed to the crime, and a psychiatrist testified that he was aware of the nature and act of murder due to his conduct before and after the crime. *Clemons v. State*, 952 So. 2d 314, 2007 Miss. App. LEXIS 174 (Miss. Ct. App. 2007), *overruled in part*, *Williams v. State*, 32 So. 3d 486, 2010 Miss. LEXIS 202 (Miss. 2010).

Whether a murder defendant was M'Naghten insane at the time of the shooting was purely a legal question which the trial judge properly prohibited the defendant's psychiatric expert from answering. *Roundtree v. State*, 568 So. 2d 1173, 1990 Miss. LEXIS 583 (Miss. 1990).

Guilty verdict in murder less-than-capital trial was not against the weight of the evidence which presented a sharp and contradictory conflict on the issue of M'Naghten insanity. *Hunter v. State*, 489 So. 2d 1086, 1986 Miss. LEXIS 2484 (Miss. 1986).

Although defendant was diagnosed as a paranoid schizophrenic, jury's finding that he was sane at the time of the murder was supported by the evidence, where the state's expert witnesses were of the opinion that he knew the difference between right and wrong at the time of the offense, and those opinions were corroborated by lay witnesses. *Gill v. State*, 488 So. 2d 801, 1986 Miss. LEXIS 2470 (Miss. 1986).

Jury's finding a capital murder defendant not M'Naghten insane was supported by evidence that at the time of committing act he knew its quality and nature, and also knew that what he was doing was considered wrong by society and was wrong according to law. *Laney v. State*, 486 So. 2d 1242, 1986 Miss. LEXIS 2890 (Miss. 1986).

Late testimony inferentially suggesting at time in question that defendant pleading insanity as defense to murder prosecution was sufficiently in possession of faculties to know difference between right and wrong and to be able to appreciate nature and quality of action is sufficient to support conviction even though there can be little doubt that defendant is decidedly psychotic. *Gerlach v. State*, 466 So. 2d 75, 1985 Miss. LEXIS 1986 (Miss. 1985).

When defense in murder prosecution is insanity, general or partial, door is thrown wide open for admission of evidence, and every act of defendant's life is relevant to issue and admissible in evidence. *Hinton v. State*, 209 Miss. 608, 45 So. 2d 805, 1950 Miss. LEXIS 420 (Miss.), cert. denied, 340 U.S. 802, 71 S. Ct. 68, 95 L. Ed. 590, 1950 U.S. LEXIS 1573 (U.S. 1950).

Letter by superintendent of Mississippi State Hospital to sheriff stating that defendant had been diagnosed "as without psychosis, not insane," was incompetent in murder prosecution wherein defendant invoked defense that he was not mentally capable of committing the crime, since letter was purely ex parte statement of fact not under oath. *Horton v. State*, 196 Miss. 506, 18 So. 2d 155, 1944 Miss. LEXIS 222 (Miss. 1944).

Exclusion of evidence relating to the issue of insanity from the consideration of the jury upon motion of the state on the ground that it failed to meet the legal requirement of showing that the defen-

dant could not distinguish between right and wrong at the time of the killing was error. *Waycaster v. State*, 185 Miss. 25, 187 So. 205, 1939 Miss. LEXIS 125 (Miss. 1939).

Under defense of insanity evidence not showing insanity held properly excluded. *Garner v. State*, 112 Miss. 317, 73 So. 50, 1916 Miss. LEXIS 111 (Miss. 1916).

52. Sufficiency of evidence; generally.

Verdict finding defendant guilty of first degree murder was not contrary to the weight of the evidence. Viewing the evidence in the light most favorable to the verdict, the jury could find beyond a reasonable doubt, and to the exclusion of every reasonable hypothesis consistent with innocence, that defendant's actions and the surrounding circumstances were indicative of first-degree, deliberate-design murder. *Adams v. State*, 291 So. 3d 405, 2020 Miss. App. LEXIS 42 (Miss. Ct. App. 2020).

Any rational trier of fact could have found the essential elements of the crime of murder beyond a reasonable doubt because one victim testified that he saw defendant holding a gun after he was shot and that he did not see anyone else with a gun that night, and a witness testified that he only heard one gun; based on that testimony, a jury could infer that defendant also shot the second victim. *Johnson v. State*, 281 So. 3d 1221, 2019 Miss. App. LEXIS 206 (Miss. Ct. App. 2019).

Defendant's claim challenging the sufficiency of the evidence failed because based on the testimonial evidence alone, a rational trier of fact could have found and did find that the essential elements of murder were proven beyond a reasonable doubt; the jury heard testimony from eyewitnesses, including defendant, confirming that defendant shot a gun at the scene of the incident, and witness accounts identified defendant as the individual who fatally shot the victim at close range. *Hall v. State*, 295 So. 3d 544, 2019 Miss. App. LEXIS 610 (Miss. Ct. App. 2019).

Defendant clearly intended to shoot his wife when he saw that she had removed some of his belongings from the house, and he had sufficient time to contemplate shooting her, which evidenced deliberate

design murder, not heat-of-passion manslaughter; simply throwing someone's belongings out during an argument does not amount to reasonable provocation of a degree to evoke an uncontrolled response of anger, rage, hatred, furious resentment or terror. *Blanden v. State*, 276 So. 3d 1204, 2018 Miss. App. LEXIS 450 (Miss. Ct. App. 2018).

Evidence was insufficient to establish depraved-heart murder or culpable-negligence manslaughter because there was no evidence defendant or the victim had experienced any adverse effects when previously using NBOMe, a controlled substance, and defendant's singular act of selling or giving the victim two hits of NBOMe was insufficient to demonstrate either offense; a forensic pathologist testified that NBOMe was a relatively new drug, and there was no evidence its dangers were common knowledge. *O'Kelly v. State*, 267 So. 3d 282, 2018 Miss. App. LEXIS 418 (Miss. Ct. App. 2018).

Jury had more than sufficient evidence to find defendant guilty of depraved-heart murder, not manslaughter, because defendant fired at least three shots directly at the victim and did not stop firing until he fled. *Swanagan v. State*, 229 So. 3d 698, 2017 Miss. LEXIS 191 (Miss. 2017).

Evidence supported defendant's conviction of murder because the forensic evidence presented at trial demonstrated that defendant shot the victim, as the victim was shot with defendant's handgun, defendant had gunshot residue on defendant's hands and clothing, signs of a scuffle were found in a nearby driveway, and the trajectory of the bullet through the victim's body made the theory of suicide highly unlikely. Moreover, the victim did not have any known mental illnesses and had not attempted suicide, and there was no evidence of self-defense. *Shelton v. State*, 214 So. 3d 250, 2017 Miss. LEXIS 106 (Miss. 2017).

Sufficient evidence supported defendant's conviction for deliberate-design murder because the prosecution established that he had a motive to kill the victim; a witness testified that she saw a white car drive by a few minutes before she heard gunshots, a white car owned by defendant's mother contained gunshot

residue (GSR), and particles indicative of GSR were found on defendant's palms. 2017 Miss. LEXIS 520.

Testimony that defendant was waiving around a shotgun inside his living room while others were in close proximity, and that defendant turned the gun on another person to prevent him from calling for an ambulance after the victim was shot, exhibiting an indifference to the victim's life, supported defendant's conviction for depraved-heart murder. *Jordan v. State*, 212 So. 3d 836, 2015 Miss. App. LEXIS 655 (Miss. Ct. App. 2015), *aff'd*, 212 So. 3d 817, 2016 Miss. LEXIS 542 (Miss. 2016).

Evidence established the elements of murder beyond a reasonable doubt; appellant armed himself with a baseball bat with the intent to cause serious bodily injury or death to the victim and struck an unarmed victim in the head three times with the baseball bat, the first of which would have knocked him unconscious and defenseless. These actions resulted in the victim's death; the victim was not in the process of unlawfully and forcibly entering, or had unlawfully and forcibly entered the business when appellant began attacking the victim. *Westbrook v. State*, 29 So. 3d 828, 2009 Miss. App. LEXIS 648 (Miss. Ct. App. 2009), *cert. denied*, 29 So. 3d 774, 2010 Miss. LEXIS 124 (Miss. 2010), *cert. denied*, 562 U.S. 849, 131 S. Ct. 98, 178 L. Ed. 2d 62, 2010 U.S. LEXIS 5934 (U.S. 2010).

Evidence was sufficient to support defendant's capital murder conviction where, although none of the information surrounding the crime had been released to the public and although defendant alleged that another person had committed the crime, defendant provided an accurate description of how the assault occurred, a description of the victim's clothing, and the location of the victim's wallet. Further, defendant's cellmate testified that, during their incarceration, defendant confessed to the robbery and assault and indicated that defendant said she left the victim naked to make it appear as if a man had committed the crime. *Dixon v. State*, 17 So. 3d 1099, 2009 Miss. App. LEXIS 88 (Miss. Ct. App.), *cert. denied*, 17 So. 3d 99, 2009 Miss. LEXIS 451 (Miss. 2009).

Two defendants' convictions for depraved-heart murder in violation of Miss.

Code Ann. § 97-3-19(1)(b) were appropriate because all eyewitnesses testified that the first defendant, who was the second defendant's son, repeatedly struck the victim; there was also sufficient evidence that the second defendant aided and abetted the first defendant in the victim's murder. *McDowell v. State*, 984 So. 2d 1003, 2007 Miss. App. LEXIS 669 (Miss. Ct. App. 2007), cert. denied, 984 So. 2d 277, 2008 Miss. LEXIS 328 (Miss. 2008).

Evidence was sufficient to convict defendant of murder where it showed the reckless and brutal nature of the crime; defendant admitted to beating and stomping the victim, numerous bruise patterns on the victim's back matched a pattern on the bottom of defendant's shoes, and there was testimony that defendant did not fight back. *Conley v. State*, 948 So. 2d 462, 2007 Miss. App. LEXIS 24 (Miss. Ct. App. 2007).

Defendant's convictions for murder and aggravated assault were proper where the evidence was sufficient to support the convictions because the State not only produced a complaining victim, but also an eyewitness to the crime. Additionally, the living victim testified that defendant shot him in the neck after defendant shot and killed the other victim. *McGee v. State*, 929 So. 2d 353, 2006 Miss. App. LEXIS 53 (Miss. Ct. App. 2006).

In a murder case, a motion for a new trial was properly denied because the verdict was not so contrary to the overwhelming weight of the evidence as to constitute an unconscionable injustice; there was conflicting testimony that defendant intended to hurt his grandfather, and he admitted to killing his grandfather, though he, the only witness to the actual crime, claimed self-defense. *Jones v. State*, 938 So. 2d 312, 2006 Miss. App. LEXIS 673 (Miss. Ct. App. 2006).

Defendant's murder conviction was not against the overwhelming weight of the evidence where three witnesses testified that they saw defendant murder his estranged wife's boyfriend, and a fourth witnessed the circumstances surrounding the murder, *Livingston v. State*, 943 So. 2d 66, 2006 Miss. App. LEXIS 417 (Miss. Ct. App.), cert. denied, 942 So. 2d 164, 2006 Miss. LEXIS 708 (Miss. 2006).

In a capital murder case, the evidence was sufficient to sustain the underlying armed robbery because a witness testified that two males wearing ski masks and gloves and brandishing pistols entered the store, pointed their guns at the witness and the victim, ordered them to hand over the money, and the victim was shot and killed during the robbery. *Duncan v. State*, 939 So. 2d 772, 2006 Miss. LEXIS 408 (Miss. 2006).

Defendant's conviction for murder was proper pursuant to Miss. Code Ann. § 97-3-19(1)(a) where defendant's bloody fingerprints were found in the automobile in which the victim was killed and his DNA was found under the victim's fingernails. *Wright v. State*, 915 So. 2d 527, 2005 Miss. App. LEXIS 976 (Miss. Ct. App. 2005).

After the victim's partially burned and decomposing body was found in a dump, defendant admitted that he shot a man in the head and burned him. A reasonable inference could be made that defendant shot the victim; the State met its burden to prove the elements of simple murder. *Anderson v. State*, 914 So. 2d 1239, 2005 Miss. App. LEXIS 862 (Miss. Ct. App. 2005), cert. dismissed, 927 So. 2d 750, 2006 Miss. LEXIS 163 (Miss. 2006).

Defendant's murder conviction was proper where defendant testified that he had dinner with the victim, his wife, shortly before she was killed, and his inconsistent testimony regarding when he left the house could have supported the jury's conclusion that he was present at the time she was shot. Shortly after the murder, defendant tested positive for gunshot residue on the back of his right hand and the palm and back of his left hand. *Dendy v. State*, 931 So. 2d 608, 2005 Miss. App. LEXIS 855 (Miss. Ct. App. 2005), cert. denied, 933 So. 2d 303, 2006 Miss. LEXIS 346 (Miss. 2006).

Evidence was sufficient to support defendant's conviction for the deliberate designed murder of his girlfriend pursuant to Miss. Code Ann. § 97-3-19 where the evidence showed that defendant clocked out of work at 10:34 p.m.; that he lived only 5 – 10 minutes from work; that he called police at 11:29 p.m.; and that he was covered with blood when police arrived and found his girlfriend's body. Also

the blood stains on defendant's tee shirt were consistent with the blood transfer pattern on the scarf his girlfriend was wearing when her body was discovered. *Jones v. State*, 918 So. 2d 1220, 2005 Miss. LEXIS 421 (Miss. 2005).

While there was conflicting testimony on whether defendant or a second man fired the gun at the victim (who had taken defendant's cocaine without paying for it), that was of no effect since there was more than enough undisputed evidence defendant had aided and abetted in the commission of the murder, making him as guilty as the principal. Witnesses for the state and defense testified that defendant drove the car used in the murder and was therefore present during the commission of the crime, and even if he was not the one who pulled the trigger, he deliberately chased the victim in the car and parked it close enough for the other man to fire the pistol at the victim and end his life; thus, the evidence sufficed for defendant's conviction, and his motion for new trial was properly denied. *Dilworth v. State*, 909 So. 2d 731, 2005 Miss. LEXIS 371 (Miss. 2005).

In defendant's murder trial, the evidence showed that the victim, who had struck defendant two days earlier in a bar fight, was struck by gunshots in a manner that indicated he was facing away from the person who shot him and was possibly running or bent over while working on his car when struck by four gunshots. It was reasonable for the jury to make the determination that defendant was seeking revenge, the evidence indicated defendant instructed his companion to stop upon observing the victim, and the jury could have reasonably concluded that defendant did not fear for his safety as he initially approached the victim; thus, the jury's verdict was not against the overwhelming weight of the evidence and defendant's motion for a new trial was properly denied. *Knox v. State*, 912 So. 2d 1004, 2005 Miss. App. LEXIS 207 (Miss. Ct. App.), cert. denied, 921 So. 2d 344, 2005 Miss. LEXIS 686 (Miss. 2005).

Defense did not dispute that defendant fired the fatal shot that killed his former girlfriend, the only dispute was whether her accidentally killed her when defend-

ing himself from her male friend or whether he killed her with deliberate design. An eyewitness testified that she saw defendant shoot the victim in the back, approach her as she lay on the ground, and shoot her in the head, and several witnesses that had been in her apartment testified that her male friend was in the apartment when they heard shots fired; thus, the evidence was sufficient to support defendant's conviction for murder and his motion for new trial was properly denied. *Raiford v. State*, 907 So. 2d 998, 2005 Miss. App. LEXIS 279 (Miss. Ct. App. 2005).

In defendant's trial for the deliberate design murder of defendant's girlfriend, a physician who performed the autopsy rebutted defendant's contention of suicide, the victim was right-handed, and the wound was to the left side of the victim's head, two witnesses testified that defendant's pants pocket showed the outline of a handgun, and defendant's suspicious behavior in removing a shell casing and leaving the scene upon the appearance of law enforcement created an inference of defendant's guilt. Thus, the evidence was sufficient to sustain defendant's conviction and the trial court properly denied defendant's motion for judgment notwithstanding the verdict. *Coleman v. State*, 876 So. 2d 1065, 2004 Miss. App. LEXIS 610 (Miss. Ct. App. 2004).

Defendant claimed that there was insufficient evidence that defendant participated in the robbery of the victim because defendant's co-indictee (who pled to manslaughter) actually took the wallet. However, the jury heard testimony that defendant stated to the co-indictee that, "I got him good, the blade went all the way through," and that defendant then searched through the victim's wallet which was later found in the possession of both men. Thus, a reasonable juror would have found defendant guilty and substantial evidence supported defendant's conviction. *Stewart v. State*, 881 So. 2d 919, 2004 Miss. App. LEXIS 556 (Miss. Ct. App. 2004).

Sufficient evidence existed to convict defendant of capital murder as the evidence showed the victim died of blunt force trauma and was sexually assaulted

and defendant was the only adult in the home with the child when she died. *Gilmore v. State*, 872 So. 2d 744, 2004 Miss. App. LEXIS 440 (Miss. Ct. App. 2004).

Where three eyewitnesses testified that the victim pulled defendant off the other man's back during a bar fight, and defendant then shot the victim in the head when the victim turned to help the other man, and defendant's self-defense argument had virtually no basis, defendant's murder conviction was proper where the jury was properly instructed on both murder and manslaughter, and chose to credit the witnesses testimony and discredit defendant's testimony; further, counsel properly followed the procedure outlined in *Turner v. State* for cases of frivolous appeals. *Smith v. State*, 868 So. 2d 1048, 2004 Miss. App. LEXIS 232 (Miss. Ct. App. 2004).

Defendant's stepson, who was sitting in the back seat of the car when the victim was shot, testified that he saw his stepfather walk out of the house, pull out a gun and shoot the victim, and that he did not see defendant slip and fall before he shot the victim. Defendant's stepson and defendant's own son both testified that after the shooting, defendant walked to the front of the car and took a few drags on the cigarette he was smoking, and the pathologist who performed the autopsy testified that the gun left an imprint below the victim's ear and that the gun left soot on the victim's skin, indicating close, hard contact between the gun and the victim's skin; thus, the evidence was sufficient to support defendant's murder conviction and defendant's motion for a new trial was properly denied. *Smith v. State*, 911 So. 2d 541, 2004 Miss. App. LEXIS 1104 (Miss. Ct. App. 2004), cert. denied, 920 So. 2d 1008, 2005 Miss. LEXIS 634 (Miss. 2005).

Defendant maintained that the State failed to offer any credible evidence that he committed the murder of his wife with deliberate design or malice aforethought. However, defendant's sister's fiancé testified that the next day, defendant told him that he had "killed his wife," and that he had done it at the old house, and defendant's sister also testified that defendant admitted having killed his wife; thus,

there was no abuse of the trial court's discretion in denying defendant's motion for a new trial based on an alleged faulty jury instruction, or a juror's alleged failure to have disclosed her status as a past crime victim during voir dire. *Gibson v. State*, 895 So. 2d 185, 2004 Miss. App. LEXIS 1142 (Miss. Ct. App. 2004).

Evidence was sufficient to support defendant's conviction for murdering his wife where he admitted the fatal shot and there was testimony that the victim was in a posture to defend herself from injury when the shot was fired and that the shot was fired at least 18 inches from her, refuting defendant's argument that the shooting was accidental. *Doss v. State*, 866 So. 2d 1105, 2003 Miss. App. LEXIS 819 (Miss. Ct. App. 2003).

Defendant's conviction for murdering her estranged husband was not against the overwhelming weight of the evidence: she attempted to cover up the murder by giving the police false information and lying about the victim's whereabouts; she attempted to impede the police investigation by seeking a temporary injunction against the police department; she never reported her husband missing or inquired about the investigation; she testified she had once moved out of the marital home to avoid killing the victim in anger; and it was for the jury to determine whether to believe defendant's testimony or that of her accomplice. *Kingston v. State*, 846 So. 2d 1023, 2003 Miss. LEXIS 244 (Miss. 2003).

Where defendant, a security guard, shot a man inside a car, who had allegedly waived a gun at defendant, and defendant argued the evidence only supported a charge of culpable negligence manslaughter, in each of the cases cited by defendant, the killing had been unintentional, but in defendant's case, there was no evidence in the record to suggest that defendant did not intend to shoot, and substantial evidence supported defendant's conviction for depraved heart murder. *Steele v. State*, 852 So. 2d 78, 2003 Miss. App. LEXIS 464 (Miss. Ct. App. 2003), cert. denied, 870 So. 2d 666, 2004 Miss. LEXIS 395 (Miss. 2004).

Defendant's murder conviction was proper: he did not articulate an arguable

basis to conclude that the trial court acted arbitrarily in denying his 11th-hour motion when he had done nothing to pursue retained counsel in time leading up to trial; further, the evidence was sufficient because the court did not find the evidence that defendant acted in self-defense so compelling as to lead to the conclusion that a fair-minded juror was obligated to accept it as true. *Nelson v. State*, 850 So. 2d 201, 2003 Miss. App. LEXIS 629 (Miss. Ct. App. 2003), cert. dismissed, 949 So. 2d 37, 2007 Miss. LEXIS 105 (Miss. 2007).

Defendant's murder conviction was proper where defendant's argument that a reasonable jury could only have found that he acted in self-defense was without merit because the evidence was uncontradicted that the victim was in fact unarmed, and no one other than defendant saw the victim reach for a weapon before defendant shot him. *Ables v. State*, 850 So. 2d 172, 2003 Miss. App. LEXIS 635 (Miss. Ct. App. 2003).

Evidence that defendant was one of five men who robbed a store owner and that defendant shot and killed the store owner during the robbery was sufficient to support defendant's conviction of and life sentence for capital murder. *Ellis v. State*, 856 So. 2d 561, 2003 Miss. App. LEXIS 456 (Miss. Ct. App.), cert. denied, 860 So. 2d 1223, 2003 Miss. LEXIS 892 (Miss. 2003).

Evidence was sufficient to convict a defendant of murder where his accomplice admitted in his statement for his plea agreement that defendant shot at the murder victim, and a witness testified about the accomplice's statement that implicated defendant in the murder. *Wells v. State*, 849 So. 2d 1231, 2003 Miss. LEXIS 213 (Miss. 2003).

Where two witnesses testified they saw defendant leave their slain mother's store carrying a money bag and their mother's purse, other witnesses placed defendant near the crime scene, and he admitted to a cellmate that he hit a woman with pipe wrench and took her purse and money bag, the evidence was legally sufficient to support defendant's conviction for capital murder. *Shelton v. State*, 853 So. 2d 1171, 2003 Miss. LEXIS 349 (Miss. 2003).

Defendant's murder conviction was proper and the evidence sufficient where

an inappropriate comment before the jury as to a prior criminal charge was sufficiently cured by the trial court's action in sustaining the objection and in requesting the jury to disregard the remark; moreover, the prejudicial effect of that comment was not of such nature as to have irreparably affected defendant's fundamental right to a fair trial. *Lee v. State*, 837 So. 2d 781, 2003 Miss. App. LEXIS 78 (Miss. Ct. App. 2003).

Where defendant first killed a man and immediately thereafter sexually assaulted and killed a woman, he was properly convicted of the felony murder of the man with sexual assault as the predicate felony, as there had been no break in the chain of events. *Moody v. State*, 841 So. 2d 1067, 2003 Miss. LEXIS 104 (Miss. 2003).

Defendant was properly convicted of the felony murder of a man and a woman, as the evidence was sufficient to prove the man was murdered while in commission of a sexual battery on the woman; defendant's intent to sexually batter the female victim could be inferred from his actions, as he had to first incapacitate the man in order to get to the woman. *Moody v. State*, 841 So. 2d 1067, 2003 Miss. LEXIS 104 (Miss. 2003).

Evidence was sufficient to sustain defendant's murder conviction where the defendant fired a 9mm gun, the victim was shot by a 9mm gun, witnesses testified that defendant fired several volleys, and no evidence showed that anyone other than defendant shot a gun. *Montana v. State*, 2002 Miss. LEXIS 172 (Miss. May 9, 2002), op. withdrawn, sub. op., 822 So. 2d 954, 2002 Miss. LEXIS 220 (Miss. 2002).

Evidence was sufficient where the physical evidence clearly suggested defendant's guilt, as it provided a possible link between a cord found in the victim's clothing and the cord in defendant's pants; and it was not error for the State to fail to present DNA evidence because the exculpatory nature of the evidence was not readily apparent. *Randle v. State*, 827 So. 2d 705, 2002 Miss. LEXIS 256 (Miss. 2002).

Evidence was sufficient to establish that the defendant attempted to commit the underlying felony of armed robbery

and, therefore, to support a conviction for felony murder where (1) the defendant confessed that a coperpetrator stated that he intended to rob a store, and the defendant accepted a gun from the coperpetrator, masked his face, and walked into the store wielding the gun, and (2) the plan was abandoned when a store employee recognized the defendant, and the defendant and his coperpetrators then shot both store employees, killing one of them. *Spann v. State*, 771 So. 2d 883, 2000 Miss. LEXIS 197 (Miss. 2000).

Evidence was sufficient to support a conviction for murder where the evidence showed that the victim was shot and killed by a .38 caliber pistol at a time when only the defendant had the opportunity to kill her. *Carter v. State*, 722 So. 2d 1258, 1998 Miss. LEXIS 564 (Miss. 1998).

Evidence was sufficient to support defendant's murder conviction for the shooting death of former paramour; defendant went to convenience store where former paramour worked, the two argued, former paramour locked herself in office, defendant became belligerent and former paramour refused to open door, defendant went to automobile and returned with shotgun, defendant shot door several times in attempt to enter room, and shots hit former paramour at close range and killed her. *Clark v. State*, 693 So. 2d 927, 1997 Miss. LEXIS 162 (Miss. 1997).

Valid conviction for capital murder, arising out of rape or kidnapping, must be supported by evidence legally sufficient to support conviction of both murder and underlying felony, had either been charged alone. *Walker v. State*, 671 So. 2d 581, 1995 Miss. LEXIS 494 (Miss. 1995), cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406, 1996 U.S. LEXIS 7236 (U.S. 1996).

When its case is based entirely upon circumstantial evidence, state is required to prove defendants guilty not only beyond reasonable doubt, but also to exclusion of every reasonable hypothesis consistent with innocence; circumstantial evidence need not exclude every possible doubt, but only every other reasonable hypothesis of guilt, and mere fanciful, farfetched, or unreasonable hypothesis of innocence is not sufficient to require acquittal. *Mont-*

gomery v. State, 515 So. 2d 845, 1987 Miss. LEXIS 2697 (Miss. 1987).

State's case passed muster under general review of sufficiency of evidence where a number of witnesses to shooting contradicted defendant's testimony. *Alford v. State*, 508 So. 2d 1039, 1987 Miss. LEXIS 2425 (Miss. 1987).

Where respondent was charged with capital murder for participating in assault during course of which respondent's companion killed victim, and was sentenced to death under capital murder statute, but death sentence was vacated under intervening U.S. Supreme Court decision holding that Eighth Amendment forbids imposition of death penalty on one who aids and abets felony in the course of which murder is committed but who does not himself kill, attempt to kill, or intend that killing take place or that lethal force be employed, curt on federal habeas corpus review should require state's judicial system to examine entire course of proceedings to determine whether at some point requisite factual finding has been made to support death penalty, which under proper circumstances does not offend Eighth amendment. *Cabana v. Bullock*, 474 U.S. 376, 106 S. Ct. 689, 88 L. Ed. 2d 704, 1986 U.S. LEXIS 46 (U.S. 1986), overruled in part, *Pope v. Illinois*, 481 U.S. 497, 107 S. Ct. 1918, 95 L. Ed. 2d 439, 1987 U.S. LEXIS 1934 (U.S. 1987).

Circumstantial evidence strongly suggesting that murder victim was in truck with defendant on night victim was murdered, coupled with evidence that defendant had never known victim before and fact that she was found strangled to death several days later, and evidence showing that victim had sexual intercourse with male on night in question is sufficient to establish to exclusion of every reasonable hypothesis consistent with innocence of defendant that victim was raped, that person who committed rape was defendant, that defendant acted with felonious intent, and that rape occurred in substantial temporal and factual relation to victim's murder at hands of defendant. *Fisher v. State*, 481 So. 2d 203, 1985 Miss. LEXIS 2281 (Miss. 1985).

When indictment charges defendant with capital murder in course of rape and

robbery and trial judge's instructions, as requested by state, tell jury that before it can convict defendant it must find that defendant killed victim while in course of committing rape and robbery, state undertakes burden of showing sufficiency of proof to establish both underlying rape and robbery as well as murder. *Fisher v. State*, 481 So. 2d 203, 1985 Miss. LEXIS 2281 (Miss. 1985).

Circumstantial evidence that defendant took several pieces of jewelry, personal property having some value, although modest, from murder victim combined with circumstantial evidence that defendant was person who committed killing, is sufficient to prove that taking of jewelry was by violence to victim or by putting victim in fear of immediate personal injury and is legally adequate to establish that defendant committed felony of robbery underlying capital murder conviction. *Fisher v. State*, 481 So. 2d 203, 1985 Miss. LEXIS 2281 (Miss. 1985).

Evidence that skeletal remains were found at place and under circumstances that were unusual, consistent with confession or admission of accused, is sufficient to prove corpus delicti. *Miskelley v. State*, 480 So. 2d 1104, 1985 Miss. LEXIS 2309 (Miss. 1985).

Evidence identifying defendant as being present on occasion of homicide in convenience store and that defendant was behind counter waiting on customers, that defendant had large amount of cash on him and that over \$300 was taken from store is sufficient to present to jury question of whether robbery and capital murder were committed and whether defendant was person who committed crime. *Johnson v. State*, 476 So. 2d 1195, 1985 Miss. LEXIS 2257 (Miss. 1985).

State's evidence showing that accused was not in imminent danger of losing his life or suffering great bodily harm at hands of the victim at the time he fired the fatal shot, in view of the distance which separated the two men at that time and the fact that the victim was unarmed and not advancing toward the accused, was sufficient to sustain conviction. *Pickert v. State*, 234 Miss. 513, 106 So. 2d 681, 1958 Miss. LEXIS 525 (Miss. 1958).

The death penalty was not justified where in a general melee in a colored

restaurant precipitated by the armed intrusion of the proprietor after the accused had taken a pistol away from his brother to prevent harm, the proprietor was shot by the accused while he was on his knees and the proprietor was trying to use his own gun. *Magee v. State*, 200 Miss. 861, 27 So. 2d 767, 1946 Miss. LEXIS 347 (Miss. 1946).

Where deceased was shot at night through a window and there were no eyewitnesses to the killing, circumstantial evidence as to the identity of defendant as the guilty person would not sustain conviction. *Moore v. State*, 188 Miss. 546, 195 So. 695, 1940 Miss. LEXIS 64 (Miss. 1940).

Proof of motive not absolutely necessary to sustain conviction of murder. *Motley v. Smith*, 172 Miss. 148, 159 So. 553, 1935 Miss. LEXIS 122 (Miss. 1935).

State must make out its case to moral certainty; accused need only raise reasonable doubt of guilt to entitle him to acquittal. *Cumberland v. State*, 110 Miss. 521, 70 So. 695, 1915 Miss. LEXIS 77 (Miss. 1915).

53. — Conviction sustained — murder.

Evidence supported defendant's convictions for second degree murder and multiple counts of attempted murder because witnesses to the shooting said that defendant was in a vehicle seated on the passenger side of the vehicle behind a codefendant, two of the victims said defendant shot at them while passing their vehicle, and the driver of the vehicle in which defendant was a passenger said in a statement before the driver's death that defendant was instrumental in getting rid of the driver's vehicle after the shooting. *Holland v. State*, 290 So. 3d 754, 2020 Miss. App. LEXIS 23 (Miss. Ct. App. 2020).

Because a rational fact-finder could have found that the victim was arguing with, but not physically threatening, defendant and a driver and defendant exited the car and shot the victim, killing him with deliberate design, there was sufficient evidence of murder. *Bernard v. State*, 288 So. 3d 301, 2019 Miss. LEXIS 403 (Miss. 2019).

Evidence supported defendant's conviction for deliberate-design murder because the victim, before dying, told a witness that the persons who shot the victim were from Friars Point and told another witness that defendant and others shot the victim, defendant and the victim were rivals for a witness who heard gunshots after a white car passed, a white car owned by defendant's mother contained gunshot residue and particles indicative of gunshot residue were found on defendant's palms, and a glove found in the car's back seat had defendant's DNA. *Chatman v. State*, 241 So. 3d 649, 2018 Miss. App. LEXIS 195 (Miss. Ct. App. 2018).

Although defendant asserted that he should have been convicted of manslaughter under the theory of imperfect self-defense, the evidence was sufficient to convict defendant of second-degree murder with a firearm enhancement because defendant's testimony demonstrated that he could not have been found not guilty under the theory of imperfect self-defense as he was not afraid of the victim and did not believe that the victim would cause serious bodily injury; and the jury was instructed on manslaughter, first-degree murder, and second-degree murder, it considered all of the evidence and testimony presented, and it determined that defendant acted neither in the heat of passion, nor committed imperfect self-defense. *Stuckey v. State*, 244 So. 3d 95, 2018 Miss. App. LEXIS 184 (Miss. Ct. App. 2018).

In a murder case, the evidence was sufficient for the jury to conclude defendant killed the victim with deliberate design. *Thompson v. State*, 269 So. 3d 301, 2018 Miss. App. LEXIS 175 (Miss. Ct. App. 2018).

Evidence supported defendant's conviction for deliberate-design murder because eyewitnesses testified that defendant and the victim argued, defendant shot the victim from approximately fifteen feet away, the victim ran toward the victim's car, and defendant followed the victim and continued to shoot at the victim. Furthermore, the victim did not have a weapon in the victim's car or near the victim's body. *Fairley v. State*, 251 So. 3d 761, 2018 Miss. App. LEXIS 170 (Miss. Ct. App. 2018).

Evidence was sufficient to support defendant's conviction of first-degree murder because it showed that shortly before the shooting defendant attempted to hit the victim with his car and then announced that he was going to kill the victim, several witnesses stated they watched defendant shoot the victim in the back of the head, multiple witnesses testified that they never saw the victim with a gun and that he was trying to run away when defendant shot him. *Bass v. State*, 273 So. 3d 768, 2018 Miss. App. LEXIS 631 (Miss. Ct. App. 2018), cert. denied, 272 So. 3d 130, 2019 Miss. LEXIS 238 (Miss. 2019).

Appellate court found that allowing defendant's first-degree murder conviction to stand would not sanction an unconscionable injustice, as there was overwhelming evidence that defendant murdered the victim. *Chatman v. State*, — So. 3d —, 2017 Miss. App. LEXIS 611 (Miss. Ct. App. Oct. 17, 2017), op. withdrawn, sub. op., 241 So. 3d 649, 2018 Miss. App. LEXIS 195 (Miss. Ct. App. 2018).

Verdict was not against the weight of the evidence because defendant admitted to killing the victim; the State offered evidence that defendant forced the door open and that the victim was not moving toward him as the door opened. *Harris v. State*, 242 So. 3d 181, 2017 Miss. App. LEXIS 579 (Miss. Ct. App. 2017).

Evidence was sufficient to convict defendant of deliberate-design murder because defendant admitted he killed the victim and that he left the house and came back before he shot the victim; although defendant testified the victim was coming toward him at the time he shot the victim, testimony to the contrary was submitted, and that testimony claimed defendant left the house and returned "moments" later to forcefully enter the house with a pistol drawn, twice firing it and killing the victim. *Harris v. State*, 242 So. 3d 181, 2017 Miss. App. LEXIS 579 (Miss. Ct. App. 2017).

Evidence supported defendant's conviction for first-degree murder because, although no one saw defendant shoot the victim after defendant told witnesses that defendant was looking for the victim and wanted to kill the victim, witnesses saw defendant carrying a gun to the area

where the victim's body was found, heard two shots, and then saw defendant flee the area. *Hill v. State*, 226 So. 3d 1251, 2017 Miss. App. LEXIS 543 (Miss. Ct. App. 2017).

Testimony from several witnesses that the victim was trying to run away from defendant and posed no threat when he was shot from behind and that both victims were trying to leave the venue when defendant shot them was sufficient to support defendant's convictions for aggravated assault and murder. *Scott v. State*, 220 So. 3d 957, 2017 Miss. LEXIS 268 (Miss. 2017).

There was sufficient evidence to convict defendant of depraved-heart murder, given that defendant admitted to both the ownership of the knife and the stabbing of the victim while he was in a defensive posture, defendant's self-defense claim was not supported by the physical evidence, and allowing the verdict to stand would not sanction an unconscionable injustice. *Hare v. State*, 232 So. 3d 793, 2017 Miss. App. LEXIS 363 (Miss. Ct. App. 2017).

Evidence was sufficient to convict defendant of first-degree murder and his conviction was not against the overwhelming weight of the evidence because defendant chose to stay in the victim's home after being asked to leave numerous times; a reasonable juror could conclude that defendant formed the required deliberate design intent in the moments before he shot and stabbed the victim 18 times; after killing the victim, rather than calling the police, defendant stole the victim's television and game console in an effort to remove his fingerprints from the home; and, although defendant testified he was acting in self-defense, the jury was free to disregard his version of events if it thought his testimony was not credible. *Potts v. State*, 233 So. 3d 782, 2017 Miss. LEXIS 237 (Miss. 2017).

Evidence was sufficient to support defendant's conviction of first-degree murder because the jury obviously found the witness's testimony that defendant had shot the victim following a fight to be credible, and a purported timestamp discrepancy and absence of the victim's vehicle on a surveillance video did not affect the essen-

tial elements of the crime. *Jones v. State*, 252 So. 3d 574, 2018 Miss. LEXIS 377 (Miss. 2018).

There was sufficient evidence to convict defendant of depraved-heart murder, given that defendant admitted to both the ownership of the knife and the stabbing of the victim while he was in a defensive posture, defendant's self-defense claim was not supported by the physical evidence, and allowing the verdict to stand would not sanction an unconscionable injustice. *Hare v. State*, 232 So. 3d 793, 2017 Miss. App. LEXIS 363 (Miss. Ct. App. 2017).

Evidence was sufficient to convict defendant of first-degree murder and his conviction was not against the overwhelming weight of the evidence because defendant chose to stay in the victim's home after being asked to leave numerous times; a reasonable juror could conclude that defendant formed the required deliberate design intent in the moments before he shot and stabbed the victim 18 times; after killing the victim, rather than calling the police, defendant stole the victim's television and game console in an effort to remove his fingerprints from the home; and, although defendant testified he was acting in self-defense, the jury was free to disregard his version of events if it thought his testimony was not credible. *Potts v. State*, 233 So. 3d 782, 2017 Miss. LEXIS 237 (Miss. 2017).

Evidence supported defendant's conviction for first degree murder because (1) defendant shot the victim once as the victim stood beside or stepped out of the car in which they were riding and several more times as the victim lay on the street; (2) witnesses described the shots as having a definite pause between the first shot and the final shot; (3) no gun other than defendant's was recovered; and (4) although the victim angrily cursed and possibly threatened others in the car, no one testified that the victim ever pointed a gun at defendant. *Cooper v. State*, 230 So. 3d 1071, 2017 Miss. App. LEXIS 168 (Miss. Ct. App.), cert. denied, 229 So. 3d 119, 2017 Miss. LEXIS 394 (Miss. 2017), cert. denied, — So. 3d —, 2017 Miss. LEXIS 395 (Miss. 2017).

Verdict finding defendant guilty of deliberate-design murder was not against

the overwhelming weight of the evidence because a witness testified that, just prior to the victim's shooting, she went to his house to obtain drugs; the witness was very familiar with the sound of defendant's voice; and, while standing behind a door from defendant's bedroom, the witness testified that she overheard defendant ask the victim for drugs to sell, that the men's conversation escalated, that their voices grew louder, that a struggle ensued, and that she heard a gunshot fired from inside the bedroom. *Titus v. State*, 229 So. 3d 187, 2017 Miss. App. LEXIS 136 (Miss. Ct. App. 2017).

Evidence was sufficient to convict defendant of being a felon in possession of a firearm and of murder because the State presented evidence that defendant had planned to rob the victim; the State's evidence put defendant and the victim together immediately before the shooting occurred as a store's security videotape placed defendant in the passenger's seat of the victim's vehicle; about eight minutes after pulling out of the store's parking lot, police informed dispatch that they were responding to a call reporting a murder at some apartments; the apartments were approximately one mile from the store; and the pathologist testified that the victim was shot twice, and that the first shot was from a distance of less than three feet. *Johnson v. State*, 224 So. 3d 66, 2016 Miss. LEXIS 521 (Miss. 2016).

There was sufficient evidence to support the jury's verdict that defendant murdered his girlfriend's ex-boyfriend with deliberate design and not in self-defense because there was competent evidence that defendant approached the ex-boyfriend with his gun drawn and then shot the ex-boyfriend while he was backing away with his hands raised in an attempt to defuse the argument. *Shaheed v. State*, 205 So. 3d 1105, 2016 Miss. App. LEXIS 806 (Miss. Ct. App. 2016).

There was sufficient proof of the elements of first-degree murder, including deliberate design, to convict defendant; he shot several times in quick succession with a deadly weapon, he admitted he intentionally shot multiple times in the direction of the victim, whom he thought was "after him," his paranoia at the time

of the shooting did not relieve him of culpability for the murder, and there was no evidence of self-defense. *Collins v. State*, 221 So. 3d 366, 2016 Miss. App. LEXIS 710 (Miss. Ct. App. 2016), cert. denied, 220 So. 3d 975, 2017 Miss. LEXIS 258 (Miss. 2017).

Evidence that defendant shot the victim after the victim confronted defendant about unpaid for gas, that the victim was unarmed, and that the victim was outside the car when defendant shot him was sufficient for a rational jury to have concluded that defendant guilty of murder beyond a reasonable doubt. *Beal v. State*, 225 So. 3d 1276, 2016 Miss. App. LEXIS 462 (Miss. Ct. App. 2016), cert. denied, 222 So. 3d 311, 2017 Miss. LEXIS 285 (Miss. 2017).

Evidence was sufficient to convict defendant of the second-degree-murder of the victim, his longtime girlfriend, because the State presented evidence that the victim was beaten and strangled through a doctor's testimony and photographs of the victim's injuries; the doctor testified that the scratches on the victim's neck were consistent with death by strangulation; the victim's daughter testified that her mother, days before the killing, told her to call 911 if she heard any screaming; defendant admitted that he killed the victim while they were fighting; and officers who arrived at the scene testified that defendant told them that he kicked the victim in the neck. *Hunter v. State*, 187 So. 3d 674, 2016 Miss. App. LEXIS 127 (Miss. Ct. App. 2016).

Evidence was sufficient to support defendant's first-degree murder conviction where a witness testified that she broke out the victim's car windows, defendant's cousins were holding the victim while defendant was fighting him and were beating and jumping on him, someone shouted to defendant to cut the victim's neck, and defendant admitted that she brought a knife from her cousin's house. *Roby v. State*, 183 So. 3d 857, 2016 Miss. LEXIS 42 (Miss. 2016).

Evidence was sufficient to convict defendant of two counts of deliberate-design murder and the jury's verdict was not against the overwhelming weight of the evidence because a neighbor testified that

he saw defendant shoot the first victim in the head; defendant went over to the first victim's house with a gun, which according to a firearms expert's testimony could not have accidentally discharged nine bullets; in order for nine rounds to have been shot from defendant's semiautomatic gun, the trigger had to have been pulled nine times; and, a couple of hours before the shooting took place, defendant told another individual he was going to kill someone. *Brown v. State*, 194 So. 3d 139, 2015 Miss. App. LEXIS 568 (Miss. Ct. App. 2015), cert. denied, 209 So. 3d 428, 2016 Miss. LEXIS 285 (Miss. 2016).

Overwhelming weight of evidence did not show that defendant killed the victim in the heat of passion, and the jury's verdict convicting defendant of deliberate design murder in the first degree was not against the overwhelming weight of the evidence as defendant stabbed or cut the victim 29 times; and the State's forensic pathologist expert testified that the stab wounds were deliberate, that the wounds were inconsistent with an accidental or unintentional stabbing, and that the victim died of massive blood loss due to 29 stab and cut wounds that caused damage to internal arteries and organs. *Bowser v. State*, 182 So. 3d 425, 2015 Miss. LEXIS 540 (Miss. 2015).

Evidence was sufficient to convict defendant of deliberate design murder in the first degree because the State presented evidence of the number, depth, and position of the victim's stab wounds, and that the stab wounds were consistent with deliberate thrusts; and, although defendant did not remember actually stabbing the victim, he repeatedly admitted that he was guilty, that no one else could have stabbed the victim as he was the only other person there, and that it was not in self-defense. *Bowser v. State*, 182 So. 3d 425, 2015 Miss. LEXIS 540 (Miss. 2015).

Evidence was sufficient to support defendant's conviction for deliberate-design murder of defendant's spouse because, although the victim's body was recovered from a house fire from which defendant escaped without serious injury, a medical examiner testified that the victim's cause of death was homicide caused by blunt-force trauma to the victim's head, a wit-

ness testified as to marital discord between defendant and the victim on the day of the victim's death, and a fire investigator testified that the house fire was deliberately set. *Rayner v. State*, 186 So. 3d 881, 2015 Miss. App. LEXIS 412 (Miss. Ct. App. 2015), cert. denied, 186 So. 3d 854, 2016 Miss. LEXIS 116 (Miss. 2016).

Evidence was sufficient to support defendant's conviction of first-degree murder where it showed that the victim had asked defendant for a divorce that morning and defendant was angry, several witnesses saw defendant angrily yelling at the victim, defendant made sure that the victim's sister was gone and the children were outside before the shooting, he admitted he was upset when he pointed the weapon at the victim, and he moved the gun and body to stage a suicide. *Holliman v. State*, 178 So. 3d 689, 2015 Miss. LEXIS 470 (Miss. 2015).

Evidence was sufficient to show that defendant deliberately pointed a loaded gun at the victim's head and pulled the trigger because the police noted that the victim's body was not in a position inconsistent with a struggle or sexual intercourse as alleged by defendant. Moreover, text messages sent moments before the victim's death showed defendant was angry and the victim thought the victim needed saving, a firearms-expert testified that the gun could not have accidentally discharged, and autopsy results effectively ruled out suicide. *Kuebler v. State*, 205 So. 3d 623, 2015 Miss. App. LEXIS 461 (Miss. Ct. App. 2015), rev'd, 204 So. 3d 1220, 2016 Miss. LEXIS 462 (Miss. 2016).

Evidence supported defendant's conviction for deliberate-design murder because defendant initiated an altercation when an employee of a power utility company came to defendant's home to turn off the power, used a deadly weapon to shoot and kill the employee, and hid the employee's body. Defendant pre-planned the murder and committed the murder with deliberate design because, prior to the shooting, defendant test fired a gun and placed it near the power meter before the employee arrived. *Davis v. State*, 165 So. 3d 537, 2015 Miss. App. LEXIS 297 (Miss. Ct. App. 2015).

There was sufficient evidence to support defendant's convictions for murder and

possession of a firearm by a convicted felon because a witness testified that defendant threatened the victim with a gun and then fired the gun at the victim multiple times; the evidence revealed that the victim died as a result of gunshot wounds, and the projectiles retrieved from his body matched the caliber of the gun that defendant was believed to have possessed. *McKnight v. State*, 187 So. 3d 635, 2015 Miss. App. LEXIS 276 (Miss. Ct. App. 2015), cert. denied, 188 So. 3d 575, 2016 Miss. LEXIS 142 (Miss. 2016).

There was sufficient evidence for a jury to find beyond a reasonable doubt that defendant murdered his victim. Although defendant's theory of defense was that several burglaries in the area could have been related to the victim's death, the evidence defendant produced to prove this theory was vague at best. *Brooks v. State*, 177 So. 3d 1152, 2015 Miss. App. LEXIS 169 (Miss. Ct. App.), cert. denied, — So. 3d —, 2015 Miss. LEXIS 631 (Miss. 2015), cert. denied, 178 So. 3d 729, 2015 Miss. LEXIS 553 (Miss. 2015).

Evidence was sufficient to support defendant's conviction because an accomplice testified that (1) the accomplice overheard defendant and codefendant discuss plans to steal the victim's money; (2) the accomplice and defendant remained in a car while codefendant went inside the victim's house; (3) after codefendant shot the victim, defendant went inside the house and removed money from the visibly dead victim's pants pocket; and (4) defendant threw the victim's gun, wallet, and cell phone into a creek. *Allen v. State*, 179 So. 3d 1138, 2015 Miss. App. LEXIS 99 (Miss. Ct. App.), cert. dismissed, — So. 3d —, 2015 Miss. LEXIS 576 (Miss. 2015).

Evidence was sufficient to find defendant guilty of deliberate-design murder because the victim's niece heard defendant on speaker phone say that she was coming over to "blow up everybody in the house," defendant arrived at the victim's house with a loaded gun and shot the victim in the head right after the victim threatened to call the police and as she was walking away. *Williams v. State*, 164 So. 3d 1078, 2015 Miss. App. LEXIS 170 (Miss. Ct. App. 2015).

Evidence was sufficient to support defendant's murder conviction under Miss.

Code Ann. § 97-3-19(1)(a) (Rev. 2014) conviction where the eyewitnesses testified that defendant told the victim to leave, the victim failed to do so, defendant then put a gun to the victim's head and shot him, and the victim did not try to take the gun from defendant or try to defend himself. *Smith v. State*, 171 So. 3d 542, 2015 Miss. App. LEXIS 33 (Miss. Ct. App.), cert. denied, — So. 3d —, 2015 Miss. LEXIS 409 (Miss. 2015).

Verdict convicting defendant of deliberate design murder was not contrary to the weight and sufficiency of the evidence where defendant admitted she was in the room with her mother at the time of her death, the weapon used to kill the mother was defendant's, there was gunshot residue on the hands of both the mother and defendant, and the jury heard testimony about the history of defendant's and her mother's relationship. *Jones v. State*, 154 So. 3d 872, 2014 Miss. LEXIS 563 (Miss. 2014).

Defendant's murder conviction was not so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice; as a result, the trial court did not abuse its discretion in denying defendant's motion for a new trial. *Collins v. State*, 172 So. 3d 813, 2014 Miss. App. LEXIS 563 (Miss. Ct. App. 2014), rev'd, 172 So. 3d 724, 2015 Miss. LEXIS 435 (Miss. 2015).

Although defendant argued that he should be granted a new trial because the weight of the evidence did not support a conviction of premeditated murder, the jury's verdict was not so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice. *Luster v. State*, 143 So. 3d 636, 2014 Miss. App. LEXIS 415 (Miss. Ct. App. 2014).

Record contained sufficient proof to establish that defendant committed murder, given in part that he was identified in a lineup as one of two men who confronted the victim, DNA testing revealed defendant's blood on his codefendant's clothing, and the victim and defendant were the only two gunshot victims in hospitals that night, and defendant did not seek charges against anyone. *Lewis v. State*, 140 So. 3d

1290, 2014 Miss. App. LEXIS 353 (Miss. Ct. App. 2014).

Evidence was sufficient to convict defendant of deliberate design murder because he admitted that he had killed the victim; the pathologist testified that the victim had been beaten severely and then strangled for more than one minute; defendant testified that he had contemplated killing the victim and then followed through while in a blackout induced by his voluntary ingestion of illegal drugs; and defendant's voluntary ingestion of drugs and alcohol did not negate the element of deliberate design. *Abeyta v. State*, 137 So. 3d 305, 2014 Miss. LEXIS 223 (Miss. 2014).

Jury's guilty verdict was not opposed by a decided preponderance of the evidence, nor was it based on no evidence whatsoever. The evidence presented by the State was legally sufficient to allow the jury to find defendant guilty of deliberate-design murder beyond a reasonable doubt and to the exclusion of all reasonable hypotheses consistent with innocence. *Beasley v. State*, 136 So. 3d 393, 2014 Miss. LEXIS 28 (Miss. 2014).

Defendant's conviction for deliberate-design murder was not against the weight of the evidence because (1) any intoxication on defendant's behalf was voluntary and could not be used to reduce the crime from murder to manslaughter; (2) there was no evidence that defendant and the victim were engaged in mutual combat at the time when defendant killed the victim; and (3) defendant, after hitting the victim in the head with a baseball bat, stabbed the victim with a knife to put the victim out of misery. *Bradshaw v. State*, 138 So. 3d 199, 2013 Miss. App. LEXIS 858 (Miss. Ct. App. 2013).

Evidence was sufficient and the weight of the evidence supporting the verdict finding defendant guilty of murder was substantial because the eyewitnesses maintained that defendant walked up behind the victim, unprovoked, and shot him in the back; the victim was unarmed; there was no case for self-defense; defendant was not in a heightened emotional state; and, regarding the previous alleged acts of violence by the victim against defendant, a two-month cooling off period

could not be considered an immediate act of provocation for manslaughter. *Day v. State*, 126 So. 3d 1011, 2013 Miss. App. LEXIS 840 (Miss. Ct. App. 2013).

While there were discrepancies at trial, because the eyewitnesses consistently testified that defendant struck the victim with a blunt object, and the medical evidence confirmed that was the cause of the victim's death, the verdict finding defendant guilty of depraved-heart murder was not against the overwhelming weight of the evidence. *Thomas v. State*, 134 So. 3d 357, 2013 Miss. App. LEXIS 717 (Miss. Ct. App. 2013).

Evidence was sufficient to convict defendant of depraved-heart murder because the two eyewitnesses' testimonies showed that defendant hit the victim in the head at least once while he was enraged at the victim; at no point before the victim was hit did he show aggression toward defendant; and the pathologist confirmed that the victim's death was caused by a blow to the left side of his head from a blunt object. *Thomas v. State*, 134 So. 3d 357, 2013 Miss. App. LEXIS 717 (Miss. Ct. App. 2013).

Weight and sufficiency of the evidence supported defendant's conviction for deliberate-design murder, as the evidence showed that he had retrieved a gun after a confrontation with the victim had ended, returned to the scene, and then shot the victim multiple times, even after the victim was lying in the street; the evidence did not support a verdict for manslaughter based on heat of passion, and did not support defendant's claim of self-defense. *Davis v. State*, 130 So. 3d 1141, 2013 Miss. App. LEXIS 490 (Miss. Ct. App. 2013), cert. denied, 131 So. 3d 578, 2014 Miss. LEXIS 73 (Miss. 2014).

Evidence supported defendant's convictions for two counts of murder, including that defendant was not acting in necessary self-defense under Miss. Code Ann. § 97-3-15, because two eyewitnesses testified that defendant shot the victims in a bar and a forensic pathologist testified as to the nature of the victims' wounds. *Copple v. State*, 117 So. 3d 651, 2013 Miss. App. LEXIS 421 (Miss. Ct. App. 2013).

Defendant's conviction for deliberate design murder was not against the mani-

fest weight of the evidence because defendant was physically present at the scene of the victim's murder, defendant gave the victim a concoction of water and crushed pills shortly before the victim was strangled, and the murder weapon, a blue dog leash, was found in defendant's trailer. *Graham v. State*, 120 So. 3d 382, 2013 Miss. LEXIS 339 (Miss. 2013).

Where defendant fatally shot his stepfather after he pushed defendant's mother onto a couch, the evidence was sufficient to convict defendant of deliberate-design murder as it established that neither he nor his mother was in danger, he admitted he could have handled the situation differently, and he had previously threatened the victim with a gun after the victim pushed the mother. *Barron v. State*, 130 So. 3d 531, 2013 Miss. App. LEXIS 314 (Miss. Ct. App. 2013), cert. denied, 131 So. 3d 577, 2014 Miss. LEXIS 61 (Miss. 2014).

Defendant's conviction for murder, rather than manslaughter, was supported by evidence that defendant had the deliberate design to kill the victim, was aware of what he was doing, and planned it quickly. Between the altercation and the shooting, a period of 20 to 90 minutes passed according to the conflicting trial testimony, and defendant planned to and did go get his gun so he could carry out his plan to kill the victim. *Griffith v. State*, 123 So. 3d 472, 2013 Miss. App. LEXIS 232 (Miss. Ct. App.), cert. denied, 123 So. 3d 450, 2013 Miss. LEXIS 543 (Miss. 2013).

Sufficient evidence supported appellant's conviction for depraved heart murder, Miss Code Ann. § 97-3-19(1)(b), because appellant was alone with a one-year-old child from the afternoon until he called 911 in the middle of the night, the child's two treating physicians and the State pathologist testified the child's injuries were inconsistent with appellant's claim that the child had fallen off the bed, but consistent with the child being violently shaken, and a reasonable juror could conclude that appellant acted without regard to the child's life by violently shaking him, resulting in his death. *Brandon v. State*, 109 So. 3d 128, 2013 Miss. App. LEXIS 49 (Miss. Ct. App. 2013).

Evidence was sufficient to support defendant's conviction for depraved-heart murder under Miss. Code Ann. § 97-3-19(1)(b) because defendant's sister-in-law testified that defendant intentionally pointed a gun at his brother and shot. *Smith v. State*, 111 So. 3d 119, 2013 Miss. App. LEXIS 176 (Miss. Ct. App. 2013).

Substantial evidence supported defendant's murder conviction where: (1) the only witness to the crime identified defendant as the shooter; (2) defendant's cell phone and a shirt containing his DNA were found near the crime scene; (3) two of defendant's friends testified that defendant had shown up at their apartment shortly after the shooting without a shirt or his cell phone; (4) a police officer testified that defendant's car was not at his home shortly after the shooting; and (5) defendant's evidence that contradicted the State's theory of the case did not entitle him to a new trial as the jury resolved the conflicts in favor of the State, and its verdict was not contrary to the weight of the evidence. *Flowers v. State*, 156 So. 3d 805, 2013 Miss. LEXIS 18 (Miss. 2013).

Evidence was sufficient to support defendant's conviction for murder, as he fatally shot the victim in the back of the head, his claim of imperfect self-defense was rejected by the jury, and he failed to provide evidence, scientific or otherwise, to support his claim that the shot was in the back of the victim's head because he had tried to duck to avoid being shot. *Branch v. State*, 118 So. 3d 646, 2013 Miss. App. LEXIS 649 (Miss. Ct. App.), cert. denied, 117 So. 3d 330, 2013 Miss. LEXIS 376 (Miss. 2013).

Defendant's murder conviction under Miss. Code Ann. § 97-3-19(1)(a) was appropriate because the evidence was sufficient. Although defendant testified that he shot the victim in self-defense, the victim was sitting in the car with his widow up, facing forward, when he was shot; the victim's wife also testified that defendant had walked past her to go to the driver's side of the vehicle. *Page v. State*, 64 So. 3d 482, 2011 Miss. LEXIS 333 (Miss. 2011).

Jury's verdict that found defendant guilty of murder pursuant to Miss. Code Ann. § 97-3-19(1) (Rev. 2006), rather than manslaughter, was supported by the evi-

dence. From evidence that several minutes had passed between the initial disagreement between defendant and the victim before defendant attacked the victim with a steak knife, the jury could find that defendant acted with deliberate design or in a way that was eminently dangerous to others and evidenced a depraved heart when she stabbed the victim in the neck. *McKay v. State*, 59 So. 3d 644, 2011 Miss. App. LEXIS 207 (Miss. Ct. App. 2011).

Evidence was sufficient to convict defendant of depraved-heart murder under Miss. Code Ann. § 97-3-19 (Rev. 2006) as the evidence showed that, after defendant's cohort threw a tire iron at the victim, causing the victim to fall to the ground, defendant retrieved the tire iron and proceeded to repeatedly strike the victim in the head with it. *Leggett v. State*, 54 So. 3d 317, 2011 Miss. App. LEXIS 78 (Miss. Ct. App. 2011).

Evidence was sufficient to convict a second defendant of manslaughter, murder, and aggravated assault as the evidence showed that defendant shot his firearm multiple times at the victims and that he did so with deliberate design. The surviving victim testified that this defendant had a gun and fired it, and an intent to kill could be inferred from use of a gun. *Sands v. State*, 62 So. 3d 374, 2011 Miss. LEXIS 128 (Miss. 2011).

Defendant's conviction for murder, in violation of Miss. Code Ann. § 97-3-19(1), was supported by the evidence because defendant admitted to the jury that the victim, a fellow gang member, was unarmed when defendant shot the victim; several people were present in the room, and others, including an infant, were present in the house at the time of the shooting. Defendant left the scene without ensuring that the victim received medical assistance. *Pitts v. State*, 66 So. 3d 174, 2010 Miss. App. LEXIS 658 (Miss. Ct. App. 2010), cert. denied, 65 So. 3d 310, 2011 Miss. LEXIS 354 (Miss. 2011).

Evidence showing that defendant fought with the victim, held the victim down, and accidentally shot himself in the hand, and then shot the victim a total of six times was sufficient to show deliberate design, in addition to evidence of man-

slaughter, thus leaving a question of fact for the jury and supporting the trial judge's denial of defendant's motion for a directed verdict. *Roach v. State*, 39 So. 3d 967, 2010 Miss. App. LEXIS 323 (Miss. Ct. App. 2010).

Evidence was sufficient to sustain a conviction for murder, pursuant to Miss. Code Ann. § 97-3-19(1)(a), because a rational trier of fact could have found that the prosecution proved that defendant was guilty of murder beyond a reasonable doubt where defendant reentered a club after leaving, walked up to the victim, and stabbed him. The jury acted within its discretion when it discounted defendant's various versions of the events. *Porter v. State*, 33 So. 3d 535, 2010 Miss. App. LEXIS 206 (Miss. Ct. App. 2010).

Weight of the evidence at trial supported defendant's conviction for felony murder, pursuant to Miss. Code Ann. § 97-3-19(1)(c), because the admissions in defendant's statement to the police showed that he actively participated in an attempted aggravated assault against an intended victim; he armed himself with a .25-caliber handgun and his companion expressed a desire to shoot the intended victim. *Coleman v. State*, 30 So. 3d 387, 2010 Miss. App. LEXIS 109 (Miss. Ct. App. 2010).

Defendant's conviction on Count II for the murder of his grandmother was proper because there was no eyewitness testimony that verified that defendant was suffering from delusions in the days preceding the shootings or at the time of the shootings, and the State offered competent medical evidence to show that he was not insane at the time of the shootings of his grandparents. *Sanders v. State*, 63 So. 3d 554, 2010 Miss. App. LEXIS 130 (Miss. Ct. App. 2010), aff'd, 63 So. 3d 497, 2011 Miss. LEXIS 193 (Miss. 2011).

Defendant's conviction on Count II for the murder of his grandmother was proper because there was no eyewitness testimony that verified that defendant was suffering from delusions in the days preceding the shootings or at the time of the shootings, and the State offered competent medical evidence to show that he was not insane at the time of the shootings of his grandparents. *Sanders v. State*,

63 So. 3d 554, 2010 Miss. App. LEXIS 130 (Miss. Ct. App. 2010), *aff'd*, 63 So. 3d 497, 2011 Miss. LEXIS 193 (Miss. 2011).

Evidence supported the murder conviction under Miss. Code Ann. § 97-3-19(1)(a), instead of a manslaughter conviction under Miss. Code Ann. § 97-3-35, because (1) witnesses testified that a fight outside of a club between defendant and the victim lasted a couple of minutes; (2) when defendant's sibling broke up the fight, defendant and the victim separated; (3) some people talked to defendant and attempted to calm defendant down; and (4) defendant, after several minutes, returned to the scene of the altercation, pulled out a gun, and shot and pursued the victim. In addition, the jury was instructed as to both murder and manslaughter. *Moore v. State*, 52 So. 3d 339, 2010 Miss. LEXIS 574 (Miss. 2010).

Defendant's murder convictions in violation of Miss. Code Ann. § 97-3-19(1)(a) were proper because he had threatened to kill one victim, his former girlfriend. Additionally, defendant's cell phone connected with a tower only three or miles from the crime scene at the time of the murders, and evidence was presented that defendant owned a weapon like the one used in the murders, contrary to his assertions. *Madden v. State*, 42 So. 3d 566, 2010 Miss. App. LEXIS 10 (Miss. Ct. App.), *cert. dismissed*, 49 So. 3d 106, 2010 Miss. LEXIS 460 (Miss. 2010).

Where the evidence showed that defendant had conducted his own investigation to find out who was having sexual relations with his wife, after identifying the victim as the one having the affair, proceeded to the victim's house armed with a gun, phoned his attorney and informed him of his intention to kill someone, and shot the unarmed victim, there was abundant evidence that the killing at issue was done with deliberate design so as to support a murder conviction, and the circuit court did not err in refusing defendant's manslaughter instruction. *Shorter v. State*, 33 So. 3d 512, 2009 Miss. App. LEXIS 830 (Miss. Ct. App. 2009).

Defendant's conviction for murder in violation of Miss. Code Ann. § 97-3-19(1)(a) was proper because there was no evidence that warranted an assisted-sui-

cide instruction. Defendant did not claim to have advised, encouraged, abetted, or assisted the victim to take or in the taking of her life; at most, defendant's statement revealed that the two talked about committing suicide together. *Williams v. State*, 53 So. 3d 761, 2009 Miss. App. LEXIS 947 (Miss. Ct. App. 2009), *rev'd*, 53 So. 3d 734, 2010 Miss. LEXIS 590 (Miss. 2010).

Defendant's conviction for capital murder in violation of Miss. Code Ann. § 97-3-19(2)(e) was proper because the evidence was sufficient to support the conviction. In part, two witnesses saw defendant standing beside the victim's car immediately after they heard shots being fired and defendant himself testified that he used the victim's credit card to go on a shopping spree on the day the victim died. *Catchings v. State*, 39 So. 3d 943, 2009 Miss. App. LEXIS 762 (Miss. Ct. App. 2009), *writ denied*, 39 So. 3d 5, 2010 Miss. LEXIS 382 (Miss. 2010), *cert. denied*, 565 U.S. 1205, 132 S. Ct. 1546, 182 L. Ed. 2d 178, 2012 U.S. LEXIS 1556 (U.S. 2012).

Evidence was sufficient to convict defendant because the victim was killed by a gun fired while in contact with her head, there was no evidence that the victim held the gun, and defendant and the victim had checked into the motel room where the victim was found. *Brown v. State*, 39 So. 3d 916, 2009 Miss. App. LEXIS 620 (Miss. Ct. App. 2009), *rev'd*, 39 So. 3d 890, 2010 Miss. LEXIS 370 (Miss. 2010).

Evidence was sufficient to convict defendant of murder under Miss. Code Ann. § 97-3-19(1)(a) (2006) because there was contradictory evidence from which a reasonable juror could have rejected defendant's claim of self-defense, and which established that defendant intended to cause his victim's death, including testimony from a neighbor, who heard an altercation, and testimony from a friend, who averred that defendant stated he intended to kill his girlfriend due to her infidelity. *Reed v. State*, 31 So. 3d 48, 2009 Miss. App. LEXIS 611 (Miss. Ct. App. 2009), *cert. denied*, 29 So. 3d 774, 2010 Miss. LEXIS 151 (Miss. 2010).

Evidence was sufficient to support defendant's conviction of murder because a pathologist testified that the victim's

death resulted from a violent struggle, that something had been tied around the victim's neck so that she could not breathe, and that she was immersed in water so that, when she was able to gasp, her lungs filled with water, resulting in her death. The *Weathersy* rule—under which a jury was required to accept the version of events of defendant or defendant's witnesses if they were the only witnesses to the homicide—did not apply because defendant did not establish his version of the victim's death—which he claim resulted from acts committed in self-defense—because defendant did not establish his version of the victim's death through his own testimony or that of other witnesses. *Bartolo v. State*, 32 So. 3d 522, 2009 Miss. App. LEXIS 530 (Miss. Ct. App. 2009).

Verdict of murder under Miss. Code Ann. § 97-3-19 was not against the overwhelming weight of the evidence as the testimony presented a factual dispute for the jury's resolution and the jury found certain testimony to be credible and defendant's attempts to establish a self-defense theory to be contradictory; although defendant cited to Miss. Code Ann. § 97-3-31, which provided for a manslaughter conviction when one killed another while resisting a felony, there was conflicting testimony as to whether the victim was attempting to commit a felony, and although defendant also cited to Miss. Code Ann. § 97-3-35 and claimed the evidence supported a heat of passion manslaughter conviction, there was no evidence that defendant was acting in a state of violent and uncontrollable rage and he only attempted to show that he was afraid of the victim and acted in self-defense. *Ray v. State*, 27 So. 3d 416, 2009 Miss. App. LEXIS 496 (Miss. Ct. App. 2009), cert. denied, 27 So. 3d 404, 2010 Miss. LEXIS 61 (Miss. 2010).

Court rejected as without merit defendant's claim that the trial court erred in failing to grant his motion for a judgment notwithstanding the verdict, given that the jury was instructed to consider whether the victim's killing was murder, manslaughter, or committed in self-defense and the jury had sufficient evidence to convict defendant of murder; although defendant argued that the facts supported

either excusable or justifiable homicide, the facts were conflicting and created a jury question, as testimony and physical evidence contradicted defendant's testimony that the victim backed him up steps and defendant having left the scene immediately after the stabbing created the impression that he knew the victim was no longer a threat. *Ray v. State*, 27 So. 3d 416, 2009 Miss. App. LEXIS 496 (Miss. Ct. App. 2009), cert. denied, 27 So. 3d 404, 2010 Miss. LEXIS 61 (Miss. 2010).

Defendant's conviction for murder in violation of Miss. Code Ann. § 97-3-19(1) was appropriate because his actions were the epitome of an act eminently dangerous to others and evincing a depraved heart, without regard for human life. Defendant had exited a nightclub after being in a fight and pulled a gun and fired 10 to 12 shots into a crowded parking lot, hitting four people. *Jackson v. State*, 28 So. 3d 638, 2009 Miss. App. LEXIS 476 (Miss. Ct. App. 2009), cert. denied, 27 So. 3d 404, 2010 Miss. LEXIS 85 (Miss. 2010).

Evidence, including testimony of a witness regarding how defendant was driving in relation to the victim's car, the testimony of another witness who spoke on the phone with the victim and testified that the victim seemed scared and was screaming, and the testimony of an expert witness who reconstructed the accident scene, was sufficient for a rational juror to convict defendant of depraved-heart murder in violation of Miss. Code Ann. § 97-3-19. *Nichols v. State*, 27 So. 3d 433, 2009 Miss. App. LEXIS 473 (Miss. Ct. App. 2009), cert. denied, 27 So. 3d 404, 2010 Miss. LEXIS 70 (Miss. 2010), cert. denied, 562 U.S. 849, 131 S. Ct. 97, 178 L. Ed. 2d 61, 2010 U.S. LEXIS 5836 (U.S. 2010).

Witness testimony that defendant chased the victim into an empty lot while firing a gun at him and that the victim's body was found in that lot and gunshot residue testing that revealed gunpowder on defendant's hand were sufficient to support defendant's conviction of murder under Miss. Code Ann. § 97-3-19(1)(a). *Watkins v. State*, 29 So. 3d 807, 2009 Miss. App. LEXIS 462 (Miss. Ct. App. 2009), cert. denied, 29 So. 3d 774, 2010 Miss. LEXIS 126 (Miss. 2010).

Evidence supported the verdict of guilt where, in his confessions to the murder,

defendant gave detailed explanations of what occurred and of his motive; defendant's confessions, along with the testimony of investigating officers, strongly preponderated in favor of the finding of guilt. *Neal v. State*, 15 So. 3d 388, 2009 Miss. LEXIS 272 (Miss. 2009), dismissed, — So. 3d —, 2016 Miss. LEXIS 340 (Miss. 2016).

Where defendant confessed to police that he choked the victim while at his house watching TV and smoking marijuana, he also admitted that he found a plastic garbage bag and duct tape; his cohort placed the bag around the victim's face and defendant taped the bag around the victim's head. A doctor testified that the victim's death was caused by strangulation and suffocation; the Supreme Court of Mississippi held that the evidence was sufficient to support defendant's conviction for murder in violation of Miss. Code Ann. § 97-3-19, and his prosecution for both capital murder and kidnapping did not violate double jeopardy. *Nelson v. State*, 10 So. 3d 898, 2009 Miss. LEXIS 198 (Miss. 2009).

Trial court did not err in denying defendant's motion for a JNOV because the evidence was sufficient to support the jury verdict finding defendant guilty of murder under Miss. Code Ann. § 97-3-19(1)(a) where the evidence showed that the half-sister of defendant's ex-wife showed defendant where the ex-wife's boyfriend—the victim—lived, that defendant told his ex-wife's sister not to tell anyone that she showed him where the victim lived, that defendant was furious when he saw that his ex-wife as at the victim's house, that the ex-wife noticed a van similar to that driven by defendant drive by the victim's house, that defendant dropped his ex-wife's half-sister off at home at 1:00 a.m., that the victim was last week alive at 2:00 a.m., that the half-sister tried to call defendant at 3:00 a.m. but he was not at home, that the victim's neighbor noticed a van similar to that belonging to defendant parked in the victim's driveway in the early morning hours, and that defendant threatened his wife that he would kill her and any man with whom he caught her. *Parker v. State*, 20 So. 3d 702, 2009 Miss. App. LEXIS 186 (Miss. Ct. App.), cert.

denied, 20 So. 3d 680, 2009 Miss. LEXIS 544 (Miss. 2009).

Where defendant disarmed his victim and fired the gun in the victim's direction and into a crowded nightclub, killing the victim and another and wounding three others, the trial court did not err in denying defendant's motion for a judgment notwithstanding the verdict because the evidence was sufficient to support defendant's convictions of murder, aggravated assault, and felon in possession of a firearm. *Roberson v. State*, 19 So. 3d 95, 2009 Miss. App. LEXIS 98 (Miss. Ct. App. 2009).

Evidence was sufficient to support defendant's convictions of murder and armed robbery where defendant's companions testified that they accompanied defendant to the victim's home seeking employment; that the victim told them that they could spend the night rather than driving all the way home; that defendant told them that he was going to rob the victim; that defendant headed toward the victim's bedroom after the victim retired; that as his companions left the home, they heard gunshots coming from the bedroom and that one looked back and saw defendant taking the victim's wallet out of his pocket; and that defendant jumped into their vehicle as they were departing and he had blood on him and was carrying a gun. Further evidence was justified defendant's conviction was testimony that defendant was angry with the victim for docking his pay after finding him sleeping on the job and the testimony of defendant's brother that defendant admitted commission of the offenses. *Lewis v. State*, 997 So. 2d 1001, 2009 Miss. App. LEXIS 2 (Miss. Ct. App. 2009).

Defendant's conviction for murdering his girlfriend was appropriate because defendant's friend, who was the only eyewitness to the incident, testified that defendant deliberately shot the victim in the head at point-blank range. Deliberate design to kill a person could be formed very quickly and the friend further recounted no "heat of passion" element to forward a possible manslaughter conviction; defendant also did not produce any evidence to that effect. *Fannings v. State*, 997 So. 2d 953, 2008 Miss. App. LEXIS 790 (Miss. Ct. App. 2008).

Defendant's murder conviction was appropriate because the admission of his statement given without a proper Miranda warning was harmless since, even without the videotaped statement, based on the overwhelming weight of the evidence of defendant's guilt, a jury would have found beyond a reasonable doubt that defendant was guilty. In part, three of the four codefendants present on the day of the murder testified that defendant was the shooter and two of those codefendants were eyewitnesses to the murder. *Walton v. State*, 998 So. 2d 971, 2008 Miss. LEXIS 572 (Miss. 2008).

Evidence was sufficient to support defendant's conviction of depraved heart murder because several witnesses testified that the shooter left the scene in defendant's vehicle, another witness obtained a partial plate number that matched that of defendant's vehicle, two witnesses positively identified defendant as the shooter in a photographic lineup shortly after the shooting, and six witnesses identified defendant as the shooter in court during his trial. *Jordan v. State*, 995 So. 2d 94, 2008 Miss. LEXIS 489 (Miss. 2008).

Defendant was not entitled to a new trial because the verdict finding defendant guilty of murder was not against the overwhelming weight of the evidence since (1) the victim's son, who witnessed the shooting, made consistent statements in court and to other individuals after the shooting about what defendant did and said right before he shot the victim; and (2) the attempted impeachment of the son involved insignificant details that happened prior to the shooting. *Mask v. State*, 996 So. 2d 106, 2008 Miss. App. LEXIS 377 (Miss. Ct. App.), cert. denied, 999 So. 2d 374, 2008 Miss. LEXIS 631 (Miss. 2008).

Evidence was sufficient to deny defendant's motion for a directed verdict and to convict him of murder because (1) the victim's son, who was in the car with the victim, testified that defendant approached his father, pointed a gun at his father, and shot his father; (2) even if the murder was an accident, as defendant claimed, a reasonable juror could still find defendant guilty of depraved-heart mur-

der under Miss. Code Ann. § 97-3-19(1)(b); and (3) a reasonable juror could reject defendant's argument that he shot the victim in self-defense because the victim was shot in the back. *Mask v. State*, 996 So. 2d 106, 2008 Miss. App. LEXIS 377 (Miss. Ct. App.), cert. denied, 999 So. 2d 374, 2008 Miss. LEXIS 631 (Miss. 2008).

Evidence was sufficient to support a jury's finding that a defendant murdered his ex-wife because the evidence showed that: (1) approximately two weeks before the ex-wife's death, the defendant told a witness that if the ex-wife tried to move to Colorado with their children, he would kill her; (2) she was in fact planning to move to Colorado about the time of her death; (3) on the date of the murder, the defendant told a friend that he had "beat her [the ex-wife] real bad this time"; and (4) a couple of weeks later, the defendant asked the friend to dispose of a tent stake that might be confused for the murder weapon. *Davis v. State*, 995 So. 2d 808, 2008 Miss. App. LEXIS 327 (Miss. Ct. App. 2008), cert. denied, 11 So. 3d 1250, 2009 Miss. LEXIS 163 (Miss. 2009).

Evidence was sufficient to support a conviction of both murder and aggravated assault, under Miss. Code Ann. §§ 97-3-19(1), 97-3-7(2), because a rational juror could have concluded beyond a reasonable doubt that defendant was guilty of both murder and aggravated assault because (1) the evidence tended to show that defendant acted recklessly in the commission of an imminently dangerous act and with extreme indifference to human life; (2) the State produced evidence showing that defendant fired a gun inside of an apartment that contained two unarmed individuals, as well as several children; (3) the State also established that defendant's firing of the gun resulted in the death of his wife and serious bodily injury to his stepson; and (4) defendant admitted pulling out the gun and firing it inside the apartment. *Readus v. State*, 997 So. 2d 941, 2008 Miss. App. LEXIS 249 (Miss. Ct. App. 2008), cert. denied, 999 So. 2d 852, 2009 Miss. LEXIS 27 (Miss. 2009).

Sufficient evidence supported the jury's finding that defendant shot the victim and caused the victim's death. Although defen-

dant argued that the State failed to establish that he had possession of the same caliber weapon that delivered the fatal shot, the absence of any evidence to establish that defendant possessed the particular caliber weapon used to shoot the victim was irrelevant. *Boyd v. State*, 977 So. 2d 329, 2008 Miss. LEXIS 144 (Miss. 2008).

In a challenge to the weight of the evidence, regarding defendant's motion for a new trial, her argument centered around her contention that there was no evidence that she caused the fire, thereby causing the death of the victim; also, she maintained that the evidence showed she was not at home before the fire was noticed and reported. Because of the many inconsistencies in the various statements of what happened the night of the fire, not to mention defendant's confessions, allowing the verdict finding her guilty of simple murder under Miss. Code Ann. § 97-3-19(1)(a) to stand did not sanction an unconscionable injustice; therefore, the trial court did not abuse its discretion in denying defendant's motion for a new trial. *Colburn v. State*, 990 So. 2d 206, 2008 Miss. App. LEXIS 74 (Miss. Ct. App. 2008).

Trial court did not err in denying defendant's motions for a directed verdict or a judgment notwithstanding the verdict because there was evidence of (1) three confessions made by defendant in the presence of three different individuals; (2) a strained relationship between defendant and the victim; (3) defendant's dislike for her job as a live-in-caretaker and the victim; and (4) the victim's autopsy showed he did not die of natural causes because he was alive when the fire started. Thus, there was sufficient proof presented at trial to establish the essential elements of murder under Miss. Code Ann. § 97-3-19(1)(a). *Colburn v. State*, 990 So. 2d 206, 2008 Miss. App. LEXIS 74 (Miss. Ct. App. 2008).

Evidence was sufficient to convict defendant of murder under Miss. Code Ann. § 97-3-19(1) because (1) defendant admitted he was the only adult at home with the victim that day; (2) the evidence of the bloody T-shirt, the bloody piece of the crutch and stopper, and the numerous

circular injuries on the victim's body from another piece of the crutch strongly suggested that defendant beat the victim severely with a crutch; (3) the evidence showed that the crutch broke into pieces, and that defendant disposed of the pieces, but that he overlooked the two pieces found by the police; (4) defendant's actions of beating and strangling the victim were willful acts likely to cause death or serious bodily injury and evinced a reckless indifference to the danger to human life from which malice could be inferred; and (5) defendant's expressions of unfamiliarity with the basics of cardiopulmonary resuscitation (CPR) while possessing certification in CPR and first aid training were inconsistent with his innocence of murder. *Staten v. State*, 989 So. 2d 938, 2008 Miss. App. LEXIS 76 (Miss. Ct. App.), cert. denied, 993 So. 2d 832, 2008 Miss. LEXIS 400 (Miss. 2008).

Directed verdict was denied a murder case under Miss. Code Ann. § 97-3-19(1)(a) because the evidence was sufficient where defendant, a bail bondsman, was owed money by the victim, defendant talked about killing the victim, the victim was picked up by defendant shortly before the shooting, defendant drove by the murder scene, and defendant confessed. Since the evidence was sufficient, a motion for judgment notwithstanding the verdict was properly denied. *Green v. State*, 982 So. 2d 471, 2008 Miss. App. LEXIS 62 (Miss. Ct. App. 2008).

Where defendant was charged with murdering her ex-boyfriend, the jury was properly instructed regarding manslaughter by culpable negligence under Miss. Code Ann. § 97-3-4. Based on defendant's written confession that she went to the victim's house to discuss their relationship, brought a pistol with her, had an argument with the victim, the gun accidentally discharged, and she attempted to set fire to his truck, the evidence was legally sufficient to support the jury verdict convicting defendant of murder and not manslaughter. *Brown v. State*, 981 So. 2d 1007, 2007 Miss. App. LEXIS 806 (Miss. Ct. App. 2007), cert. denied, 981 So. 2d 298, 2008 Miss. LEXIS 222 (Miss. 2008).

Evidence was sufficient to support a conviction based on depraved heart mur-

der under Miss. Code Ann. § 97-3-19(1)(b) since defendant fired at an occupied vehicle after arguing with her boyfriend. In reviewing the weight of the evidence, even though there was inconsistent testimony, allowing the verdict to stand would not have sanctioned an unconscionable injustice. *Cooper v. State*, 977 So. 2d 1220, 2007 Miss. App. LEXIS 701 (Miss. Ct. App. 2007).

Evidence was sufficient to support defendant's murder conviction because: (1) the victim was shot four times in the back and once in the chest; (2) three eyewitnesses stated that they saw defendant standing over the victim, shooting him repeatedly; (3) the state pathologist's testimony corroborated that the cause of death was multiple gun shots, consistent with shots being fired from above while the victim was on the ground; (4) both parties stipulated that two of the bullets that were found in the victim's body during the autopsy came from an automatic pistol that defendant admitted at trial was the one he used to shoot the victim; (5) an officer with the sheriff's department testified that approximately one hour after the shooting, defendant turned himself in to the police; and (6) defendant then gave a statement in which he said that during the course of an argument, he shot the victim, but made no claim of seeing the victim with any weapon. *Scott v. State*, 965 So. 2d 758, 2007 Miss. App. LEXIS 642 (Miss. Ct. App. 2007).

Evidence did not so heavily preponderate against the verdict finding defendant guilty of murder that a new trial was warranted because: (1) defendant admitted to shooting the victim and stated that he did not see the victim with a weapon; (2) three eyewitnesses testified that they saw defendant standing over the victim's body, shooting him repeatedly; (3) no one saw the victim with a weapon and no weapon was seen or found in his car; and (4) the state pathologist confirmed that the victim's wounds were consistent with the victim lying on the ground and being shot from above. *Scott v. State*, 965 So. 2d 758, 2007 Miss. App. LEXIS 642 (Miss. Ct. App. 2007).

Sufficient evidence support defendant's conviction for murder when a rational

juror could have concluded that when defendant left the house, he went to get a weapon and then intended to go through with what he had been desiring to do for a long time, to get the victim; he succeeded by firing a shot at close range, several inches away according to expert testimony. *Mullen v. State*, 986 So. 2d 320, 2007 Miss. App. LEXIS 605 (Miss. Ct. App. 2007), cert. denied, 987 So. 2d 451, 2008 Miss. LEXIS 559 (Miss. 2008).

Defendant's murder conviction was affirmed because the jury heard the testimony from all of the state's witnesses, including the defense's cross-examination of those witnesses, and from the defense's witnesses, including the state's cross-examination of the witnesses; the court held that the verdict was not contrary to the weight of the evidence. *Jones v. State*, 962 So. 2d 1263, 2007 Miss. LEXIS 473 (Miss. 2007).

Evidence was sufficient to sustain defendant's conviction for deliberate-design murder because three witnesses stated that defendant confessed to killing the victim, the victim sustained multiple blows to the head, chest, abdomen and back, and a pathologist testified that the amount of force necessary to produce the victim's injuries was unlikely to have been inflicted without an object and most likely was made by contact with a blunt object. *Brown v. State*, 965 So. 2d 1023, 2007 Miss. LEXIS 430 (Miss. 2007).

Defendant's murder conviction pursuant to Miss. Code Ann. § 97-3-19(a)(1) was proper because there was sufficient evidence that permitted the jury to find that, before defendant slashed the victim's throat, he had an appreciable time to plan, and did in fact plan, to kill her. *Craft v. State*, 970 So. 2d 178, 2007 Miss. App. LEXIS 477 (Miss. Ct. App. 2007), cert. denied, 977 So. 2d 343, 2008 Miss. LEXIS 89 (Miss. 2008).

Evidence was sufficient to convict defendant of murder under Miss. Code Ann. § 97-3-19(1)(a) because, inter alia: (1) the victim's wife made an in-court identification of defendant as the man with whom the victim had argued after giving defendant and the accomplice-after-the-fact a ride home; (2) the next day, the wife filed a missing person's report in which she re-

ported that the victim was last seen in the company of defendant and his friend; (3) she identified defendant from a photographic lineup; and (4) the accomplice-after-the-fact identified defendant as the killer. *Bailey v. State*, 960 So. 2d 583, 2007 Miss. App. LEXIS 427 (Miss. Ct. App. 2007).

Evidence was sufficient to support defendant's conviction of murder because the testimony of the accessory-after-the-fact showed that: (1) her testimony did not have to be corroborated since she was not an accomplice to the murder; and (2) even assuming that she was an accomplice, her testimony about the murder was corroborated because the forensic pathologist corroborated the accessory-after-the-fact's testimony that the victim was stabbed, the victim's wife testified that defendant was the last person she saw with the victim and stated that they were quarreling when she left the home, and a friend who helped defendant dig a hole in his backyard to supposedly bury a dog never saw a dog, but he did see the heel of a human who was covered by a white sheet. *Bailey v. State*, 960 So. 2d 583, 2007 Miss. App. LEXIS 427 (Miss. Ct. App. 2007).

Defendant's convictions for murder, armed robbery, and shooting into an occupied dwelling were appropriate because the evidence was sufficient: two witnesses testified to seeing defendant shoot the victim; a witness further testified to observing defendant removing the victim's clothing and wallet; and a female testified to a shot being fired through her front door at approximately the time that the victim was shot. *Conner v. State*, 971 So. 2d 630, 2007 Miss. App. LEXIS 370 (Miss. Ct. App.), cert. denied, 973 So. 2d 244, 2007 Miss. LEXIS 682 (Miss. 2007).

Defendant's conviction for murdering the victim by deliberate design under Miss. Code Ann. § 97-3-19(1)(a) was proper in part because statements that witnesses overheard defendant and the victim make to one another immediately before the fight leading to the victim's death began were relevant to show that defendant intended to fight and might have been in the initial aggressor. *Council v. State*, 976 So. 2d 889, 2007 Miss. App. LEXIS 297 (Miss. Ct. App. 2007), cert.

dismissed, 977 So. 2d 343, 2008 Miss. LEXIS 74 (Miss. 2008).

Defendant's conviction for murder in violation of Miss. Code Ann. § 97-3-19(1)(a) was appropriate because there was sufficient evidence to support the conviction since there was evidence that defendant repeatedly beat the victim and then proceeded to the kitchen where defendant obtained a knife that he used to repeatedly stab the victim; there was also evidence that defendant took money from the victim after the victim's death to buy more drugs. *McCain v. State*, 971 So. 2d 608, 2007 Miss. App. LEXIS 295 (Miss. Ct. App.), cert. denied, 973 So. 2d 244, 2007 Miss. LEXIS 700 (Miss. 2007), cert. denied, 553 U.S. 1056, 128 S. Ct. 2478, 171 L. Ed. 2d 772, 2008 U.S. LEXIS 4228 (U.S. 2008).

Where defendant was convicted of murdering a neighbor in violation of Miss. Code Ann. § 97-3-19(1)(a), defendant's motions for a directed verdict, judgment notwithstanding the verdict, and a new trial were properly denied because: (1) the testimony of witnesses and the presence of defendant's DNA at the crime scene were sufficient evidence to allow a rational juror to conclude that the state proved each element of murder; and (2) the jury decided which evidence and testimony was credible and returned a reasonable verdict. *Saucier v. State*, 950 So. 2d 262, 2007 Miss. App. LEXIS 114 (Miss. Ct. App. 2007).

Trial court properly denied defendant's motion for a judgment notwithstanding the verdict because there was sufficient evidence for a reasonable jury to find that he committed murder; the prosecution produced an eyewitness to the murder, in addition to another witness who heard defendant state that he was going to kill the victim for stealing his truck battery. *Herron v. State*, 941 So. 2d 834, 2006 Miss. App. LEXIS 242 (Miss. Ct. App.), cert. denied, 942 So. 2d 164, 2006 Miss. LEXIS 643 (Miss. 2006).

Evidence at trial was sufficient to convict defendant of murder and the conviction was not against the overwhelming weight of the evidence because, inter alia: (1) permissible inferences from the evidence presented at trial included that

defendant armed himself, drove to the store, and intentionally killed the victim without justification; (2) whatever occurred earlier during a fight between the victim and defendant, that fight was over and the jury could find that defendant was in no imminent danger from the victim; and (3) the victim's back was to defendant when he was killed. *Chandler v. State*, 967 So. 2d 47, 2006 Miss. App. LEXIS 791 (Miss. Ct. App. 2006), cert. denied, 966 So. 2d 172, 2007 Miss. LEXIS 595 (Miss. 2007).

In a trial for depraved heart murder, the trial court properly denied defendant's motion for directed verdict, motion for a new trial, and motion notwithstanding the verdict because the state introduced testimony from six witnesses, who did not know one another, all of whom testified that defendant fired an automatic weapon into a crowd at an event; the victim, who was seated about 30 to 40 yards from defendant, was killed after being struck in the temple by one of the shots. *Johnson v. State*, 950 So. 2d 217, 2006 Miss. App. LEXIS 743 (Miss. Ct. App. 2006).

Evidence was sufficient to sustain a murder conviction because a witness observed defendant threatening to kill the victim, defendant's statement to the police differed from his trial testimony concerning both the time that he left the victim's house and where he was picked up by a friend, and after the murder, defendant fled to Louisiana and acted suspiciously upon his apprehension. *Moffett v. State*, 938 So. 2d 321, 2006 Miss. App. LEXIS 684 (Miss. Ct. App. 2006).

Motion for a directed verdict was denied in a murder case because a rational trier of fact could have found defendant guilty of murder, even though there was no eyewitnesses to a stabbing; defendant alleged that he acted in self-defense, and he argued that a girlfriend's inculpatory testimony was false. *Jones v. State*, 938 So. 2d 312, 2006 Miss. App. LEXIS 673 (Miss. Ct. App. 2006).

Evidence was sufficient to convict defendant of murder because, *inter alia*, defendant's hypotheses that the automatic weapon was not in his possession during the murder were conflicting and unreasonable, and defendant contended that a

reasonable hypothesis consistent with his innocence would be that another individual had motive and opportunity to commit the crimes, but he did not hypothesize any motive that individual might have had for the shootings or any way the murder weapon might have fallen into the individual's possession and later end up in a bayou. *Jackson v. State*, 943 So. 2d 720, 2006 Miss. App. LEXIS 506 (Miss. Ct. App. 2006).

Where the evidence showed that defendant acted nervous around the time of a shooting, he asked a neighbor to provide a false alibi, he had borrowed a gun from his brother before the shooting and returned it several days after, and no alibi was ever confirmed, there was sufficient evidence to support a conviction for the murder of an ex-girlfriend's new paramour; therefore, a motion for a directed verdict was properly denied. *Sipp v. State*, 936 So. 2d 326, 2006 Miss. LEXIS 336 (Miss. 2006).

Motion for judgment notwithstanding the verdict or a new trial was properly denied because there was sufficient evidence to support a conviction for murder based on a deliberate design; the police had been called to a residence to interrupt two domestic disputes prior to the final attack, defendant broke through a door with his bare hands and beat the victim until she fell to the floor, and defendant delivered three fatal blows to the victim while fighting off her son and other family members. *Wilson v. State*, 936 So. 2d 357, 2006 Miss. LEXIS 435 (Miss. 2006).

Defendant's convictions for murder and aggravated assault in violation of Miss. Code Ann. § 97-3-19 and Miss. Code Ann. § 97-3-7(2) were proper because there was sufficient evidence from which a rational jury could have concluded that defendant possessed the gun and shot the victim with the gun, without any struggle between the two. *Anthony v. State*, 936 So. 2d 471, 2006 Miss. App. LEXIS 590 (Miss. Ct. App. 2006).

Sufficient evidence existed to convict defendant of murder in violation of Miss. Code Ann. § 97-3-19 as defendant wrote goodbye notes to his daughters asking for forgiveness and the two daughters testified that defendant stabbed the victim and then stabbed himself. *Wash v. State*, 931

So. 2d 672, 2006 Miss. App. LEXIS 454 (Miss. Ct. App.), cert. dismissed, 937 So. 2d 450, 2006 Miss. LEXIS 544 (Miss. 2006).

Defendant's murder conviction was appropriate where the State presented an eyewitness to the murder, along with two witnesses whose testimony revealed the consistency of the child witness's account. Additionally, there was arguably incriminating testimony of defendant's cell mate. *Osborne v. State*, 942 So. 2d 193, 2006 Miss. App. LEXIS 134 (Miss. Ct. App.), cert. denied, 942 So. 2d 164, 2006 Miss. LEXIS 714 (Miss. 2006).

Defendant's conviction for murder of his mother was affirmed as defendant rested without putting on a defense, the manner of death (homicide) was not contested by any evidence in the record, and the broom was consistent with the type of instrument that was used to inflict the injuries to the mother's bruised and battered body. *Ware v. State*, 914 So. 2d 751, 2005 Miss. App. LEXIS 672 (Miss. Ct. App. 2005).

Appellate court affirmed defendant's conviction for capital murder as defendant entered the victim's home, knocked the victim unconscious, and then set the house on fire. *McIntosh v. State*, 917 So. 2d 78, 2005 Miss. LEXIS 754 (Miss. 2005).

Where defendant repeatedly hit the victim with a barstool and her blows were so forceful that they caused the barstool to break, the evidence was sufficient to sustain her murder conviction under Miss. Code Ann. § 97-3-19. There was no evidence that defendant was acting in self-defense. *Shields v. State*, 920 So. 2d 1033, 2005 Miss. App. LEXIS 779 (Miss. Ct. App. 2005).

State proved the elements of murder because (1) defendant stated that she saw no one else at the apartment when the victim was shot three times; (2) she stated that she was in the apartment when the victim was shot and fell; (3) she did not try to get help for the victim, and it was not until defendant's mother arrived that the mother called the police; (4) defendant had a scratch on her face; and (5) a gunshot residue test kit showed that defendant tested positive for gunshot residue on her right and left palms. *Reynolds v. State*, 913 So. 2d 290, 2005 Miss. LEXIS 258 (Miss. 2005).

Evidence was sufficient to convict defendant of murder because there was an abundance of credible, corroborated, eyewitness testimony in support of the verdict, including (1) the DNA evidence on defendant's clothing; (2) the testimony of a witness that defendant confessed to killing the victim; and (3) the testimony of a second witness placing defendant at the motel in the time period that the victim was killed. *Young v. State*, 891 So. 2d 813, 2005 Miss. LEXIS 40 (Miss. 2005).

Evidence proved beyond a reasonable doubt that defendant murdered the victim because (1) the victim had various bruises upon her body when she was admitted to the hospital; (2) the victim's blood and urine alcohol content were zero when she was admitted to the hospital; (3) defendant had two prior convictions for domestic abuse upon the victim; (4) the doctor performing the autopsy determined the cause of the victim's death to be blunt force trauma to the abdomen, leading to necrosis of the bowel; and (5) defendant's evidence contradicting the State's version of events that the victim was murdered and did not die from alcohol or acetaminophen toxicity was not so strong that reasonable and fair-minded jurors could only have found defendant not guilty; thus, the trial court did not err in denying defendant's motion for a directed verdict, or his motion for a judgment notwithstanding a verdict or a new trial. *Moses v. State*, 893 So. 2d 258, 2004 Miss. App. LEXIS 1066 (Miss. Ct. App. 2004).

Where defendant brutally beat, stabbed and choked his wife to death in the presence of her friend and her seven-month-old baby, the evidence was sufficient to support his conviction for murder. Defendant was properly sentenced to life imprisonment. *Green v. State*, 887 So. 2d 840, 2004 Miss. App. LEXIS 931 (Miss. Ct. App. 2004).

In a murder case, in view of evidence that (1) defendant and his girlfriend were seen together about 1 ½ hours before her body was found in defendant's truck; (2) the truck was found minutes after defendant reported it stolen by his girlfriend; (3) a bullet in the victim's head came from a .38 caliber gun, and such a gun was recovered from defendant's home; and (4)

there were similarities between the bullet recovered from the victim's body and bullets fired from the recovered gun, the trial court properly denied defendant's motion for judgment notwithstanding the verdict or for a new trial. *Rinehart v. State*, 883 So. 2d 573, 2004 Miss. LEXIS 1228 (Miss. 2004).

Following evidence was sufficient to convict defendant of capital murder: (1) an eyewitness's testimony that he was with defendant when defendant murdered a woman, that defendant threatened him with death if he told anyone, and that defendant used the same type of weapon that the State's expert testified had been used to kill the victim; (2) testimony of another witness that defendant had bragged about killing a woman; and (3) testimony of a third witness that pinpointed two males at the scene when the victim was killed, corroborating the eyewitness's story. *Brown v. State*, 890 So. 2d 901, 2004 Miss. LEXIS 1104 (Miss. 2004), cert. denied, 544 U.S. 981, 125 S. Ct. 1842, 161 L. Ed. 2d 735, 2005 U.S. LEXIS 3424 (U.S. 2005).

Sufficient evidence existed to convict defendant of capital murder as defendant confessed to the murder after twice waiving his Miranda rights, defendant was seen leaving the murder scene, and the victim's blood was on defendant's clothing. Further, defendant's confession that he attacked the victim when she would not lend him money was sufficient to support a finding of armed robbery under Miss. Code Ann. § 97-3-79. *Carr v. State*, 880 So. 2d 1079, 2004 Miss. App. LEXIS 849 (Miss. Ct. App. 2004).

Sufficient evidence existed to convict defendant of murder of the two victims; the victims lived with defendant, defendant's friend testified that she saw one of the victims in her bed over a period of a couple of days before the fire and the victim never moved, and defendant prevented a home nurse from checking the other victim by lying to her and telling her the victim had been taken to the hospital. *McGruder v. State*, 886 So. 2d 27, 2004 Miss. App. LEXIS 590 (Miss. Ct. App. 2004).

There was substantial evidence in the record to support defendant's conviction

for murder (1) there was DNA evidence on defendant's clothing; (2) a witness testified that defendant confessed to killing the victim; and (3) another witness, the hotel manager, placed defendant at the hotel in the time period that the victim was killed. Because there was substantial evidence to support defendant's conviction, the trial court did not abuse its discretion in denying defendant's motion for a new trial. *Young v. State*, 2004 Miss. LEXIS 588 (Miss. May 27, 2004), op. withdrawn, sub. op., 891 So. 2d 813, 2005 Miss. LEXIS 40 (Miss. 2005).

Court affirmed defendant's murder conviction, rejecting defendant's contention that he could have been guilty of manslaughter only on the theory that he had used excessive force to repel an unwanted trespasser. Defendant's wife had voluntarily admitted the victim into defendant's home as a guest, and the victim's efforts to calm defendant did not place him in the class of an unauthorized trespasser despite defendant's repeated demands that he leave the property. *Lester v. State*, 862 So. 2d 582, 2004 Miss. App. LEXIS 6 (Miss. Ct. App. 2004).

Defendant's murder conviction under Miss. Code Ann. § 97-3-19 was supported by sufficient evidence and was not against the weight of the evidence; the State presented testimony by witnesses that indicated defendant's killing of the victim, defendant's ex-boyfriend, was intentional, as defendant told one witness that she intended to kill the victim, and another witness testified that the victim had taken no threatening action against the victim prior to the shooting. *Reed v. State*, 863 So. 2d 981, 2003 Miss. App. LEXIS 1197 (Miss. Ct. App. 2003).

Evidence presented at trial was sufficient to permit the verdict of murder found by the jury where the facts indicated that when the victim and defendant began to argue, defendant retrieved a gun, which discharged and struck the victim in the head, fatally wounding her; defendant stopped the vehicle and shoved the victim out of the car onto the road where she was struck by another vehicle. *Fairley v. State*, 871 So. 2d 1282, 2003 Miss. LEXIS 690 (Miss. 2003).

Defendant's conviction for murder, Miss. Code Ann. § 97-3-19, was affirmed;

based on testimony by three witnesses who identified defendant as the shooter, the verdict was not against the weight of the evidence, and was not so unconscionable as to require a new trial. *Bownes v. State*, 861 So. 2d 1061, 2003 Miss. App. LEXIS 1191 (Miss. Ct. App. 2003).

Where the facts showed that defendant shot an unarmed friend in the back, defendant stated an intention to kill the victim, and defendant kicked the victim's body after the shooting, there was sufficient evidence to sustain a murder conviction, rather than a conviction for heat of passion manslaughter. *Schuck v. State*, 865 So. 2d 1111, 2003 Miss. LEXIS 753 (Miss. 2003).

Evidence showing that defendant was beaten by her husband, that defendant told her husband that he was "fixing to die," that defendant went inside the trailer where she lived with her husband and armed herself with a shotgun, which she fired once as a "warning" to her husband and fired again 45 minutes later fatally wounding him, was sufficient to support a jury's finding that defendant had murdered her husband. *Moore v. State*, 859 So. 2d 379, 2003 Miss. LEXIS 654 (Miss. 2003).

Evidence that defendant stabbed two companions was sufficient to support his conviction for double murder. *Stack v. State*, 860 So. 2d 687, 2003 Miss. LEXIS 529 (Miss. 2003).

Evidence was sufficient to convict a defendant of murder where his accomplice admitted in his statement for his plea agreement that defendant shot at the murder victim, and a witness testified about the accomplice's statement that implicated defendant in the murder. *Wells v. State*, 849 So. 2d 1231, 2003 Miss. LEXIS 213 (Miss. 2003).

Defendant's conviction for murdering her estranged husband was not against the overwhelming weight of the evidence: she attempted to cover up the murder by giving the police false information and lying about the victim's whereabouts; she attempted to impede the police investigation by seeking a temporary injunction against the police department; she never reported her husband missing or inquired about the investigation; she testified she

had once moved out of the marital home to avoid killing the victim in anger; and it was for the jury to determine whether to believe defendant's testimony or that of her accomplice. *Kingston v. State*, 846 So. 2d 1023, 2003 Miss. LEXIS 244 (Miss. 2003).

Testimony that defendant threatened the victim, shot him with a sawed-off shotgun while the victim sat in his car, and that the victim's wounds were consistent with defendant standing over him and firing his weapon, was sufficient to convict defendant of murder; defendant's testimony that the gun accidentally went off as he jumped out of the way of the car merely created an issue of fact for the jury. *Shipp v. State*, 847 So. 2d 806, 2003 Miss. LEXIS 275 (Miss. 2003).

Defendant's motions for a directed verdict and for a new trial were properly denied and the evidence was sufficient to support defendant's conviction for murder where defendant admitted killing the victim, and his accomplice's testimony evidenced the conspirators' premeditated design. *Roy v. State*, 878 So. 2d 84, 2003 Miss. App. LEXIS 729 (Miss. Ct. App. 2003), cert. denied, 878 So. 2d 67, 2004 Miss. LEXIS 911 (Miss. 2004).

Evidence that defendant was one of five men who robbed a store owner and that defendant shot and killed the store owner during the robbery was sufficient to support defendant's conviction of and life sentence for capital murder. *Ellis v. State*, 856 So. 2d 561, 2003 Miss. App. LEXIS 456 (Miss. Ct. App.), cert. denied, 860 So. 2d 1223, 2003 Miss. LEXIS 892 (Miss. 2003).

Where two witnesses testified they saw defendant leave their slain mother's store carrying a money bag and their mother's purse, other witnesses placed defendant near the crime scene, and he admitted to a cellmate that he hit a woman with pipe wrench and took her purse and money bag, the evidence was legally sufficient to support defendant's conviction for capital murder. *Shelton v. State*, 853 So. 2d 1171, 2003 Miss. LEXIS 349 (Miss. 2003).

Trial judge properly refused to direct a verdict in defendant's favor where the evidence offered by the State was such that fair-minded jurors could find defendant guilty as charged; eyewitnesses tes-

tified that they had seen the defendant kill the victim and shoot into the air and gun residue tests indicated that defendant had been in the environment of a discharged weapon. *Maxwell v. State*, 856 So. 2d 513, 2003 Miss. App. LEXIS 379 (Miss. Ct. App. 2003), cert. denied, 892 So. 2d 824, 2005 Miss. LEXIS 11 (Miss. 2005).

Where defendant first killed a man and immediately thereafter sexually assaulted and killed a woman, he was properly convicted of the felony murder of the man with sexual assault as the predicate felony, as there had been no break in the chain of events. *Moody v. State*, 841 So. 2d 1067, 2003 Miss. LEXIS 104 (Miss. 2003).

Defendant was properly convicted of the felony murder of a man and a woman, as the evidence was sufficient to prove the man was murdered while in commission of a sexual battery on the woman; defendant's intent to sexually batter the female victim could be inferred from his actions, as he had to first incapacitate the man in order to get to the woman. *Moody v. State*, 841 So. 2d 1067, 2003 Miss. LEXIS 104 (Miss. 2003).

Sufficient evidence supported the jury's verdict where, although conflicting evidence was presented as to defendant's mental status at the time of the offense, it was in the jury's discretion to accept or reject any expert testimony, and its finding would not be reversed as it was supported by substantial evidence. *Knight v. State*, 854 So. 2d 17, 2003 Miss. App. LEXIS 251 (Miss. Ct. App.), cert. denied, 859 So. 2d 392, 2003 Miss. LEXIS 390 (Miss. 2003).

Evidence that a defendant who was charged with the murder of a woman whose badly decomposed body was found in Mississippi in an area where defendant had relatives, that the defendant had left New Mexico with the victim to visit the father of the victim's infant child in Texas shortly before the probable time of the victim's death, that defendant was seen with the victim's child in Memphis shortly after the date of the victim's death and heard telling people that the child's mother was either on tour as an entertainer or was in jail, that defendant was in possession of a gun and ammunition similar to those used to kill the victim, that

defendant used a false name when contacted by police in Florida, as well as other circumstantial and scientific evidence linking the defendant to the crime, was sufficient to support the defendant's conviction of the crime of murder. *Smith v. State*, 835 So. 2d 927, 2002 Miss. LEXIS 298 (Miss. 2002).

Evidence that the defendant gave a gun to another man who had said he wanted to shoot the victim, told the man the victim was outside, was in the alley with the man who shot the victim when the victim was shot, and was seen running from the alley with the other man after the shooting while they both carried guns, and asked the other man "Did you get him"? was sufficient to support a conviction for murder. *Brown v. State*, 796 So. 2d 223, 2001 Miss. LEXIS 176 (Miss. 2001).

Evidence was sufficient to support a conviction for murder since there was ample evidence of the defendant's deliberate design to kill the victim where the defendant stated that he was going to "burn [the victim's] ass," he then left for his house to retrieve a gun, ran his car off the road in the process, got a ride from someone else for the remainder of the trip to his house, retrieved a gun, walked for at least ten minutes through the woods to return to the scene, stood outside the window, shouted, "MF, I'm fixing to kill you," and then shot and killed the victim. *Jackson v. State*, 784 So. 2d 180, 2001 Miss. LEXIS 124 (Miss. 2001), cert. denied, 534 U.S. 1139, 122 S. Ct. 1088, 151 L. Ed. 2d 987, 2002 U.S. LEXIS 807 (U.S. 2002).

Evidence was sufficient to support convictions for murder, notwithstanding the defendant's assertion that he and the co-defendant did not act with deliberate design but only intended to beat the victims severely, as the defendant and codefendant committed a dangerous act, i.e., the severe beating of two human beings, which showed disregard for the lives of those two people and resulted in their deaths. *Reed v. State*, 799 So. 2d 92, 2001 Miss. App. LEXIS 127 (Miss. Ct. App. 2001).

Evidence was sufficient to show deliberate design murder where (1) conversations between the defendant and a cocon-

spirator showed a plan to commit murder, (2) the defendant sought out the victim, and (3) the defendant shot the victim through a screen door. *Ellis v. State*, 778 So. 2d 114, 2000 Miss. LEXIS 242 (Miss. 2000).

Evidence was sufficient to support a conviction for murder, notwithstanding the contention that the shooting was accidental and in self-defense, where (1) the defendant did not testify and there was no direct evidence to support the theory that the defendant subjectively believed or apprehended the necessity, if any, of the use of deadly force to defend against the alleged aggression of the victim, (2) the defendant left the home of the victim in order to obtain a pistol and returned to this site with the intention of shooting the victim, (3) witnesses at the scene of the incident testified that the defendant returned with his weapon in order to confront the victim and force him to repay 20 dollars and apologize, and (4) the defendant remained in the front seat of a truck with the pistol in his lap, and when the victim approached the truck, the defendant stepped from the truck and shot the victim in the chest. *Walters v. State*, 772 So. 2d 1072, 2000 Miss. App. LEXIS 445 (Miss. Ct. App. 2000).

Evidence was sufficient to support a conviction for murder where the defendant pressed a gun to the victim's head, pulled the trigger, and killed her, notwithstanding that he had removed the clip from the gun and believed it to be unloaded, although one round remained in the chamber, since his conduct was eminently dangerous and evinced a depraved heart demonstrating complete disregard for the victim's life. *Dowda v. State*, 776 So. 2d 714, 2000 Miss. App. LEXIS 387 (Miss. Ct. App. 2000).

Evidence was sufficient to sustain a conviction for deliberate design murder, notwithstanding the defendant's contention that his gun discharged accidentally, where, according to three witnesses, (1) the defendant approached the victim's car and berated him for ignoring a request to move his car, (2) the defendant then deliberately returned to the automobile he had been riding in, retrieved a gun from the back seat, and went back to the victim's

vehicle where he placed the gun to the victim's head, and (3) the defendant then took a step back and fired a shot into the door of the victim's car and then took a second step back, deliberately aimed the gun at the victim, and fired the shot that mortally wounded him. *Carr v. State*, 774 So. 2d 469, 2000 Miss. App. LEXIS 340 (Miss. Ct. App. 2000).

Evidence was sufficient to support a conviction for murder. *Brooks v. State*, 763 So. 2d 859, 2000 Miss. LEXIS 156 (Miss. 2000).

Evidence was sufficient to support a conviction for murder and to disprove self-defense where (1) expert evidence showed that the defendant shot the victim was she was lying on the ground, (2) the defendant stated that he choked the victim until she fell on the floor, and that she got up and pleaded with him not to kill her, (3) a bruise found on the victim's left hand was consistent with defensive posturing, (4) the defendant was substantially larger than the victim, and (5) the victim sustained several blunt force traumas. *Boyd v. State*, 754 So. 2d 586, 2000 Miss. App. LEXIS 29 (Miss. Ct. App. 2000).

The evidence was legally sufficient and supported the guilty verdict of the jury where witnesses testified that the victim did not have a weapon, that they saw defendant remove a gun from his car and fire one shot in the direction of the victim, and the police officer who pulled defendant over found the murder weapon on the floorboard of defendant's vehicle. *Jackson v. State*, 755 So. 2d 45, 1999 Miss. App. LEXIS 698 (Miss. Ct. App. 1999).

The stabbing of an unarmed seventy-nine year old woman, 47 times, by a twenty-two year old defendant is evidence sufficient to support the jury's finding of malice and the verdict of murder. *Robinson v. State*, 749 So. 2d 1054, 1999 Miss. LEXIS 371 (Miss. 1999).

Evidence was sufficient to sustain a conviction for deliberate design murder where the defendant never denied shooting at the victim, but claimed it was in self-defense, because the victim fired first, but where witnesses testified that the victim was just talking to the defendant when the defendant pulled a gun and shot at the victim's feet four or five times, that

the victim did not push the defendant or pull a gun, and that the defendant chased the victim and shot at him an additional seven or eight times, and the victim was shot a total of six times with two wounds in his back and one wound in the back of his leg. *Riddley v. State*, 1999 Miss. App. LEXIS 541 (Miss. Ct. App. Aug. 24, 1999), *aff'd*, 777 So. 2d 31, 2000 Miss. LEXIS 167 (Miss. 2000).

Evidence was sufficient to show that the defendant killed his estranged wife with deliberate design and, therefore, was sufficient to support his conviction for murder; it was not necessary for the state to prove that the defendant went to the scene of the crime with the purposeful design to stab his wife to death and it was sufficient that, at some point, he formed an intention to violently attack his estranged wife with a steak knife and to repeatedly stab her with the knife until he had inflicted one or more mortal wounds to her body. *Coffield v. State*, 749 So. 2d 215, 1999 Miss. App. LEXIS 508 (Miss. Ct. App. 1999).

Evidence was sufficient to show deliberate design and to support a conviction for murder, notwithstanding the defendant's assertion that the victim shot at him first and that he shot the victim in self-defense, where (1) a witness testified that she saw the victim talking to the defendant when the defendant pulled a gun and shot at the victim's feet four or five times, and that she never saw the victim push the defendant or pull a gun on him, and that the defendant chased the victim and shot at him an additional seven or eight times, (2) another witness that he never saw the victim with a gun nor did he see a gun in his immediate vicinity, and (3) the victim was shot a total of six times with two wounds in his back and one wound in the back of his leg. *Riddley v. State*, 1999 Miss. App. LEXIS 237 (Miss. Ct. App. Apr. 20, 1999).

Defendant's confession, coupled with witness' verification of defendant's story, was sufficient to support convictions of murder and armed robbery when coupled with other trial testimony, even though witness had made deal with state for lesser sentence if he testified against defendant; jury was made aware of deal.

Morgan v. State, 681 So. 2d 82, 1996 Miss. LEXIS 429 (Miss. 1996).

Defendant's conviction of murdering her husband was supported by evidence that defendant was the only other person home when shots were fired, that defendant proclaimed that victim committed suicide by shooting himself twice, that victim was shot a third time in a manner that indicated that shot was not self-inflicted, that two of victim's wounds could not both have been self-inflicted, that defendant later asked an individual living in home where shooting occurred to retrieve a gun from attic, and that bullets found in victim's body bore same characteristics as those produced by gun retrieved from attic. *Rhodes v. State*, 676 So. 2d 275, 1996 Miss. LEXIS 318 (Miss. 1996).

A murder defendant's actions met the requirements for aiding and abetting, and therefore her conviction for murder would be affirmed, where she was present when her boyfriend shot the victim, she arranged for the victim to be at the location of the killing, she testified that she suspected trouble when she saw her boyfriend arrive with a gun, she admitted that she did nothing while her boyfriend stood talking with the victim for approximately 30 minutes, and there was testimony that she knew of the plan to kill the victim. *Swinford v. State*, 653 So. 2d 912, 1995 Miss. LEXIS 90 (Miss. 1995).

The evidence was sufficient to support a conviction of murder, even though the defendant testified in his own behalf and claimed that he shot the victim in self-defense, where the defendant armed himself with a loaded shotgun after threatening to do something to the victim before the victim did something to him, he drove to the victim's house and made his presence known by honking his automobile horn, and he thereafter shot the victim from a distance of 30 to 40 feet when the victim's hands were at his side. *Hart v. State*, 637 So. 2d 1329, 1994 Miss. LEXIS 115 (Miss. 1994).

The evidence was sufficient to support a murder conviction where witnesses saw the defendant near the crime scene during the time period that the murder was estimated to have occurred, the defendant was seen trying to sell a gun similar to the

gun owned by the victim on the evening after the murder occurred, the defendant was seen purchasing oranges before the murder occurred and the victim was found with an orange in her mouth, human blood was found on the defendant's knife which was hidden by the defendant at his girlfriend's house, a witness testified to an admission of the killing made by the defendant on the evening after the murder occurred, inmates who were with the defendant in jail testified as to another admission of the murder made by the defendant while in jail, and witnesses testified as to the defendant's detailed knowledge of the victim's injuries and the crime scene. *Sudduth v. State*, 562 So. 2d 67, 1990 Miss. LEXIS 235 (Miss. 1990).

Circumstantial evidence was sufficient to sustain conviction for murder where: (1) motive existed; (2) serial number of rifle was listed in ledger found in defendant's room; (3) defendant's diary contained schedule of victim's morning procedure and whereabouts; (4) bullets extracted from victim's body plus those found in defendant's drawer, door facing, and those remaining in clip were of same type, accounting for all 15 bullets missing from box of ammunition found nearby; (5) defendant was in area of murder on morning of murder; (6) defendant admitted smoking brand of cigarettes found in victim's office commode; and, (7) defendant's fingerprints were on door facing of back door. *Montgomery v. State*, 515 So. 2d 845, 1987 Miss. LEXIS 2697 (Miss. 1987).

State's proof was sufficient to establish beyond reasonable doubt that defendant acted in manner imminently dangerous to others and evincing depraved heart where evidence showed that defendant had hit victim several times with large stick, and victim subsequently died as result of blows inflicted about his head. *Fairman v. State*, 513 So. 2d 910, 1987 Miss. LEXIS 2791 (Miss. 1987).

Defendant's conviction for murder was sustained by state's evidence showing that the deceased was shot with the defendant's gun, the defendant moved the body and the gun from the original site, the defendant got rid of the bullets from the gun, the deceased had several bruises and abrasions about the head, face and

hand which were inflicted near the time of death and were unaccounted for, and defendant had threatened the deceased some months prior to the shooting. *Higgins v. State*, 502 So. 2d 332, 1987 Miss. LEXIS 2320 (Miss. 1987).

Evidence that at approximately 3:00 in afternoon, parent entered apartment carrying child, who was then alive, that parent had been drinking, that no one else entered apartment but 3 other young children, that at approximately midnight, officers were summoned to apartment where they found child's body on bed, badly bruised and cut, that cause of death was extensive blows to head, and that medical experts' testimony discounted parent's testimony that cause of death was accidental fall is sufficient to support murder conviction of parent. *Johnson v. State*, 475 So. 2d 1136, 1985 Miss. LEXIS 2238 (Miss. 1985).

Testimony by witnesses for state and physical evidence contradicting murder defendant's version of shooting as being accidental is sufficient to support murder conviction. *Fuller v. State*, 468 So. 2d 68, 1985 Miss. LEXIS 2055 (Miss. 1985).

Evidence was sufficient to support defendants conviction of murder, in violation of subsection (2)(e) of this section, notwithstanding minor inconsistencies in defendant's two confessions, and notwithstanding contradictory testimony by defendant's two accomplices who pleaded guilty to murder, where the confessions were consistent in most respects, where law enforcement officers testified that defendant knew the location of his rape-murder victim and directed them to it, where he explained to them how he had gained entry to the house, where contradictions in the accomplices' testimony was explainable by their desire to blame each other for the crime, where the jury had sufficient evidence from the two of them to believe that all three defendants had been in the victim's home, that the victim had been raped and then murdered, and that all three of them had in some manner participated, and where there was ample evidence, aside from the accomplice testimony, to sustain defendant's conviction. *Ruffin v. State*, 447 So. 2d 113, 1984 Miss. LEXIS 1629 (Miss. 1984).

The proof was sufficient to support a conviction of murder under this section where the adult defendant killed a four year old child by kicking her in the stomach and striking a blow to her head. *Neighbors v. State*, 361 So. 2d 345, 1978 Miss. LEXIS 2367 (Miss. 1978).

The evidence, although largely circumstantial, against the defendant who was identified by witnesses as the driver of the automobile in which the female victim had been driven off after being offered a babysitting job, which automobile was registered in the name of the defendant's wife according to the tag number which the victim's mother had written down, and who could not name a single person he saw or talked to in the hours subsequent to the disappearance of the victim, was sufficient to sustain his conviction of murder. *Taylor v. State*, 254 So. 2d 728, 1971 Miss. LEXIS 1264 (Miss. 1971).

Conviction of murder was sustained by evidence that defendant, angry over an altercation with respect to money and using a deadly weapon, purposely and designedly, shot the victim in the back when she was running away from him and having no weapon of any kind on her person, notwithstanding defendant alleged that victim had called him a son-of-a-bitch. *McLaurin v. State*, 205 Miss. 554, 37 So. 2d 8, 1948 Miss. LEXIS 220 (Miss. 1948), cert. denied, 336 U.S. 933, 69 S. Ct. 750, 93 L. Ed. 1093, 1949 U.S. LEXIS 2614 (U.S. 1949).

Evidence that defendant, after leaving deceased's house, returned and, upon requesting deceased to bring him a splinter and match to hunt for his pocketbook, shot deceased with a shotgun as he came out of the door, sufficiently established malice so as to authorize conviction of murder. *Dillon v. State*, 196 Miss. 625, 18 So. 2d 454, 1944 Miss. LEXIS 243 (Miss. 1944).

Evidence was sufficient for jury in murder prosecution although the testimony showed that the night was dark and rainy so as to affect the ability of the witnesses to see the event testified to and their testimony was in conflict with natural laws. *Williams v. State*, 188 Miss. 398, 195 So. 334, 1940 Miss. LEXIS 49 (Miss. 1940).

Evidence of a dispute between defendant and deceased, that defendant invited

deceased outside, at the same time opening a knife and placing it in his pocket, that shortly thereafter the deceased approached defendant, having no weapon in his hands, and placed one hand on defendant's shoulder, and that defendant thereupon stabbed him, causing his death, justified a conviction of murder against plea of self-defense. *Hudson v. State*, 185 Miss. 677, 188 So. 561, 1939 Miss. LEXIS 178 (Miss. 1939).

54. — Capital murder.

Evidence was sufficient to support defendant's conviction of two counts capital murder because it showed that he acted in concert or aided and abetted the shooter in the robbery during which the two victims were shot and killed. After defendant initially observed the layout of the victim's bedroom with his first purchase of pills, defendant and the shooter returned armed, defendant stood behind the shooter as the shooter asked the victim where the money was, and when the victim did not respond he shot both victims. *Story v. State*, 296 So. 3d 104, 2019 Miss. App. LEXIS 539 (Miss. Ct. App. 2019), cert. denied, 293 So. 3d 833, 2020 Miss. LEXIS 223 (Miss. 2020).

Trial court did not err in denying defendant's motion for a judgment notwithstanding the verdict because a rational juror could have found beyond a reasonable doubt that all the elements of capital murder, including all the elements of the underlying crime of robbery, had been proven; defendant admitted the plan was to steal the victim car, he brought his gun with him to forcibly take the car from the victim's personal possession, and when the victim resisted he shot the victim. *Gary v. State*, 237 So. 3d 140, 2018 Miss. LEXIS 58 (Miss. 2018).

Sufficient evidence supported defendant's capital murder conviction based on aiding and abetting because witness statements and testimony showed defendant acted as a look-out for perpetrators. *Shepard v. State*, 256 So. 3d 12, 2018 Miss. App. LEXIS 24 (Miss. Ct. App.), cert. dismissed, — So. 3d —, 2018 Miss. LEXIS 439 (Miss. 2018).

State provided evidence that defendant had lost his job at furniture store and had

his paycheck reduced as a result of damaged large tractor batteries defendant had improperly loaded, and a reasonable juror could conclude from that evidence that defendant had a motive to rob the store and kill four of its employees. When the evidence was viewed as a whole and in the light most favorable to the State, the Supreme Court concluded that any rational trier of fact could have found that the State had proved the essential elements of capital murder beyond a reasonable doubt. *Flowers v. State*, 240 So. 3d 1082, 2017 Miss. LEXIS 431 (Miss. 2017), rev'd, — U.S. —, 139 S. Ct. 2228, 204 L. Ed. 2d 638, 2019 U.S. LEXIS 4196 (U.S. 2019).

Defendant's conviction for capital murder was supported by evidence that defendant and another went to a home with the felonious intent to break, enter, and steal, and that an ensuing argument led to the other individual shooting the victims. *Christian v. State*, 207 So. 3d 1207, 2016 Miss. LEXIS 463 (Miss. 2016).

Evidence was sufficient to convict defendant of capital murder with the underlying felony of robbery because two witnesses testified that the accomplice informed them that he was going to beat the victim because the victim owed him money; defendant then gave the accomplice the padlock, which the accomplice used to beat the victim to death; it was undisputed that defendant removed the victim's wallet from his pocket after the accomplice fatally beat the victim; and the victim's murder and the removal of his wallet were part of a continuous chain of events. *Hampton v. State*, 188 So. 3d 625, 2016 Miss. App. LEXIS 205 (Miss. Ct. App. 2016).

Evidence supported defendant's capital murder conviction because, after defendant and defendant's coconspirators robbed the victim, defendant stayed behind, after the victim was shot in the robbery, to shoot the victim as the other coconspirators fled. Furthermore, defendant's hands and palms contained particles indicative of gunshot residue, and four of five shell casings recovered from the scene were fired from the gun which defendant admitted to hiding on a school bus after the shooting. *Thomas v. State*, 180 So. 3d 756, 2015 Miss. App. LEXIS 609 (Miss. Ct. App. 2015).

Evidence was sufficient to convict defendant of capital murder with the underlying felony of robbery because defendant and two other individuals were the only people inside the victim's house at the time of his attack; a witness testified that she saw a television and other personal property being taken out of the victim's house and she saw defendant leaving the victim's house with a metal bar; the doctor who performed the autopsy opined that the bar defendant was seen leaving the residence with was consistent with the type of blunt object that caused the victim's fatal injuries; and the doctor testified that the victim's death was a homicide. *Burleson v. State*, 166 So. 3d 499, 2015 Miss. LEXIS 243 (Miss. 2015).

Evidence that defendant admitted to pouring gasoline throughout the victim's house and setting on fire after stabbing the victim multiple times and that the victim was still alive at the time of the fire but was unable to escape due to her stab wounds was sufficient to support a conviction of capital murder with the underlying felony or arson. *Ronk v. State*, 172 So. 3d 1112, 2015 Miss. LEXIS 219 (Miss. 2015), cert. denied, — U.S. —, 136 S. Ct. 1657, 194 L. Ed. 2d 773, 2016 U.S. LEXIS 2643 (U.S. 2016), in part, — So. 3d —, 2016 Miss. LEXIS 493 (Miss. 2016).

Evidence was sufficient to support defendant's convictions of capital murder with the underlying felony of armed robbery where he was fired from the store and told he would not be paid before the shootings, he was seen standing next to the car where the gun used in the murders was located on the morning of the murders, numerous witnesses saw defendant walking to and from the store the morning of the murders, a shoe print found at the crime scene matched his, he tested positive for gunshot residue, the only paperwork disturbed at the store was defendant's paycheck and time card, and a witness testified that defendant confessed to the murders. *Flowers v. State*, 158 So. 3d 1009, 2014 Miss. LEXIS 569 (Miss. 2014), vacated, — U.S. —, 136 S. Ct. 2157, 195 L. Ed. 2d 817, 2016 U.S. LEXIS 3930 (U.S. 2016).

Evidence supported defendant's conviction for capital murder for killing his

infant son in the commission of felonious abuse or battery of a child, as defendant's wife testified that she and defendant had had a disagreement about the child and that defendant was angry when she left to go back to work the day the child died, and the doctor who performed an autopsy testified that the child's death was consistent with Shaken Baby Syndrome. *Brown v. State*, 152 So. 3d 1146, 2014 Miss. LEXIS 595 (Miss. 2014).

Sufficient evidence supported defendant's capital-murder conviction, and the verdict was not against the weight of the evidence because defendant's girlfriend testified that she and defendant went to the victim's house to rob him; once inside, the girlfriend looked for something to steal; when she reappeared in the living room, she saw defendant with cash in hand, as he beat the victim to death with a bat; she noticed the victim's pants pocket was inside-out; the girlfriend recalled defendant counting the stolen cash; and law enforcement recovered cash from defendant the next morning and found the stolen blood-stained bat. *Radau v. State*, 152 So. 3d 1217, 2014 Miss. App. LEXIS 729 (Miss. Ct. App. 2014).

Defendant's motion for a judgment notwithstanding the verdict or a new trial was properly denied because the evidence was sufficient to find him guilty of capital-murder where the property that was the subject of the predicate felony of robbery did not have to be identified in the indictment, the dismissal of a count involving theft of a van did not amend or alter the indictment, and defendant's actions did not support his claim of abandonment. *Keen v. State*, 164 So. 3d 1039, 2014 Miss. App. LEXIS 593 (Miss. Ct. App. 2014).

Trial court correctly sentenced defendant to life without parole because the evidence was sufficient to find defendant guilty of capital murder (as a principal or an accessory) and parole was not an option where the jury was allowed to find defendant guilty of capital murder whether he or his girlfriend was the driver of the truck that hit the sheriff and defendant confessed that he saw uniformed deputies at a blocked intersection and that he "nudged" one of them. *Baxter v. State*, 177 So. 3d 423, 2014 Miss. App.

LEXIS 413 (Miss. Ct. App. 2014), *aff'd*, 177 So. 3d 394, 2015 Miss. LEXIS 389 (Miss. 2015).

In a capital murder case, evidence was sufficient to sustain defendant's predicate sexual battery conviction because the evidence included the crime scene, the condition of the body, the victim's defensive wounds, and the "fresh" injury to her anus. The evidence showed the act occurred during the commission of her murder. *Galloway v. State*, 122 So. 3d 614, 2013 Miss. LEXIS 328 (Miss. 2013), *cert. denied*, 572 U.S. 1134, 134 S. Ct. 2661, 189 L. Ed. 2d 209, 2014 U.S. LEXIS 3685 (U.S. 2014).

Evidence supported defendant's conviction for capital murder with the underlying felony of robbery because defendant stated in a confession that defendant killed the victim during a fight, left the apartment for approximately an hour and a half, and then returned and began a clean-up effort when defendant was discovered by a sheriff's deputy. Other evidence showed that defendant used the victim's cash and credit card to purchase cleaning supplies with which to conceal the crime. *Batiste v. State*, 121 So. 3d 808, 2013 Miss. LEXIS 295 (Miss. 2013), *cert. denied*, 572 U.S. 1117, 134 S. Ct. 2287, 189 L. Ed. 2d 178, 2014 U.S. LEXIS 3424 (U.S. 2014).

There was sufficient evidence for the jury to convict defendant of capital murder in violation of Miss. Code Ann. § 97-3-19(2)(e) and kidnapping in violation of Miss. Code Ann. § 97-3-53 because the jury heard defendant's confession of putting the victim in a headlock and choking him, and the trial court noted that defendant's statement to the police placed him at the scene of the crime and also placed him at the victim's car while the victim was being transported; the verdict was not contrary to the overwhelming weight of the evidence because defendant confessed to choking the victim and helping his co-defendant secure a plastic bag over the victim's head. *McBeath v. State*, 66 So. 3d 663, 2010 Miss. App. LEXIS 666 (Miss. Ct. App. 2010), *cert. denied*, 69 So. 3d 9, 2011 Miss. LEXIS 373 (Miss. 2011).

Defendant's convictions for capital murder during the commission of a robbery

were proper under Miss. Code Ann. § 97-3-19(2)(e) because the person killed did not have to have an interest in the property taken. *Gillett v. State*, 56 So. 3d 469, 2010 Miss. LEXIS 337 (Miss. 2010), cert. denied, 565 U.S. 1095, 132 S. Ct. 844, 181 L. Ed. 2d 552, 2011 U.S. LEXIS 8944 (U.S. 2011).

In a case in which defendant did not act when he first saw the two victims in bed but instead: (1) returned to his car, (2) retrieved his revolver, (3) knocked on the front door and kicked it in when no one answered, (4) pushed past one victim, (5) shot the first victim and pursued him briefly, and (6) found the second victim and shot her three times, there was sufficient evidence of deliberate design to support his two convictions for capital murder, in violation of Miss. Code Ann. § 97-3-19(1)(a). *Williams v. State*, 29 So. 3d 53, 2009 Miss. App. LEXIS 532 (Miss. Ct. App. 2009), cert. denied, 29 So. 3d 774, 2010 Miss. LEXIS 116 (Miss. 2010).

After the victim stated that he wanted to have sex with defendant's sister, defendant became enraged, picked up a lead pipe, walked away from the campsite, told two witnesses that he was going to kill the victim, returned to the campsite ten minutes later, and beat the victim in the head repeatedly with the pipe; defendant took the victim's keys and truck, put the body in the truck, drove to Alabama, and put the victim's body on the side of the road. The evidence was sufficient to support defendant's conviction for capital murder in violation of Miss. Code Ann. § 97-3-19(2)(e). *Woods v. State*, 14 So. 3d 767, 2009 Miss. App. LEXIS 233 (Miss. Ct. App. 2009).

In defendant's trial on a charge of capital murder, the court rejected defendant's claim that the prosecution failed to produce evidence sufficient to convict him of the underlying felony of robbery because defendant's possession of the deceased victim's wallet created a reasonable inference that the property was stolen; the State's theory of the case was that defendant went back to the motel where he and the victim had been staying to get back what was rightfully his—the money in the victim's wallet, and the evidence, although circumstantial, supported this

theory. During the State's case-in-chief, evidence was presented to establish that, after defendant left the motel earlier in the day, the victim feared his return, and when defendant did return and was unable to access the room, a motel employee told him that the door was locked from the inside; additional evidence was presented that defendant had received a significant amount of money from his mother for a business that he planned to start and that defendant was supporting the victim and was the source of the cash found inside her wallet. *Goff v. State*, 14 So. 3d 625, 2009 Miss. LEXIS 273 (Miss. 2009), cert. denied, 559 U.S. 944, 130 S. Ct. 1513, 176 L. Ed. 2d 122, 2010 U.S. LEXIS 1251 (U.S. 2010).

Sufficient evidence existed to support defendant's conviction for capital murder when the evidence showed defendant was angry with the victim about his employment arrangement with the victim; defendant's girlfriend testified that defendant took the victim's money, credit cards, and car keys during the course of the murder. *Lima v. State*, 7 So. 3d 903, 2009 Miss. LEXIS 190 (Miss. 2009).

Because defendant and his brother-in-law acted in concert in assaulting a victim and the victim died, the evidence was sufficient to support defendant's conviction of capital murder even in the absence of evidence that he, and not his brother-in-law, fired the fatal shot. *Moffett v. State*, 3 So. 3d 165, 2009 Miss. App. LEXIS 103 (Miss. Ct. App. 2009).

While the evidence against defendant was not overwhelming, there was sufficient evidence to establish his guilt under Miss. Code Ann. § 97-3-19(2)(e) (Rev. 2006): a witness testified that defendant told him that if he did not get the money to pay his probation officer he was going to "hit the barbershop man up"; the witness stated that the day of the murder he saw defendant in a bloody shirt, and defendant told him that he had just "hit a lick"; the witness testified that he gave defendant the pistol used in the commission of the murder; and, inter alia, another witness testified that he saw defendant walking toward a pathway that led in the direction of the barbershop with a gun prior to the murder. *Mitchell v. State*, 21 So. 3d 633,

2008 Miss. App. LEXIS 706 (Miss. Ct. App. 2008), cert. denied, 20 So. 3d 680, 2009 Miss. LEXIS 575 (Miss. 2009).

Where the co-indictee testified that he and defendant went to the victim's house to sell him some stones, they gave the victim an empty bag; defendant stabbed the victim and took his wallet which contained \$160. The co-indictee's testimony was sufficient to support defendant's conviction for capital murder; the trial court did not err by denying his motion for a JNOV. *Spurlock v. State*, 13 So. 3d 301, 2008 Miss. App. LEXIS 674 (Miss. Ct. App. 2008), cert. denied, 14 So. 3d 731, 2009 Miss. LEXIS 343 (Miss. 2009).

Defendant's convictions for robbery and capital murder were appropriate because, while the circuit court erred in allowing references to a deceased codefendant's statement to law enforcement to corroborate defendant's statement, the violation of defendant's constitutional right to confront the witness was harmless since the weight of the evidence was overwhelming. Defendant's own statement confessing to robbing the victim and stabbing him in the abdomen with a screwdriver was entered into evidence; other evidence included an officer's and sheriff's recounting of the "treasure hunt" with the codefendant, where they traveled to various areas and retrieved evidence that corroborated defendant's statement to a "T." *Singleton v. State*, 1 So. 3d 930, 2008 Miss. App. LEXIS 641 (Miss. Ct. App. 2008).

Evidence was sufficient to convict defendant of capital murder where two witnesses testified that defendant was at the scene of the robbery and murder and that the contact one witness had with defendant and with the gun during the course of the robbery left the gunshot residue on the witness's hands. *Grant v. State*, 8 So. 3d 213, 2008 Miss. App. LEXIS 495 (Miss. Ct. App. 2008), cert. denied, 12 So. 3d 531, 2009 Miss. LEXIS 207 (Miss. 2009).

Defendant's conviction for capital murder in violation of Miss. Code Ann. § 97-3-19(2)(e) was appropriate because defendant admitted that he went to an individual's house with the intention of stealing the victim's personal property and further admitted to shooting the victim; he also admitted that the crack co-

caine at issue was stolen from the victim. The only dispute was how he came into possession of the crack cocaine and a witness testified that after shooting the victim, defendant rolled the victim over and picked up a pill bottle. *Nelson v. State*, 995 So. 2d 799, 2008 Miss. App. LEXIS 319 (Miss. Ct. App.), cert. denied, 999 So. 2d 374, 2008 Miss. LEXIS 660 (Miss. 2008).

Defendant's conviction for the capital murder of his brother in violation of Miss. Code Ann. § 97-3-19(2)(d) was appropriate, in part because two witnesses testified that after their failed attempts to murder the brother and his wife in exchange for money, defendant contacted them and told them that he found someone else to complete the job. Thus, defendant's argument that the State failed to meet its burden because there was no direct evidence proving that anything of value was offered or exchanged for the killing of the brother was without merit. *Vickers v. State*, 994 So. 2d 200, 2008 Miss. App. LEXIS 208 (Miss. Ct. App.), cert. denied, 998 So. 2d 1010, 2008 Miss. LEXIS 675 (Miss. 2008).

Evidence was sufficient to find defendant committed a burglary in a capital murder case as there was a pry mark on the front door, the front door was left ajar, a television was missing, and drawers were left open, and defendant was found in possession of the victim's personal property shortly after the burglary. Evidence also showed that defendant broke into the victim's house, killed her, and stole some of her personal belongings because he desired money to purchase drugs, and further testimony established that he sold the television and used the proceeds to purchase crack. *Young v. State*, 981 So. 2d 308, 2007 Miss. App. LEXIS 749 (Miss. Ct. App. 2007), cert. denied, 979 So. 2d 691, 2008 Miss. LEXIS 206 (Miss. 2008).

There was sufficient circumstantial evidence to convict defendant of capital murder even without direct evidence because: (1) the witnesses testified that the victim's credit cards were missing after his death, that his pockets were turned inside out, that one card was used at several stores, and that defendant was in each of the stores where the card was used; (2) there was a video of defendant purchasing a

television at one of the stores where defendant used the victim's credit card after his death; (3) the evidence was corroborated by defendant's friend who stated that he drove defendant to the different stores and witnessed defendant using the credit cards to purchase items; and (4) when the police told defendant that defendant was being questioned about the stolen credit cards, defendant blurted out that defendant did not kill defendant's uncle even before the police realized that defendant was related to the victim. *Smith v. State*, 984 So. 2d 295, 2007 Miss. App. LEXIS 643 (Miss. Ct. App. 2007).

In a case where defendant slammed his car into a patrol car that was blocking his path during a chase, the evidence was sufficient to support a capital murder conviction under Miss Code Ann. § 97-3-19(2)(a) because it supported the finding that defendant knew the victim was a peace officer at the moment of impact; the officer was standing outside of his vehicle, which was stopped with the blue lights flashing. *White v. State*, 964 So. 2d 1181, 2007 Miss. App. LEXIS 576 (Miss. Ct. App. 2007).

Circuit court did not err in denying defendant's motion for motion for a directed verdict, or defendant's motion for a new trial, because evidence was sufficient to convict defendant of capital murder as a result of felonious abuse of a child under Miss. Code Ann. § 97-3-19(2)(f); from the facts presented in the case, taken in the light most favorable to the verdict, defendant was in charge of caring for a two-year-old child who was healthy and in good condition when she went into defendant's care, and less than two weeks later, the child was found dead, covered in bruises and abrasions, had lost a significant amount of hair, and had the skin burned off of her feet and ankles. *Berry v. State*, 980 So. 2d 936, 2007 Miss. App. LEXIS 393 (Miss. Ct. App. 2007), cert. denied, 979 So. 2d 691, 2008 Miss. LEXIS 204 (Miss. 2008).

In a capital murder case, defendant's motion for a new trial and/or judgment notwithstanding the verdict was properly denied because three victims testified they witnessed an assault on a victim, defendant was observed removing the vic-

tim from a trunk of a car and leading him into a cornfield, defendant was observed firing a gun six times at the victim, and defendant made incriminating statements about his role in the murder. *Strahan v. State*, 955 So. 2d 968, 2007 Miss. App. LEXIS 294 (Miss. Ct. App. 2007).

In a capital murder case, because there was sufficient evidence, both circumstantial and in the form of a key witness's testimony, for a reasonable jury to find that defendant committed murder during the commission of a robbery, it was not error for the trial court to deny defendant's proposed instruction for a directed verdict. *Ross v. State*, 954 So. 2d 968, 2007 Miss. LEXIS 235 (Miss. 2007).

Evidence was sufficient to sustain the underlying felony of robbery in a capital murder case, and thus the capital murder conviction, where officers discovered defendant in possession of the victim's truck and a sword taken from the victim's trailer, and in addition to his possession of the property, there was testimony that defendant admitted that the truck was stolen. *Spicer v. State*, 921 So. 2d 292, 2006 Miss. LEXIS 20 (Miss.), cert. denied, 549 U.S. 993, 127 S. Ct. 493, 166 L. Ed. 2d 364, 2006 U.S. LEXIS 8022 (U.S. 2006).

In a case where defendant was convicted of capital murder during the commission of a robbery when he killed his father and stole his father's revolver and car, the jury's verdict was not against the overwhelming weight of the evidence because, inter alia: (1) there was testimony that placed defendant at or near the scene of the crime; (2) several area residents testified to hearing loud bangs around the time defendant was at the scene of the crime, and to hearing a car door slam, tires squeal, and a car speed off from the area moments after hearing the unidentified loud bangs; and (3) there was testimony that the revolver found at the scene of defendant's car accident belonged to his father. *Boone v. State*, 964 So. 2d 512, 2006 Miss. App. LEXIS 894 (Miss. Ct. App. 2006), cert. denied, 964 So. 2d 508, 2007 Miss. LEXIS 515 (Miss. 2007).

There was sufficient evidence to support a capital murder conviction with the underlying felony of robbery due to eyewitness testimony, the finding of the victim's

personal effects that defendant's mother had discarded, the finding of the murder weapon near defendant, the finding of shell casings in defendant's house, and the fact that defendant was found near the victim's stolen vehicle. *Ramsey v. State*, 959 So. 2d 15, 2006 Miss. App. LEXIS 764 (Miss. Ct. App. 2006), cert. denied, 958 So. 2d 1232, 2007 Miss. LEXIS 588 (Miss. 2007).

Defendant's conviction for capital murder pursuant to Miss. Code Ann. § 97-3-19(2)(f) was appropriate because the state presented substantial evidence that supported the verdict, including testimony that the victim, a child, did not suffer splash burns and that her injuries were consistent with being held or immersed in hot water. *Williams v. State*, 937 So. 2d 35, 2006 Miss. App. LEXIS 618 (Miss. Ct. App. 2006).

Defendant attempted to assert that the jury did not have sufficient evidence to convict him of murder with the underlying offense of robbery; this argument hung on the fact that the robbery occurred right after the murder. The time between the murder and the robbery, however, formed a continuous chain of events; therefore, there was compliance with the statute's intent, and the evidence was sufficient to support the convictions. *Shaw v. State*, 915 So. 2d 442, 2005 Miss. LEXIS 465 (Miss. 2005).

There was ample evidence to support the jury's verdict convicting defendant of capital murder because (1) an accomplice testified that he and defendant attempted to rob the victims and thus proved the underlying felony of robbery, Miss. Code Ann. § 97-3-79; (2) three detectives testified that defendant confessed to shooting the deceased victim; and (3) defendant's letters to the accomplice apparently expressed defendant's concern in the accomplice's testimony against him. Thus, the trial court did not err in denying defendant's motion to dismiss and for a judgment of acquittal. *Moore v. State*, 914 So. 2d 185, 2005 Miss. App. LEXIS 60 (Miss. Ct. App.), cert. denied, 921 So. 2d 344, 2005 Miss. LEXIS 745 (Miss. 2005).

In a capital murder case, a conviction was based on substantial evidence where the evidence showed that defendant par-

ticipated in a robbery where three victims were killed by beating; the intent to kill was not required to support the conviction where the jury found that the homicides were committed during a robbery. *Le v. State*, 913 So. 2d 913, 2005 Miss. LEXIS 151 (Miss.), cert. denied, 546 U.S. 1004, 126 S. Ct. 622, 163 L. Ed. 2d 508, 2005 U.S. LEXIS 8254 (U.S. 2005).

In a capital murder case, the evidence was sufficient to convict defendant of the underlying felony of robbery because jury could have found that (1) the inmate killed the victim in the garage; (2) took her house and car keys from her; (3) dragged her body and placed it in the trunk of the car; and (4) took the keys intending to take her car, and that he either failed to do so or intended to return at a later time. *Knox v. State*, 901 So. 2d 1257, 2005 Miss. LEXIS 190 (Miss.), cert. denied, 546 U.S. 1063, 126 S. Ct. 797, 163 L. Ed. 2d 630, 2005 U.S. LEXIS 9080 (U.S. 2005).

Evidence was sufficient to convict defendant of capital murder under Miss. Code Ann. § 97-3-19 where it was shown that he had felonious intent to commit robbery under Miss. Code Ann. § 97-3-79 in that he admitted that his plan was to kill the victim and take the victim's car to Chicago to get away, and he packed his belongings and left them outside the victim's house for easy access. *Walker v. State*, 913 So. 2d 198, 2005 Miss. LEXIS 216 (Miss.), cert. denied, 546 U.S. 1038, 126 S. Ct. 743, 163 L. Ed. 2d 581, 2005 U.S. LEXIS 8688 (U.S. 2005).

There was sufficient evidence to convict defendant of capital murder under Miss. Code Ann. § 97-3-19 with armed robbery as the underlying felony under Miss. Code Ann. § 97-3-79 in that he confessed to and described the murder and the accounts matched the cashier's and other witnesses'. *Bush v. State*, 895 So. 2d 836, 2005 Miss. LEXIS 93 (Miss. 2005).

Capital murder is the killing of a human being without the authority of law by any means or when done with or without any design to effect death, by any person engaged in the commission of the crime of robbery; the jury could have easily inferred that defendant knew about the money on the victim's person, shot him in

the back of the head, and proceeded to take the money from the victim's pocket; the court will reverse only when reasonable and fair-minded jurors could find the accused not guilty. *Miller v. State*, 885 So. 2d 97, 2004 Miss. App. LEXIS 964 (Miss. Ct. App. 2004).

Evidence included the testimony of the witnesses who saw defendant and co-defendant together throughout the evening, the blood evidence, the items found at co-defendant's home, and defendant's confession; thus, reasonable, fair-minded jurors could find beyond a reasonable doubt that defendant was guilty of robbery and capital murder. Therefore, the trial court did not err in denying defendant's motion for a directed verdict. *Branch v. State*, 882 So. 2d 36, 2004 Miss. LEXIS 586 (Miss. 2004), cert. denied, 544 U.S. 907, 125 S. Ct. 1595, 161 L. Ed. 2d 282, 2005 U.S. LEXIS 2289 (U.S. 2005).

Sufficient evidence supported the capital murder conviction of an aider and abettor who provided a gun that was used in a murder; defendant admitted that he thought his accomplice was planning to steal the victim's car, and the jury specifically found that defendant had intended to kill the victim. *Lynch v. State*, 877 So. 2d 1254, 2004 Miss. LEXIS 591 (Miss. 2004), cert. denied, 543 U.S. 1155, 125 S. Ct. 1299, 161 L. Ed. 2d 122, 2005 U.S. LEXIS 1592 (U.S. 2005).

Evidence was sufficient to convict defendant of capital murder where the jury heard defendant's version of events and decided instead that the State's account of the victim's death was correct; the verdict of guilty was upheld as it was not the result of prejudice, bias or fraud, and was not against the weight of the evidence. *Palmer v. State*, 878 So. 2d 1009, 2004 Miss. App. LEXIS 167 (Miss. Ct. App.), cert. denied, 878 So. 2d 67, 2004 Miss. LEXIS 945 (Miss. 2004).

Capital murder conviction and death sentence were affirmed because there was sufficient evidence to support the underlying charge of attempted rape, the State's evidence concerning the underlying charge was not based upon circumstantial evidence, and defendant's claims that he received ineffective assistance of counsel at his trial were without merit. *Powers v.*

State, 883 So. 2d 20, 2003 Miss. LEXIS 850 (Miss. 2003), cert. denied, 543 U.S. 1155, 125 S. Ct. 1297, 161 L. Ed. 2d 121, 2005 U.S. LEXIS 1584 (U.S. 2005).

Evidence was sufficient to support defendant's conviction for capital murder where defendant was identified as the shooter by an independent witness and by a codefendant, testimony revealed that defendant had pulled away from the car, raised his hands in the air, jumped back, and fired the gun, and a codefendant stated that when defendant returned to the car, defendant said that the victim sprayed him in the face with mace so he shot him. *Howell v. State*, 860 So. 2d 704, 2003 Miss. LEXIS 556 (Miss. 2003), cert. dismissed, 543 U.S. 440, 125 S. Ct. 856, 160 L. Ed. 2d 873, 2005 U.S. LEXIS 1371 (U.S. 2005).

Evidence that defendant was one of five men who robbed a store owner and that defendant shot and killed the store owner during the robbery was sufficient to support defendant's conviction of and life sentence for capital murder. *Ellis v. State*, 856 So. 2d 561, 2003 Miss. App. LEXIS 456 (Miss. Ct. App.), cert. denied, 860 So. 2d 1223, 2003 Miss. LEXIS 892 (Miss. 2003).

Evidence was sufficient to uphold defendant's capital murder conviction, even in the absence of fingerprint and DNA evidence, because defendant's dentition matched the bite marks found on the victim's body, he lived two blocks away from the victim, his former girlfriend testified that he liked to bite her on the breast and neck during intercourse, he smelled of burnt wood or clothes the morning after the murder, and he confessed to a detective that he had a temper and that is why the incident occurred. *Howard v. State*, 853 So. 2d 781, 2003 Miss. LEXIS 343 (Miss. 2003), cert. denied, 540 U.S. 1197, 124 S. Ct. 1455, 158 L. Ed. 2d 113, 2004 U.S. LEXIS 1327 (U.S. 2004).

Where two witnesses testified they saw defendant leave their slain mother's store carrying a money bag and their mother's purse, other witnesses placed defendant near the crime scene, and he admitted to a cellmate that he hit a woman with pipe wrench and took her purse and money bag, the evidence was legally sufficient to support defendant's conviction for capital

murder. *Shelton v. State*, 853 So. 2d 1171, 2003 Miss. LEXIS 349 (Miss. 2003).

Where the defendant did not attempt to rebut any of the state's evidence, the court was required to take the evidence presented by the state as true and to affirm the trial court's denial of his motion for a directed verdict as well as his motion for jnov. *Morris v. State*, 777 So. 2d 16, 2000 Miss. LEXIS 113 (Miss. 2000).

Evidence was sufficient to support a conviction for capital murder where the state presented testimony about the events surrounding the robbery of two businesses and the defendant's presence and participation in the robbery, established that the defendant owned the gun used as the murder weapon, and also established that the victim died from a gunshot wound inflicted during the robbery. *Ellis v. State*, 2000 Miss. App. LEXIS 385 (Miss. Ct. App. Aug. 15, 2000), rev'd, 790 So. 2d 813, 2001 Miss. LEXIS 114 (Miss. 2001).

Circumstantial evidence was sufficient to support the defendant's conviction for capital murder while in the commission of felonious child abuse, notwithstanding the defendant's offer of a hypothesis consistent with his innocence. *James v. State*, 2000 Miss. App. LEXIS 164 (Miss. Ct. App. Apr. 11, 2000), op. withdrawn, sub. op., 777 So. 2d 682, 2000 Miss. App. LEXIS 457 (Miss. Ct. App. 2000).

Evidence supported a conviction for capital murder with the underlying felony being sexual battery where photographs and testimony established that the victim was under the age of 14, medical testimony established sexual penetration, and eyewitness testimony and bite marks on the victim identified the defendant as the perpetrator. *Brooks v. State*, 748 So. 2d 736, 1999 Miss. LEXIS 318 (Miss. 1999).

The evidence was sufficient to establish that the murder victim was a deputy sheriff and was sufficient to sustain a conviction for capital murder, notwithstanding that the state did not produce a written appointment and oath of the victim that specifically addressed the office of deputy sheriff where (1) the sheriff testified that the victim was a deputy, and was in charge of the jail, pursuant to his control, consent, and approval, (2) numerous wit-

nesses testified that, when he was killed, the victim was wearing a deputy sheriff's uniform and a badge with an inscription of his name, and (3) the victim had, under the administration of a previous sheriff, signed an oath of office. *Stevenson v. State*, 733 So. 2d 177, 1998 Miss. LEXIS 627 (Miss. 1998).

Substantial circumstantial evidence existed for the jury to find that the prosecution met its burden of proof regarding the kidnapping and murder of the victim; therefore, evidence was sufficient to support the defendant's conviction for capital murder. *Underwood v. State*, 708 So. 2d 18, 1998 Miss. LEXIS 45 (Miss. 1998).

Evidence supported jury's verdict of guilt for capital murder committed while engaged in child abuse, despite defendant's claim that child had fallen from bed; State presented no fewer than five medical witnesses who testified that child could not have been injured the way defendant claimed she was, and defendant had sole custody of child on day injuries were inflicted. (Per Pittman, J., with two Justices concurring, two Justices concurring in the result only, and one Justice concurring in part.) *Kolberg v. State*, 704 So. 2d 1307, 1997 Miss. LEXIS 697 (Miss. 1997).

Finding that murder was committed during course of robbery, meeting statutory definition of capital murder, was supported by defendant's own statements to police and to newsman and by fact that he took victims' purses, jewelry, and car. *Wilcher v. State*, 697 So. 2d 1087, 1997 Miss. LEXIS 100 (Miss. 1997), cert. denied, 522 U.S. 1053, 118 S. Ct. 705, 139 L. Ed. 647, 1998 U.S. LEXIS 149 (U.S. 1998).

Conviction of capital murder was supported by evidence that defendant planned to "get" his wife by harming one of her children, that defendant lacked alibi during time of victim's disappearance, that defendant gave conflicting accounts of scratches on his face and body, that defendant attempted to get 2 different women to say that they had scratched him, and that defendant told a friend that he had killed victim. *Taylor v. State*, 672 So. 2d 1246, 1996 Miss. LEXIS 193 (Miss.), cert. denied, 519 U.S. 994, 117 S.

Ct. 486, 136 L. Ed. 2d 379, 1996 U.S. LEXIS 7020 (U.S. 1996).

Finding that defendant was under life sentence when murder was committed, which allowed conviction for capital murder, was supported by certified copy of order of prior conviction and life sentence, and by testimony of Department of Corrections supervisor of probation and parole services that defendant was on parole from life sentence when murder was committed. *Taylor v. State*, 672 So. 2d 1246, 1996 Miss. LEXIS 193 (Miss.), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379, 1996 U.S. LEXIS 7020 (U.S. 1996).

For defendant to be convicted of capital murder, state was not required to prove that defendant's prior conviction resulting in life sentence was valid; state was only required to prove that defendant was "under sentence of life imprisonment." *Taylor v. State*, 672 So. 2d 1246, 1996 Miss. LEXIS 193 (Miss.), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379, 1996 U.S. LEXIS 7020 (U.S. 1996).

Evidence that money and money orders were taken from victim's presence before victim was fatally shot and that money orders were found in defendant's possession when he was arrested was sufficient to support conviction of capital murder during commission of robbery, despite inconsistencies in testimony of defendant's accomplice. *Holly v. State*, 671 So. 2d 32, 1996 Miss. LEXIS 15 (Miss.), cert. denied, 518 U.S. 1025, 116 S. Ct. 2565, 135 L. Ed. 2d 1082, 1996 U.S. LEXIS 4179 (U.S. 1996).

Evidence supported felony-murder conviction of defendant, even though he claimed he formed intent to commit sexual battery upon victim only after she was already dead, and that his act of inserting a stick into her vagina after he had apparently drowned her could not serve as a felony-murder predicate; there was testimony from accomplice that defendant had attempted to have vaginal intercourse with victim, and had succeeded in having anal intercourse, before he drowned her and that after defendant had inserted the stick he told accomplice that he "had always wanted to do that." *Walker v. State*, 671 So. 2d 581, 1995

Miss. LEXIS 494 (Miss. 1995), cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406, 1996 U.S. LEXIS 7236 (U.S. 1996).

Testimony from accomplices provided sufficient evidence to sustain defendant's murder conviction; contradictions in accomplice testimony were minor and did not concern defendant's role in the crime. *Ballenger v. State*, 667 So. 2d 1242, 1995 Miss. LEXIS 451 (Miss. 1995), cert. denied, 518 U.S. 1025, 116 S. Ct. 2565, 135 L. Ed. 2d 1082, 1996 U.S. LEXIS 4177 (U.S. 1996).

Psychological examinations that allegedly showed that it was improbable that defendant was mastermind of robbery and murder were not relevant in determining whether evidence was sufficient for conviction, where examinations were not introduced as evidence at trial or were not offered until sentencing phase, at which one examination was admitted for identification purposes only. *Ballenger v. State*, 667 So. 2d 1242, 1995 Miss. LEXIS 451 (Miss. 1995), cert. denied, 518 U.S. 1025, 116 S. Ct. 2565, 135 L. Ed. 2d 1082, 1996 U.S. LEXIS 4177 (U.S. 1996).

The evidence was sufficient to support a conviction for capital murder where the defendant was seen on the night the victim was killed in the same area where she had been seen, the defendant was in the vicinity of the crime scene the following morning, the defendant was a "non-secreter" and forensic evidence showed that semen found in the victim's vagina was from a non-secreter, and the DNA banding pattern from the defendant's blood matched one of the patterns found in the victim's vaginal swab. *Parker v. State*, 606 So. 2d 1132, 1992 Miss. LEXIS 563 (Miss. 1992), overruled in part, *Goff v. State*, 14 So. 3d 625, 2009 Miss. LEXIS 273 (Miss. 2009).

In a capital murder prosecution, there was sufficient evidence to support the jury's verdict that the murder occurred during the course of an armed robbery, in spite of the defendant's argument that the alleged robbery was completed long before the victim was killed 60 miles away in another county, where the jury was instructed that it was necessary for them to find that the defendant had the intent to

rob when the killing was done, the evidence offered at trial put the defendant in the same neighborhood as the victim on the date in question, there was evidence of violence in the victim's home, within a few hours the defendant was seen approximately 60 miles away in possession and control of the victim's car, and the victim's personal effects were found in the general vicinity of the car. *Mackbee v. State*, 575 So. 2d 16, 1990 Miss. LEXIS 831 (Miss. 1990).

Valid subsection (2)(e) of this section capital murder conviction must be supported by evidence legally sufficient to support conviction of both murder and underlying felony had either been charged alone. *Fisher v. State*, 481 So. 2d 203, 1985 Miss. LEXIS 2281 (Miss. 1985).

Testimony of accomplice, which is corroborated by bloodstain and fiber tests and which is directly disputed only by another accomplice whose testimony is not convincing, is sufficient to support conviction for capital murder. *Johnson v. State*, 477 So. 2d 196, 1985 Miss. LEXIS 2072 (Miss. 1985), cert. denied, 476 U.S. 1109, 106 S. Ct. 1958, 90 L. Ed. 2d 366 (U.S. 1986).

Defendant's conviction for murder while engaged in robbery in violation of subsection (2)(e) of this section was adequately supported by the evidence, where a forensic pathologist testified that the cause of the victim's death was cardiac arrest resulting from stress compatible with blows to his head, where two eye witnesses saw defendant and the victim struggling in a restroom, and it appeared that the defendant had partially pulled the victim's billfold out of his back pocket, where forensic investigation revealed that the blood on the floor of the restroom was the victim's type but not the defendant's, and that blood on the defendant's face and hand was also of the victim's type, and where arresting officers found the victim's billfold in the defendant's possession 15 minutes after the victim's death. *Jackson v. State*, 441 So. 2d 1382, 1983 Miss. LEXIS 3073 (Miss. 1983).

Testimony that a certain carburetor was found in defendant's apartment, that defendant rented the truck which was used in the robbery and returned it the next

day, and that the body found in the woods was that of the robbery victim constituted sufficient evidence to sustain defendant's conviction of capital murder; and in violation of subsection (2)(c) of this section imposition of the death sentence was not disproportionate, wanton, or freakish when compared to cases involving similar crimes, nor was the sentence imposed under the influence of passion, prejudice, or any other arbitrary factors, where defendant had been engaged in robbing the victim, committed the murder for pecuniary gain, had previously been convicted of a felony involving the use or threat of violence, and committed the murder in an especially heinous, atrocious, and cruel manner. *Hill v. State*, 432 So. 2d 427, 1983 Miss. LEXIS 2613 (Miss.), cert. denied, 464 U.S. 977, 104 S. Ct. 415, 78 L. Ed. 2d 352, 1983 U.S. LEXIS 2329 (U.S. 1983).

In a prosecution for murdering a constable while such constable was attempting to serve an arrest warrant, defendant's conviction of murder was adequately supported by testimony including that of the defendant's son who stated that his father stated he shot the constable and intended to do so. *Polk v. State*, 417 So. 2d 930, 1982 Miss. LEXIS 2101 (Miss. 1982).

In a capital murder prosecution, the jury properly found beyond a reasonable doubt that the alleged killing occurred while defendant was engaged in committing the crime of robbery where the jury was fully instructed that it was necessary for them to find that defendant had the intent to rob when the murder was committed and where, based on the defendant's actions as well as the surrounding circumstances, the evidence was sufficient to show such intent. *Voyles v. State*, 362 So. 2d 1236, 1978 Miss. LEXIS 2159 (Miss. 1978), cert. denied, 441 U.S. 956, 99 S. Ct. 2184, 60 L. Ed. 2d 1059, 1979 U.S. LEXIS 1933 (U.S. 1979).

55. —Conviction not sustained.

Conviction for depraved heart murder was not sustained by evidence that defendant and victim had been playing with gun all day, defendant picked up bracelet and asked victim if he could wear it, victim told him no, the 2 started joking

around and horseplaying, defendant grabbed gun and cocked it, defendant put gun to victim's head, gun went off, and defendant fell to ground and started crying; defendant's conduct of falling to ground and crying following shooting could be considered as consistent with accident, and there was no testimony indicating that gun was defendant's, that he knew it was loaded, or that he pulled the trigger. *Hankins v. City of Grenada* (In re City of Grenada), 669 So. 2d 85, 1996 Miss. LEXIS 121 (Miss. 1996).

The evidence was insufficient to support a defendant's conviction for murder for failure to properly feed and care for her daughter, who suffered from birth defects and required constant care, where the record was replete with hospital visits, doctors' office visits, "and a spasmodic, yet continuous, effort by the defendant to find help for the child and to deal with her numerous health problems"; the defendant should not have been held to a standard of care that she could not give and which was not available to her even through charitable or government agencies. *Clayton v. State*, 652 So. 2d 720, 1995 Miss. LEXIS 136 (Miss. 1995).

Circumstantial evidence conviction will not be disturbed unless it is opposed by decided preponderance of evidence. *Stokes v. State*, 518 So. 2d 1224, 1988 Miss. LEXIS 36 (Miss. 1988).

In case in which testimony is so contradictory that it is virtually impossible to reconstruct what actually happened and there are number of unresolved issues, proof is not sufficient to sustain conviction for murder but is sufficient to sustain conviction for lesser included offense of manslaughter. *Clemons v. State*, 473 So. 2d 943, 1985 Miss. LEXIS 2160 (Miss. 1985).

Evidence that deceased and accused killed in heat of passion or self-defense is insufficient to sustain murder conviction. *Pigott v. State*, 107 Miss. 552, 65 So. 583, 1914 Miss. LEXIS 117 (Miss. 1914).

Conviction of murder not supported by evidence where deceased began shooting at defendant before defendant showed any intent to kill or do him bodily harm. *Jones v. State*, 60 So. 735 (Miss. 1913).

Where evidence raises only issue of self-defense or manslaughter murder conviction

will be reversed. *Jones v. State*, 98 Miss. 899, 54 So. 724, 1910 Miss. LEXIS 140 (Miss. 1910).

"Maliciously" not same as "malice aforethought," and conviction of murder where jury find that defendant wilfully and maliciously killed deceased with deadly weapon, is error. *Brett v. State*, 94 Miss. 669, 47 So. 781, 1909 Miss. LEXIS 327 (Miss. 1909).

III. INSTRUCTIONS.

56. In general.

Defendant was properly convicted of first-degree murder because the trial court did not abuse its discretion in the giving of the instructions which defendant challenged or in the refusal of defendant's proposed instruction as the court fairly and adequately instructed the jury on the nature and elements of the charged offenses and defendant's theory of defense. *Cooper v. State*, 230 So. 3d 1071, 2017 Miss. App. LEXIS 168 (Miss. Ct. App.), cert. denied, 229 So. 3d 119, 2017 Miss. LEXIS 394 (Miss. 2017), cert. denied, — So. 3d —, 2017 Miss. LEXIS 395 (Miss. 2017).

Inclusion of deliberate-design language included in a jury instruction in defendant's trial for capital murder merely bolstered the State's burden of proof; any error in the language's inclusion was harmless. *Husband v. State*, 23 So. 3d 550, 2009 Miss. App. LEXIS 332 (Miss. Ct. App. 2009), cert. dismissed, 31 So. 3d 1217, 2010 Miss. LEXIS 218 (Miss. 2010).

Jury was properly instructed as to the elements of the crime charged; defendant was indicted on a charge of capital murder, and the jury instructions properly instructed the jury as to the elements of capital murder and as to what the jury was required to find in order to convict defendant. *Grant v. State*, 8 So. 3d 213, 2008 Miss. App. LEXIS 495 (Miss. Ct. App. 2008), cert. denied, 12 So. 3d 531, 2009 Miss. LEXIS 207 (Miss. 2009).

Jury was properly instructed that it could consider as an aggravating factor the fact that defendant was previously convicted of another capital offense or of a felony involving the use or threat of violence to the person, even though defen-

dant's previous conviction was for manslaughter, which was not a capital offense. *Brown v. State*, 890 So. 2d 901, 2004 Miss. LEXIS 1104 (Miss. 2004), cert. denied, 544 U.S. 981, 125 S. Ct. 1842, 161 L. Ed. 2d 735, 2005 U.S. LEXIS 3424 (U.S. 2005).

In a capital murder case, an instruction to the jurors that they should consider and weigh any aggravating and mitigating circumstances but which cautioned them not to be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion, or public feelings correctly stated the law, as it did not tell the jurors to completely disregard sympathy. *Brown v. State*, 890 So. 2d 901, 2004 Miss. LEXIS 1104 (Miss. 2004), cert. denied, 544 U.S. 981, 125 S. Ct. 1842, 161 L. Ed. 2d 735, 2005 U.S. LEXIS 3424 (U.S. 2005).

As defendant, on trial for capital murder, could be sentenced only to death or life imprisonment without the eligibility of parole, by instructing the jury that these were its only sentencing options, the trial judge properly gave the jury all the instructions that were needed. *Brown v. State*, 890 So. 2d 901, 2004 Miss. LEXIS 1104 (Miss. 2004), cert. denied, 544 U.S. 981, 125 S. Ct. 1842, 161 L. Ed. 2d 735, 2005 U.S. LEXIS 3424 (U.S. 2005).

Trial court did not err in denying defendant's requested alibi instruction where the evidence showed that defendant was not present in the location where the crime was committed on dates before and after the date on which the victim was killed but did not raise an issue as to whether defendant was present in the area on the date of the offense. *Smith v. State*, 835 So. 2d 927, 2002 Miss. LEXIS 298 (Miss. 2002).

In a prosecution in which the defendant was charged with depraved heart murder, it was not error to instruct the jury with regard to both depraved heart murder and deliberate design murder. *Sanders v. State*, 781 So. 2d 114, 2001 Miss. LEXIS 22 (Miss. 2001).

Trial court did not improperly speculate on parole in capital murder case by telling venire about possibility of parole should defendant be sentenced to life in prison; trial court emphasized that court and jury had no control over parole, when further pressured by venire regarding parole eli-

gibility, court gave truthful response, and at close of presentation of evidence, court properly instructed jury regarding options of life and death. *Wiley v. State*, 691 So. 2d 959, 1997 Miss. LEXIS 43 (Miss.), cert. denied, 522 U.S. 886, 118 S. Ct. 219, 139 L. Ed. 2d 153, 1997 U.S. LEXIS 5706 (U.S. 1997).

Defendant is not per se entitled to manslaughter instruction in murder case. *Blue v. State*, 674 So. 2d 1184, 1996 Miss. LEXIS 304 (Miss.), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517, 1996 U.S. LEXIS 7523 (U.S. 1996).

That murder was committed (1) while engaged in crime of robbery and (2) for pecuniary gain may not be given as two separate and independent aggravating circumstances, as they essentially comprise one. When life is at state, a jury cannot be allowed to doubly weigh the commission of the underlying felony and the motive behind it as separate aggravators. *Willie v. State*, 585 So. 2d 660, 1991 Miss. LEXIS 454 (Miss. 1991).

Defendant on trial for murder less than capital was not entitled to requested reasonable doubt instruction where the jury had been properly and adequately instructed on reasonable doubt, and the requested instruction was argumentative and abstract. *Hunter v. State*, 489 So. 2d 1086, 1986 Miss. LEXIS 2484 (Miss. 1986).

Instruction that where defendant is only eyewitness to homicide, defendant's version of homicide, if reasonable, must be accepted as true need not be given where defendant's version of homicide is contradicted by state witness who received telephone call from victim immediately prior to homicide and where court has great difficulty reconciling physical evidence with defendant's account. *Flanagin v. State*, 473 So. 2d 482, 1985 Miss. LEXIS 2168 (Miss. 1985).

Instruction tailored specifically to facts of murder case is proper. *Fairley v. State*, 467 So. 2d 894, 1985 Miss. LEXIS 1902 (Miss.), cert. denied, 474 U.S. 855, 106 S. Ct. 160, 88 L. Ed. 2d 133, 1985 U.S. LEXIS 3725 (U.S. 1985).

Instruction which impermissibly directs jury to find defendant guilty of murder if homicide victim was willfully and deliber-

ately killed by defendant without authority of law is not cured by giving of instruction properly setting forth distinction between murder and manslaughter. *Smith v. State*, 463 So. 2d 1028, 1984 Miss. LEXIS 1633 (Miss. 1984), overruled, *Ferrell v. State*, 733 So. 2d 788, 1999 Miss. LEXIS 87 (Miss. 1999).

In a capital murder prosecution, even if one jury instruction was confusing, the underlying felony was adequately explained in another instruction, which tracked the language of subsection (2)(e) of this section; accordingly, the jury was fully and fairly instructed as to the applicable law. *Billiot v. State*, 454 So. 2d 445, 1984 Miss. LEXIS 1777 (Miss. 1984), cert. denied, 469 U.S. 1230, 105 S. Ct. 1232, 84 L. Ed. 2d 369, 1985 U.S. LEXIS 171 (U.S. 1985).

In a prosecution for murder while engaged in armed robbery, an instruction was not defective for failing to mention armed robbery, where the indictment stated armed robbery, the evidence was as to armed robbery, the state secured instructions on armed robbery, as did the defendant, and when all of the instructions were read and considered as a whole, the jury had adequate instruction on the issues. *Alexander v. State*, 250 So. 2d 629, 1971 Miss. LEXIS 1185 (Miss. 1971).

Where an indictment charged that the defendant did wilfully, unlawfully, feloniously, and of his malice aforethought, kill and murder the deceased, the indictment was sufficient to charge murder in the proper terms, and the state was entitled to instructions setting forth both the theory of a premeditated killing and the theory of a homicide resulting from the commission of a crime of violence. *Wilson v. J. Ed Turner, Inc.*, 221 So. 2d 368, 1969 Miss. LEXIS 1497 (Miss. 1969).

In a prosecution for murder an instruction that if jury believed from the evidence that the defendant intentionally and unlawfully pointed a pistol at and toward a crowd not in self-defense and not in unlawful discharge of an official duty and discharged the pistol so intentionally pointed or aimed and by this discharge killed the deceased, then the jury should return a verdict of not guilty was improper. *Bass v. State*, 54 So. 2d 259 (Miss. 1951).

Instruction in murder prosecution is not erroneous as assuming defendant killed victim as it does not assume as fact that defendant inflicted fatal blow when it provides "if the defendant was inflicting blows," the qualifying word "if" eliminating any possibility of there being unwarranted assumption by jury. *Dickins v. State*, 208 Miss. 69, 43 So. 2d 366, 1949 Miss. LEXIS 409 (Miss. 1949).

Only approved instructions should be requested. *Mott v. State*, 123 Miss. 729, 86 So. 514, 1920 Miss. LEXIS 75 (Miss. 1920).

57. Variance between pleadings and instructions.

Jury was instructed it could find defendant guilty of murder if it found beyond a reasonable doubt that defendant had killed the victim with the deliberate design to effect her death, and not in necessary self-defense, and the murder instruction allowed the jury to return a verdict of guilt if it believed that defendant had killed the victim in some manner other than by decapitation; the murder instruction was not fatally defective for permitting the jury to find that defendant had killed the victim by any method. *Neal v. State*, 15 So. 3d 388, 2009 Miss. LEXIS 272 (Miss. 2009), dismissed, — So. 3d —, 2016 Miss. LEXIS 340 (Miss. 2016).

In a capital murder case, defendant made no objection to a jury instruction, so his error based on a variance was waived; even if it had not been, the jury was properly instructed to find all the elements required for capital murder where the instructions stated that defendant, acting alone or with another, took personal property from the victim, and during the course of the robbery, the victim was killed. *Ramsey v. State*, 959 So. 2d 15, 2006 Miss. App. LEXIS 764 (Miss. Ct. App. 2006), cert. denied, 958 So. 2d 1232, 2007 Miss. LEXIS 588 (Miss. 2007).

Defendant waived any objection to a variance of one day between the date of offense set out in the indictment and the date of offense set out in the jury instructions by not objecting to the instructions as given at trial. *Smith v. State*, 835 So. 2d 927, 2002 Miss. LEXIS 298 (Miss. 2002).

There was no fatal variance between the pleadings and the instructions where

the indictment charged that the defendant murdered the victim with malice aforethought, but the jury was instructed to convict the defendant if he killed the defendant while engaged in a robbery, since notwithstanding the “malice aforethought” language, the indictment served notice on the defendant that he was charged with murder while engaged in the commission of an armed robbery. *Bell v. State*, 725 So. 2d 836, 1998 Miss. LEXIS 305 (Miss. 1998), cert. denied, 526 U.S. 1122, 119 S. Ct. 1777, 143 L. Ed. 2d 805, 1999 U.S. LEXIS 3380 (U.S. 1999).

58. Terms and definitions.

Because the addition of the language “either by himself” in the jury instruction defining murder did not change the elements that had to be proven for the jury to find defendant guilty of murder, the trial court did not commit plain error when it gave the instruction. *Luster v. State*, 143 So. 3d 636, 2014 Miss. App. LEXIS 415 (Miss. Ct. App. 2014).

No reversible error occurred when the capital-murder instruction incorrectly stated that the killing had to have been done with malice because the error favored defendant by increasing the State’s burden of proof. *Harrell v. State*, 134 So. 3d 266, 2014 Miss. LEXIS 52 (Miss. 2014).

Every murder committed with deliberate design was by definition done in the commission of an act imminently dangerous to others, evincing a depraved heart; thus, the two versions of murder in *Code Ann.* § 97-3-19(1)(b) (depraved heart) and (1)(a) (deliberate design) have been coalesced by the case law. Therefore, the trial court did not err when it allowed a “depraved heart murder” clause to be added to the deliberate design jury instruction. *Young v. State*, 2004 Miss. LEXIS 588 (Miss. May 27, 2004), op. withdrawn, sub. op., 891 So. 2d 813, 2005 Miss. LEXIS 40 (Miss. 2005).

Instruction defining offense of murder, which contained surplus language that killing must not have been in necessary self-defense, was not prejudicial to defendant in murder prosecution; such surplus language served only to raise state’s burden of proof. *De La Beckwith v. State*, 707 So. 2d 547, 1997 Miss. LEXIS 749 (Miss.

1997), cert. denied, 525 U.S. 880, 119 S. Ct. 187, 142 L. Ed. 2d 153, 1998 U.S. LEXIS 5751 (U.S. 1998).

Trial court’s refusal to give defendant’s proposed instruction setting out elements of murder offense and instructing jury that prosecution was required to prove each and every one of those elements beyond a reasonable doubt did not constitute reversible error in murder prosecution, where charges given, taken together, fully and fairly instructed jury on elements of murder, presumption of innocence, and reasonable doubt requirement. *De La Beckwith v. State*, 707 So. 2d 547, 1997 Miss. LEXIS 749 (Miss. 1997), cert. denied, 525 U.S. 880, 119 S. Ct. 187, 142 L. Ed. 2d 153, 1998 U.S. LEXIS 5751 (U.S. 1998).

In prosecution for capital offense of murder during commission of robbery, jury instruction given regarding sequence of the robbery and murder did not sufficiently instruct jury on elements of underlying crime of robbery, for purposes of determining whether failure to specifically instruct jury on elements of robbery constituted reversible error. *Hunter v. State*, 684 So. 2d 625, 1996 Miss. LEXIS 288 (Miss. 1996).

State had duty, in prosecution for capital offense of murder during commission of robbery, to ensure that jury was properly instructed on elements of underlying crime of robbery, and therefore failure to give such instruction constituted reversible error, even though defendant did not present acceptable robbery instruction. *Hunter v. State*, 684 So. 2d 625, 1996 Miss. LEXIS 288 (Miss. 1996).

“Depraved heart” instruction did not constitute an amendment to indictment charging deliberate design/premeditated murder; the two subsections of murder statute had “coalesced.” *Catchings v. State*, 684 So. 2d 591, 1996 Miss. LEXIS 214 (Miss. 1996).

Denial of instruction defining deliberate design was not reversible error, where elements of murder were sufficiently addressed by other instructions. *Catchings v. State*, 684 So. 2d 591, 1996 Miss. LEXIS 214 (Miss. 1996).

In a prosecution for capital murder while engaged in the crime of kidnapping,

an instruction as to the underlying felony of kidnapping was proper even though it did not include “asportation” as an element of the crime. *Carr v. State*, 655 So. 2d 824, 1995 Miss. LEXIS 56 (Miss. 1995), cert. denied, 516 U.S. 1077, 116 S. Ct. 783, 133 L. Ed. 2d 734, 1996 U.S. LEXIS 547 (U.S. 1996).

Where the objective of an instruction is to distinguish culpable negligence manslaughter from depraved heart murder, “culpable negligence” should be defined as “negligence of a degree so gross as to be tantamount to a wanton disregard of, or utter indifference to, the safety of human life.” *Clayton v. State*, 652 So. 2d 720, 1995 Miss. LEXIS 136 (Miss. 1995).

A trial court’s instruction to the jury that the defendant should be found guilty of capital murder if the jury found that he killed the victim while committing the crimes of kidnapping “or” robbery did not require reversal of the defendant’s conviction, in spite of the defendant’s contention that the instruction permitted the jury to return a less-than-unanimous verdict because some jurors could have found him guilty of kidnapping but not robbery while other jurors could have found him guilty of robbery but not kidnapping, where the jury’s sentencing verdict clearly indicated a finding that the defendant was engaged in both kidnapping and robbery when he murdered the victim, and all 3 crimes of which the defendant was accused occurred as part of a single transaction and were essentially inseparable. *Conner v. State*, 632 So. 2d 1239, 1993 Miss. LEXIS 541 (Miss. 1993), cert. denied, 513 U.S. 927, 115 S. Ct. 314, 130 L. Ed. 2d 276, 1994 U.S. LEXIS 7088 (U.S. 1994), overruled, *Weatherspoon v. State*, 732 So. 2d 158, 1999 Miss. LEXIS 4 (Miss. 1999).

In a capital murder prosecution arising from the defendant’s alleged killing of the victim while engaged in the commission of a robbery, the jury instructions defining the crimes of robbery and capital murder were adequate, even though neither instruction specifically mentioned the element of robbery known as “felonious intent,” where the language “without authority of the law” was used in the instruction defining capital murder, so that robbery was defined correctly track-

ing the language of the statute when the 2 instructions were read together. *Mackbee v. State*, 575 So. 2d 16, 1990 Miss. LEXIS 831 (Miss. 1990).

It is permissible to use words “deliberate design” in place of “malice aforethought” in capital murder instruction. *Lancaster v. State*, 472 So. 2d 363, 1985 Miss. LEXIS 2115 (Miss. 1985).

A definition of murder in the exact language of the statute [Code 1942, § 2215] is not error on the ground that it states an abstract legal definition. *Dobbs v. State*, 200 Miss. 595, 27 So. 2d 551, 29 So. 2d 84, 1946 Miss. LEXIS 330, 1947 Miss. LEXIS 354 (Miss. 1946), cert. denied, 331 U.S. 787, 67 S. Ct. 1318, 91 L. Ed. 1817, 1947 U.S. LEXIS 2295 (U.S. 1947), overruled in part, *Flowers v. State*, 473 So. 2d 164, 1985 Miss. LEXIS 2140 (Miss. 1985).

An instruction setting forth the allowable verdicts upon conviction of murder and their respective implications, which was prefaced with a proviso that conviction be “as charged in the indictment,” did not preclude conviction for manslaughter. *Dobbs v. State*, 200 Miss. 595, 27 So. 2d 551, 29 So. 2d 84, 1946 Miss. LEXIS 330, 1947 Miss. LEXIS 354 (Miss. 1946), cert. denied, 331 U.S. 787, 67 S. Ct. 1318, 91 L. Ed. 1817, 1947 U.S. LEXIS 2295 (U.S. 1947), overruled in part, *Flowers v. State*, 473 So. 2d 164, 1985 Miss. LEXIS 2140 (Miss. 1985).

Instructions granted in favor of the state given in the exact language of Code 1942, § 2215, subsections a and b, defining the crime of murder, with the additional words “and the court further instructs the jury that if you believe beyond a reasonable doubt that the defendant, at the time and place testified about, so killed the deceased, he would be guilty of murder, and the jury should so find,” were not objectionable. *White v. State*, 190 Miss. 672, 1 So. 2d 500, 1941 Miss. LEXIS 87 (Miss. 1941).

Instruction that unlawful killing of human being, with malice aforethought and deliberate design to kill him, or in commission of act eminently dangerous to others and evincing depraved heart, regardless of human life, though without such design, is murder, held not erroneous in trial for murder under indictment in

language of statute. *Talbert v. State*, 172 Miss. 243, 159 So. 549, 1935 Miss. LEXIS 120 (Miss. 1935).

Instruction defining “murder” in exact language of statute held proper, notwithstanding it did not contain words “with malice aforethought.” *Brown v. State*, 173 Miss. 542, 158 So. 339, 161 So. 465, 1935 Miss. LEXIS 190 (Miss. 1935).

In prosecution for shooting another with intent to murder him, court properly included in instruction definition of murder. *Martin v. State*, 163 Miss. 454, 142 So. 15, 1932 Miss. LEXIS 62 (Miss. 1932).

An instruction purporting to define murder under this section which excludes the statutory words “without authority of law” is erroneous. *Ivy v. State*, 84 Miss. 264, 36 So. 265, 1904 Miss. LEXIS 38 (Miss. 1904); *Rutherford v. State*, 100 Miss. 832, 57 So. 224, 1911 Miss. LEXIS 81 (Miss. 1911).

59. Lesser included offenses.

Jury instructions, when read as a whole, fairly announced the law of the case because the jury was instructed on all elements of the offense of second-degree murder, and the jury was separately instructed that it had to find that defendant was guilty of each element beyond a reasonable doubt; the jury was instructed that it could not consider second-degree murder unless it had found that defendant was not guilty of first-degree murder. *Jenkins v. State*, 284 So. 3d 862, 2019 Miss. App. LEXIS 561 (Miss. Ct. App. 2019).

Defendant failed to show that a jury could have acquitted him of capital murder and then convicted him of second-degree murder and thus the circuit court properly refused to give a jury instruction on the lesser-included offense; defendant’s statement that he did not intend to shoot the victim did not separate defendant from the burglary, for which there was sufficient evidence as he gained entry into the house by force. The fact that the victim died as a result of the burglary elevated the crime to capital murder. *Taylor v. State*, 291 So. 3d 14, 2019 Miss. App. LEXIS 498 (Miss. Ct. App. 2019).

Trial court did not abuse its discretion in denying the jury instructions proffered

by defense counsel because defendant was not entitled to an instruction on aggravated assault since it was not a lesser-included offense within the crime of murder. *Thomas v. State*, 249 So. 3d 331, 2018 Miss. LEXIS 272 (Miss. 2018).

Trial court did not abuse its discretion in denying jury instructions for culpable-negligence and heat-of-passion manslaughter because the evidence did not support the instructions; defendant admitted in his oral and written statements to having hit the victim with a welding rod in an effort to steal his money. *Thomas v. State*, 249 So. 3d 331, 2018 Miss. LEXIS 272 (Miss. 2018).

Since no evidence was presented which would have allowed the jury to separate the killing from the arson and convict defendant only of manslaughter, the trial court did not err in denying defendant’s imperfect-self-defense manslaughter instruction. *Ronk v. State*, 172 So. 3d 1112, 2015 Miss. LEXIS 219 (Miss. 2015), cert. denied, — U.S. —, 136 S. Ct. 1657, 194 L. Ed. 2d 773, 2016 U.S. LEXIS 2643 (U.S. 2016), in part, — So. 3d —, 2016 Miss. LEXIS 493 (Miss. 2016).

Trial court did not err in refusing to instruct the jury on excusable homicide by accident and misfortune where nothing indicated that the gun misfired or was shot by accident, and there was no evidence of uncontrollable rage or evidence that the victim reached for the gun or tied to defend himself. *Smith v. State*, 171 So. 3d 542, 2015 Miss. App. LEXIS 33 (Miss. Ct. App.), cert. denied, — So. 3d —, 2015 Miss. LEXIS 409 (Miss. 2015).

Trial court did not err in refusing to give a culpable-negligence-manslaughter jury instruction where there was no evidence of horseplay, the gun misfiring, or that the victim was shot by accident, but instead, the evidence showed that defendant told the victim to leave and when the victim failed to do so, defendant put a gun to the victim’s head and shot him. *Smith v. State*, 171 So. 3d 542, 2015 Miss. App. LEXIS 33 (Miss. Ct. App.), cert. denied, — So. 3d —, 2015 Miss. LEXIS 409 (Miss. 2015).

Defendant was not entitled to a heat-of-passion-manslaughter instruction as a lesser-included offense of murder because

the evidence was overwhelming that defendant killed his mother with deliberate design as the pathologist testified that the victim had been struck five to six times in the face, and three to four times in the side and back of the head, and that she had been strangled for more than one minute before succumbing; and defendant testified that he had contemplated killing the victim, then followed through. *Abeyta v. State*, 137 So. 3d 305, 2014 Miss. LEXIS 223 (Miss. 2014).

Because mere words could never constitute reasonable provocation, the victim's threat to cut off defendant, an adult child, financially did not rise to the level of reasonable provocation sufficient to reduce murder to manslaughter; thus, a jury instruction on the lesser-included offense of manslaughter was properly denied. *Abeyta v. State*, 137 So. 3d 305, 2014 Miss. LEXIS 223 (Miss. 2014).

Defendant was properly denied jury instructions on deliberate-design murder and manslaughter because there was no evidentiary basis for those instructions, given that defendant had confessed to murder while in the commission of a robbery, which is capital murder. *Keller v. State*, 138 So. 3d 817, 2014 Miss. LEXIS 89 (Miss. 2014), cert. denied, 574 U.S. 1159, 135 S. Ct. 1397, 191 L. Ed. 2d 371, 2015 U.S. LEXIS 1353 (U.S. 2015).

Defendant's burglary conviction was inappropriate because the trial court clearly erred by granting the State's request for an instruction on burglary since burglary was not a lesser-included offense of capital murder and since the State was not entitled to a lesser-offense instruction, Miss. Code Ann. § 97-3-19(2)(e), (3). *Gause v. State*, 65 So. 3d 295, 2011 Miss. LEXIS 314 (Miss. 2011), limited, *Hall v. State*, 127 So. 3d 202, 2013 Miss. LEXIS 649 (Miss. 2013).

60. -- Depraved heart murder.

Second-degree murder instruction was not fatally defective where it tracked the language of the statute and did not instruct the jury to presume any element of depraved-heart murder. *Holliman v. State*, 178 So. 3d 689, 2015 Miss. LEXIS 470 (Miss. 2015).

Because the Mississippi Supreme Court held that there was no error in coalescing

Miss. Code Ann. § 97-3-19(1)(a) and (b), it was not error for a State jury instruction to combine the elements of deliberate-design murder and depraved-heart murder. *Pitts v. State*, 66 So. 3d 174, 2010 Miss. App. LEXIS 658 (Miss. Ct. App. 2010), cert. denied, 65 So. 3d 310, 2011 Miss. LEXIS 354 (Miss. 2011).

Jury was properly informed on depraved-heart murder and culpable-negligent manslaughter; the court gave depraved-heart murder jury instruction which stated that if the jury found that appellant killed the victim while engaged in the commission of an act eminently dangerous to others and evincing a depraved heart, disregarding the value of human life, whether or not he had any intention of actually killing the victim, then the jury should find appellant guilty of murder. Culpable negligence was defined as the conscious and wanton or reckless disregard of the probabilities of fatal consequences to others as a result of the willful creation of an unreasonable risk thereof and it was negligence of a degree so gross as to be tantamount to a wanton disregard of or utter indifference to the safety of human life; accordingly, the jury instructions given fully explained the difference between depraved-heart murder and culpable-negligence manslaughter. *Westbrook v. State*, 29 So. 3d 828, 2009 Miss. App. LEXIS 648 (Miss. Ct. App. 2009), cert. denied, 29 So. 3d 774, 2010 Miss. LEXIS 124 (Miss. 2010), cert. denied, 562 U.S. 849, 131 S. Ct. 98, 178 L. Ed. 2d 62, 2010 U.S. LEXIS 5934 (U.S. 2010).

Where defendant was convicted of depraved-heart murder based on firing a gun into a group of fleeing people, even if he had not failed to properly preserve the issue, defendant did not establish error because the trial court's instructions correctly recited the elements of this offense. *Humphries v. State*, 18 So. 3d 305, 2009 Miss. App. LEXIS 606 (Miss. Ct. App. 2009).

In defendant's trial for murder, jury instructions that stated that culpable negligence was conduct which exhibited or manifested a wanton or reckless disregard for the safety of human life, or such indifference to the consequences of defendant's

act under the surrounding circumstances as to render his conduct tantamount to willfulness, were proper; the difference in the mental state of culpability came through the jury instructions in that depraved heart murder required a higher mental culpability, i.e., a depraved heart. *Mullen v. State*, 986 So. 2d 320, 2007 Miss. App. LEXIS 605 (Miss. Ct. App. 2007), cert. denied, 987 So. 2d 451, 2008 Miss. LEXIS 559 (Miss. 2008).

In a case where defendant was charged with capital murder after he slammed his car into a patrol car that was blocking his path during a chase, a trial court did not err by instructing the jury on depraved heart murder because that concept had coalesced with deliberate design murder. *White v. State*, 964 So. 2d 1181, 2007 Miss. App. LEXIS 576 (Miss. Ct. App. 2007).

In a criminal prosecution for murder, the State was permitted to instruct the jury that it could convict defendant if his actions showed a depraved heart. The State produced evidence showing depraved heart murder by establishing that defendant was engaged in a fight with an unarmed man before he fired several shots in a hotel room with several people present; defendant was properly convicted as charged. *Lett v. State*, 902 So. 2d 630, 2005 Miss. App. LEXIS 157 (Miss. Ct. App. 2005).

59. -- Depraved heart murder.

Because the depraved-heart-murder instructions, when read as a whole, fairly announce the law of the case and create no injustice, no plain error occurred; although one of the depraved-heart-murder instructions omitted the phrase "without authority of law," other instructions made clear that to find defendant guilty of murdering the victim, the killing could not be justifiable self-defense or an excusable accident. *Montgomery v. State*, 253 So. 3d 305, 2018 Miss. LEXIS 382 (Miss. 2018).

61. Failure to give manslaughter instruction—where accused fails to request.

During defendant's trial for capital murder, the trial court did not err in failing to give an instruction on manslaughter by culpable negligence because defendant never requested that the in-

struction for manslaughter be given, and there was no evidentiary basis for the request of a manslaughter-by-culpable-negligence instruction; the State's evidence showed the victim died of strangulation and suffocation by way of a plastic bag duct-taped over his head, and defendant failed to offer any evidence justifying an instruction for manslaughter by culpable negligence. *McBeath v. State*, 66 So. 3d 663, 2010 Miss. App. LEXIS 666 (Miss. Ct. App. 2010), cert. denied, 69 So. 3d 9, 2011 Miss. LEXIS 373 (Miss. 2011).

In a felony murder prosecution, the trial court did not err in denying defendant a lesser-included offense instruction on heat of passion manslaughter, Miss. Code Ann. § 97-3-35, as the granting of such an instruction would have been purely speculative and not supported by the evidence. *Moody v. State*, 841 So. 2d 1067, 2003 Miss. LEXIS 104 (Miss. 2003).

Trial court's failure to give instruction on manslaughter was not error where defendant had submitted instruction on manslaughter, which undoubtedly would have been granted by lower court, but then withdrew instruction, obviously exercising trial strategy and gambling upon clear verdict of not guilty. *Fairman v. State*, 513 So. 2d 910, 1987 Miss. LEXIS 2791 (Miss. 1987).

Capital murder defendant who fails to request manslaughter instruction, on theory that giving of such instruction would encourage jury to find defendant guilty on compromised charge, may not thereafter obtain reversal of conviction on basis of trial judge's failure to give instruction, which judge would have done had defendant so requested. *Lancaster v. State*, 472 So. 2d 363, 1985 Miss. LEXIS 2115 (Miss. 1985).

Accused in murder prosecution who has requested and been granted instruction limiting jury to verdict of guilty of murder or acquittal cannot complain of instruction given at request of state because it limited jury to murder or acquittal. *May v. State*, 205 Miss. 295, 38 So. 2d 726, 1949 Miss. LEXIS 432 (Miss. 1949).

62. —Where evidence supports manslaughter.

In a felony murder prosecution, the trial court did not err in denying defendant a

lesser-included offense instruction on heat of passion manslaughter, Miss. Code Ann. § 97-3-35, as the granting of such an instruction would have been purely speculative and not supported by the evidence. *Moody v. State*, 841 So. 2d 1067, 2003 Miss. LEXIS 104 (Miss. 2003).

Trial court's failure to give any manslaughter instructions in prosecution for capital murder during course of felonious child abuse was reversible error; jury was given no choice other than convicting defendant's of capital murder or acquitting him and, at the time, statutes were indistinguishable. (Per Pittman, J., with two Justices concurring, two Justices concurring in the result only, and one Justice concurring in part.) *Kolberg v. State*, 704 So. 2d 1307, 1997 Miss. LEXIS 697 (Miss. 1997).

State Supreme Court's *Butler* decision, under which defendant was entitled to manslaughter instructions in prosecution for capital murder during course of felonious child abuse, applied retroactively, even though it had been reversed on appeal on other grounds; rule was not specifically designated as "purely prospective" in nature, and failure to give manslaughter instruction was overwhelmingly prejudicial where jury ultimately found that defendant had caused child's death, but not that he either attempted to kill child or intended death. (Per Pittman, J., with two Justices concurring, two Justices concurring in the result only, and one Justice concurring in part.) *Kolberg v. State*, 704 So. 2d 1307, 1997 Miss. LEXIS 697 (Miss. 1997).

A defendant should not be denied a manslaughter instruction where he or she could have been lawfully indicted and prosecuted for manslaughter as easily as capital murder. *Butler v. State*, 608 So. 2d 314, 1992 Miss. LEXIS 588 (Miss. 1992).

An instruction limiting the verdict to murder was erroneous where the evidence could have warranted a jury verdict of manslaughter. *McMullen v. State*, 291 So. 2d 537, 1974 Miss. LEXIS 1726 (Miss. 1974).

Error to refuse submission of manslaughter in murder trial where elements present in testimony. *Lee v. State*, 130 Miss. 852, 94 So. 889, 1922 Miss. LEXIS 247 (Miss. 1922).

63. —Where evidence does not support manslaughter.

In a case in which defendant was convicted of murder by deliberate design, the trial judge did not err when he refused the proposed jury instructions on manslaughter because, although the victim's mother, who was also defendant's girlfriend, testified that defendant seemed angry, agitated, frustrated, mad, and even beyond rage, defendant repeatedly denied that he was angry at all, much less beyond rage; defendant testified that he was afraid, terrified, in fear for his life, and frightened, and that he acted to defend himself, which was inconsistent with the requirements for manslaughter; and a significant amount of time passed between the victim's and defendant's interaction when defendant shot the victim. *Jenkins v. State*, 253 So. 3d 349, 2018 Miss. App. LEXIS 68 (Miss. Ct. App.), cert. denied, 252 So. 3d 596, 2018 Miss. LEXIS 387 (Miss. 2018).

Trial court did not err by refusing defendant's proffered instructions on heat-of-passion manslaughter, as nothing indicated or even hinted that his passion or anger was aroused by immediate or reasonable provocation, and his argument completely ignored evidence regarding his plan to kill the victim that he hatched two weeks before the murder. *Evans v. State*, 226 So. 3d 1, 2017 Miss. LEXIS 249 (Miss. 2017), cert. denied, — U.S. —, 138 S. Ct. 2567, 201 L. Ed. 2d 1104, 2018 U.S. LEXIS 4033 (U.S. 2018).

Defendant's claim that she was entitled to a manslaughter instruction was barred because felonious child abuse was statutorily identified as one of the felonies that could not be relegated to manslaughter and the evidence supported a conviction for child abuse. *Ealey v. State*, 158 So. 3d 283, 2015 Miss. LEXIS 80 (Miss. 2015).

Defendant, who was convicted of capital murder with the underlying felony of robbery, was not entitled to a manslaughter instruction because there was no evidentiary basis for an imperfect-self-defense, fighting words, or depraved heart murder theory. *Batiste v. State*, 121 So. 3d 808, 2013 Miss. LEXIS 295 (Miss. 2013), cert. denied, 572 U.S. 1117, 134 S. Ct. 2287, 189 L. Ed. 2d 178, 2014 U.S. LEXIS 3424 (U.S. 2014).

Where defendant was convicted of depraved-heart murder based on firing a gun into a fleeing group of people, even if he had not failed to properly preserve the issue, defendant did not establish error from the trial court's failure to instruct on manslaughter because the evidence did not fairly raise this issue. *Humphries v. State*, 18 So. 3d 305, 2009 Miss. App. LEXIS 606 (Miss. Ct. App. 2009).

Where defendant was charged with murder after he disarmed his victim and fired the gun in the victim's direction and into a crowded nightclub, killing the victim and another and wounding three others, defendant was not entitled to a jury instruction on manslaughter because defendant failed to present evidence that he acted in the heat of passion when he fired the gun. Although defendant claimed that the victim had previously shot him, the alleged shooting occurred several days earlier, and nothing in the record suggested that defendant was in a state of violent and uncontrollable rage when he shot the victim. *Roberson v. State*, 19 So. 3d 95, 2009 Miss. App. LEXIS 98 (Miss. Ct. App. 2009).

In a murder case, there was no error in refusing to instruct the jury on manslaughter where defendant was not claiming self-defense at trial, but alleged that someone else committed the crime. *Green v. State*, 982 So. 2d 471, 2008 Miss. App. LEXIS 62 (Miss. Ct. App. 2008).

In a murder case, defendant's right to a fair trial was not violated when the jury was not instructed on manslaughter under Miss. Code Ann. § 97-3-47 because there was nothing to support a claim that a shooting was accidental where defendant pointed a gun at the victim and shot her from four feet away; moreover, the evidence indicated that defendant acted with malice where defendant and the victim were arguing so much that the victim's daughter was praying for her life prior to the shooting. *Page v. State*, 989 So. 2d 887, 2007 Miss. App. LEXIS 551 (Miss. Ct. App. 2007), cert. denied, 993 So. 2d 832, 2008 Miss. LEXIS 439 (Miss. 2008).

In a murder case under Miss. Code Ann. § 97-3-19(1)(a), a trial court did not err by refusing to give an instruction on man-

slaughter despite evidence of abuse, since the evidence did not show that defendant murdered his father in the heat of passion where he had considered killing him; defendant had forged the victim's name on a life insurance policy, bought a gun, used gloves, and shot the victim eight times. *Clemons v. State*, 952 So. 2d 314, 2007 Miss. App. LEXIS 174 (Miss. Ct. App. 2007), overruled in part, *Williams v. State*, 32 So. 3d 486, 2010 Miss. LEXIS 202 (Miss. 2010).

In a murder case, the facts did not support a culpable negligence manslaughter instruction because: (1) although defendant stated he was scared of victim, he followed victim into the woods; (2) defendant's revolver was fired three times; (3) firing the revolver three times was unlikely to be an accident because the gun's trigger actually had to be pulled three times; and (4) witnesses stated that they did not see a struggle for the gun and that defendant pointed the gun at the victim and shot him. *Chandler v. State*, 946 So. 2d 355, 2006 Miss. LEXIS 689 (Miss. 2006).

Where the evidence showed that defendant murdered another passenger in the car by shooting him in the head and burning his body, there was no evidence that he acted in the heat of passion. Defendant was convicted of simple murder; he was not entitled to a jury instructions regarding the lesser-included offense of manslaughter. *Anderson v. State*, 914 So. 2d 1239, 2005 Miss. App. LEXIS 862 (Miss. Ct. App. 2005), cert. dismissed, 927 So. 2d 750, 2006 Miss. LEXIS 163 (Miss. 2006).

Defendant's murder conviction was upheld because the trial court did not err in rejecting defendant's requested manslaughter instruction, as nothing in defendant's testimony or the testimony of the other witnesses supported an instruction that defendant killed the victim in the heat of passion or in self-defense, and the record was devoid of any evidence indicating that the relationship between defendant and the victim was contentious. *Cotton v. State*, 933 So. 2d 1048, 2006 Miss. App. LEXIS 520 (Miss. Ct. App. 2006).

In a case where defendant was convicted of murdering his wife and her son,

the trial court did not err in refusing defendant's proffered manslaughter instructions because defendant put on no evidence of accident, misfortune, or heat of passion, and there was no evidence that would entitle defendant to have the jury instructed on the lesser included offense of manslaughter. *Wortham v. State*, 883 So. 2d 599, 2004 Miss. App. LEXIS 618 (Miss. Ct. App. 2004).

Because defendant was found guilty of robbery, and the death resulted in the commission of the robbery, defendant was guilty of capital murder regardless of whether a lesser-included offense instruction was given. Thus, the trial court did not err in refusing the jury instruction of the lesser-included offense of manslaughter. *Jacobs v. State*, 870 So. 2d 1202, 2004 Miss. LEXIS 410 (Miss. 2004).

Both the depraved heart murder and culpable negligence manslaughter instructions were given, and the question essentially before the jury was how reckless was defendant? The jury resolved that question by convicting of depraved heart murder. *Steele v. State*, 852 So. 2d 78, 2003 Miss. App. LEXIS 464 (Miss. Ct. App. 2003), cert. denied, 870 So. 2d 666, 2004 Miss. LEXIS 395 (Miss. 2004).

In a felony murder prosecution, the trial court did not err in denying defendant a lesser-included offense instruction on heat of passion manslaughter, Miss. Code Ann. § 97-3-35, as the granting of such an instruction would have been purely speculative and not supported by the evidence. *Moody v. State*, 841 So. 2d 1067, 2003 Miss. LEXIS 104 (Miss. 2003).

The defendant was not entitled to an instruction on manslaughter since his heat of passion argument was purely speculation and was totally void of any evidentiary support, notwithstanding the defendant's claim that his unusual conduct on the day of the victim's death coupled with the testimony and photographs of the victim's living room supported his assertion that he acted in the heat of passion. *Agnew v. State*, 783 So. 2d 699, 2001 Miss. LEXIS 95 (Miss. 2001).

In a prosecution for depraved heart murder, it was not error to refuse to instruct the jury with regard to culpable negligence manslaughter since there was

absolutely no evidence of a negligent act on the part of the defendant where all the testimony was that he intentionally hit the victim in the head with a hammer. *Sanders v. State*, 781 So. 2d 114, 2001 Miss. LEXIS 22 (Miss. 2001).

Defendant charged with capital offense of killing while engaged in commission of child abuse or battery was not entitled to lesser included offense instruction on manslaughter based on killing while committing a felony. *Jackson v. State*, 684 So. 2d 1213, 1996 Miss. LEXIS 7 (Miss. 1996), cert. denied, 520 U.S. 1215, 117 S. Ct. 1703, 137 L. Ed. 2d 828, 1997 U.S. LEXIS 2937 (U.S. 1997).

In capital murder trial based on allegation that defendant killed child victim while engaged in commission of child abuse or battery, evidence that defendant used victim as shield while struggling with victim's mother was insufficient to support heat of passion manslaughter instruction, in view of evidence that defendant planned robbery of victim's home, had told victim's mother that he was going to kill her and her family, and did not stab victim until after struggle with mother. *Jackson v. State*, 684 So. 2d 1213, 1996 Miss. LEXIS 7 (Miss. 1996), cert. denied, 520 U.S. 1215, 117 S. Ct. 1703, 137 L. Ed. 2d 828, 1997 U.S. LEXIS 2937 (U.S. 1997).

Failure to give circumstantial evidence instruction with regard to capital murder charge was not error, where circumstantial evidence instruction was given in connection with felonious child abuse charge arising from same conduct. *Jackson v. State*, 684 So. 2d 1213, 1996 Miss. LEXIS 7 (Miss. 1996), cert. denied, 520 U.S. 1215, 117 S. Ct. 1703, 137 L. Ed. 2d 828, 1997 U.S. LEXIS 2937 (U.S. 1997).

Defendant who killed victim during commission of rape and armed robbery was not entitled to manslaughter instruction. *Blue v. State*, 674 So. 2d 1184, 1996 Miss. LEXIS 304 (Miss.), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517, 1996 U.S. LEXIS 7523 (U.S. 1996).

Defendant was not entitled to manslaughter instruction in capital murder prosecution where there was no evidence that he did not intend to kill the victim or that the murder was committed in the

heat of passion and evidence was presented as to brutal and intentional nature of the crime. *Blue v. State*, 674 So. 2d 1184, 1996 Miss. LEXIS 304 (Miss.), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517, 1996 U.S. LEXIS 7523 (U.S. 1996).

Capital murder defendant prosecuted for killing while engaged in child abuse was not entitled to jury instruction on manslaughter as lesser included offense given that one act alone may constitute abuse or battery of child. *Jackson v. State*, 672 So. 2d 468, 1996 Miss. LEXIS 718 (Miss. 1996).

Planning to conduct robbery of home at time when defendant believed residents would be at church and defendant's statements that he had come to kill residents precluded finding that killings were in heat of passion and, thus, defendant prosecuted on capital murder charges for killing while engaged in commission of child abuse was not entitled to jury instruction on lesser included offense on homicide for killing without malice in heat of passion. *Jackson v. State*, 672 So. 2d 468, 1996 Miss. LEXIS 718 (Miss. 1996).

Capital murder defendant was not entitled to instruction on lesser included offense of manslaughter; that offense required absence of malice, defined as doing of wrongful act in such manner and under such circumstances that death of human being may result, and victim's manner of death, from breaking of neck bone as part of strangulation or drowning, precluded claim that defendant could have acted without malice. *Walker v. State*, 671 So. 2d 581, 1995 Miss. LEXIS 494 (Miss. 1995), cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406, 1996 U.S. LEXIS 7236 (U.S. 1996).

No error was committed by a trial court in a capital murder prosecution in refusing to give a manslaughter instruction where the only justification for such an instruction would have been if the slaying had been committed in the heat of passion without premeditation, and premeditation was evidenced by the defendant's actions in arming himself with 2 deadly weapons, getting the victim into a car by trickery, and directing her at knife point to drive into a secluded wooded area miles

away where he raped her, cut her throat, and then shot her. *Thorson v. State*, 653 So. 2d 876, 1994 Miss. LEXIS 600 (Miss. 1994).

A capital murder defendant was not entitled to a manslaughter instruction based on the defendant's contention that the victim's stabbing death was accidental, where statements regarding an accidental stabbing made by the defendant to a third party shortly after the incident were inconsistent, the autopsy revealed that the stab wound could not have been inflicted under any one of the inconsistent scenarios related by the defendant, and the defendant's scenarios of an accidental stabbing would constitute evidence of innocence of any crime rather than evidence of the crime of manslaughter. *Holland v. State*, 587 So. 2d 848, 1991 Miss. LEXIS 648 (Miss. 1991).

There was no evidence of sudden provocation that would warrant the giving of a manslaughter instruction in a prosecution for murder of the defendant's former wife, in spite of the testimony of attorneys who represented the defendant during his divorce proceedings and the testimony of the defendant's family, all of whom noticed a change in the defendant after the divorce, since a long-standing domestic dispute did not constitute grounds for a manslaughter instruction. *Graham v. State*, 582 So. 2d 1014, 1991 Miss. LEXIS 359 (Miss. 1991).

A trial court properly denied a murder defendant's request for a jury instruction on the lesser included offense of manslaughter where the evidence indicated that there had been a struggle in the victim's home, the defendant knocked the victim unconscious by hitting him with a blunt object with tremendous force, the defendant put the victim's unconscious body into the trunk of the victim's car and drove the car to another county, and the defendant poured gasoline on the victim and burned him to death hours later. *Mackbee v. State*, 575 So. 2d 16, 1990 Miss. LEXIS 831 (Miss. 1990).

A defendant who was indicted for murder under subsection (2)(e) of this section was not entitled to a manslaughter instruction under § 97-3-27, where the victim was beaten to death and the injuries

were consistent with injuries inflicted by hands and feet, and therefore no reasonable hypothetical juror could have found that the killing was without malice. *Berry v. State*, 575 So. 2d 1, 1990 Miss. LEXIS 849 (Miss. 1990), cert. denied, 500 U.S. 928, 111 S. Ct. 2042, 114 L. Ed. 2d 126, 1991 U.S. LEXIS 2673 (U.S. 1991).

A murder defendant was not entitled to a manslaughter instruction where the record contained no evidence from which the jury could determine that the killing resulted from heat of passion and was not the result of malice. *Wilson v. State*, 574 So. 2d 1324, 1990 Miss. LEXIS 845 (Miss. 1990).

Evidence in a murder trial was insufficient to support a manslaughter instruction where the defendant did not testify, the only account of the slaying was the defendant's statements to the investigating officer and the testimony of eyewitnesses, there was no gross insult, and the defendant and the victim were not engaged in physical combat, and thus there was no evidence upon which any jury could rationally conclude that the defendant shot the victim as a result of provoked rage. *Barnett v. State*, 563 So. 2d 1377, 1990 Miss. LEXIS 284 (Miss. 1990).

Capital murder defendant is not entitled to instruction on lesser included offense of manslaughter where, considering evidence in light most favorable to defendant, defendant armed himself and two other persons, abducted two persons at knife point, led murder victim into woods at knife point, beat victim to ground breathless, supplied knife to accomplice and left accomplice to complete crime. *Gray v. State*, 472 So. 2d 409 (Miss. 1985), rev'd on other grounds, 481 U.S. 648, 107 S. Ct. 2045, 95 L. Ed. 2d 622 (1987), and see *Willie v. State*, 585 So. 2d 660, 1991 Miss. LEXIS 454 (Miss. 1991).

Conventional instruction as to verdicts and punishments upon conviction of murder, which does not contain instruction on manslaughter, is not improper on ground that it limits jury to murder on acquittal, when there is no evidence suggesting manslaughter. *May v. State*, 205 Miss. 295, 38 So. 2d 726, 1949 Miss. LEXIS 432 (Miss. 1949).

Granting a manslaughter charge to the state on an indictment for murder, sus-

tained by the state's proof, and where the evidence discloses no elements of manslaughter, is not prejudicial error even though the defendant denies that he did the killing. *Lowry v. State*, 202 Miss. 411, 32 So. 2d 197, 1947 Miss. LEXIS 292 (Miss. 1947).

Failure of trial court to inform jury, which found defendant guilty of murder, that it might convict him of manslaughter, is not error where the proof failed to show any element of manslaughter. *Dillon v. State*, 196 Miss. 625, 18 So. 2d 454, 1944 Miss. LEXIS 243 (Miss. 1944).

It is proper to refuse an instruction in a murder case informing the jury that they may find the accused guilty of manslaughter if, under the evidence, the jury could not rightfully so find. *Leavell v. State*, 129 Miss. 579, 92 So. 630, 1922 Miss. LEXIS 70 (Miss. 1922).

64. —Where underlying offense is robbery.

Conviction for capital murder with the underlying felony of robbery was appropriate because the jury received proper instruction on the elements of capital murder and on the one-continuous-transaction rule. *Batiste v. State*, 121 So. 3d 808, 2013 Miss. LEXIS 295 (Miss. 2013), cert. denied, 572 U.S. 1117, 134 S. Ct. 2287, 189 L. Ed. 2d 178, 2014 U.S. LEXIS 3424 (U.S. 2014).

Defendant charged with capital murder was not entitled to lesser included offense instruction of murder where evidence, which included defendant's confession and empty purse found at scene, supported theory that robbery had occurred. *Davis v. State*, 684 So. 2d 643, 1996 Miss. LEXIS 292 (Miss. 1996), cert. denied, 520 U.S. 1170, 117 S. Ct. 1437, 137 L. Ed. 2d 544, 1997 U.S. LEXIS 2295 (U.S. 1997).

Defendant was not entitled to instruction on manslaughter as lesser included offense of capital murder where killing took place during robbery at which defendant was not present. *Ballenger v. State*, 667 So. 2d 1242, 1995 Miss. LEXIS 451 (Miss. 1995), cert. denied, 518 U.S. 1025, 116 S. Ct. 2565, 135 L. Ed. 2d 1082, 1996 U.S. LEXIS 4177 (U.S. 1996).

A trial court did not err in refusing to grant a lesser included offense instruction

for manslaughter in a capital murder prosecution arising from the commission of a murder while engaged in the commission of an armed robbery, since the manslaughter statute explicitly excepts robbery from its provisions. *Willie v. State*, 585 So. 2d 660, 1991 Miss. LEXIS 454 (Miss. 1991).

A capital murder defendant was not entitled to a manslaughter instruction based upon his claim that he intended to strike the victim over the head with a shotgun and that in doing so it discharged. Having occurred during the course of a robbery, the homicide was capital murder, regardless of the intent of the defendant; there is nothing in this section which requires any intent to kill when a person is slain during the course of a robbery, and it is no legal defense to claim accident or that it was done without malice. Although § 97-3-27 authorizes a conviction of manslaughter only when a person is slain without malice during the commission of felonies generally, certain felonies, including robbery, are specifically excluded. *Griffin v. State*, 557 So. 2d 542, 1990 Miss. LEXIS 50 (Miss. 1990).

Capital murder defendant was not entitled to manslaughter instruction, where neither his confession nor his testimony at trial supported a finding that the victim's death was the result of defendant's intent to commit larceny instead of robbery. *Cabello v. State*, 490 So. 2d 852, 1986 Miss. LEXIS 2479 (Miss. 1986).

Trial court may refuse defendant's request that manslaughter instruction be given in homicide prosecution in which state's evidence shows robbery and repeated stab wounds to victim and defendant denies having anything to do with stabbing of victim. *Swanier v. State*, 473 So. 2d 180, 1985 Miss. LEXIS 2155 (Miss. 1985).

In a capital murder prosecution, the trial court properly refused to give a lesser included offense instruction, since under subsection (2)(e) of this section any murder committed during the course of a robbery is capital murder, and since, inasmuch as it was proved that defendant committed a robbery, any murder committed had to be capital. *Jones v. Thigpen*, 555 F. Supp. 870, 1983 U.S. Dist. LEXIS

19724 (S.D. Miss. 1983), *aff'd* in part and *rev'd* in part, 741 F.2d 805, 1984 U.S. App. LEXIS 18556 (5th Cir. Miss. 1984).

65. Manslaughter instruction given where evidence sufficient for murder.

Circuit court did not err in giving an instruction to the jury which simply tracked the language found in cases regarding heat-of-passion manslaughter. *Bradshaw v. State*, 138 So. 3d 199, 2013 Miss. App. LEXIS 858 (Miss. Ct. App. 2013).

In a criminal prosecution for murder where defendant fatally shot the victim during a fight, the State was entitled to a jury instruction on the lesser included offense of manslaughter. However, defendant was not entitled to a jury instruction on reasonable doubt, because the State had fully informed the jury to find defendant guilty only if the State established guilt beyond a reasonable doubt. *Lett v. State*, 902 So. 2d 630, 2005 Miss. App. LEXIS 157 (Miss. Ct. App. 2005).

Where the record contains evidence legally sufficient to support a finding of guilty of murder, had the jury so found, the defendant will not be heard to complain that a manslaughter instruction was given. *Fowler v. State*, 566 So. 2d 1194, 1990 Miss. LEXIS 439 (Miss. 1990).

It was not error for trial court to give jury manslaughter instruction where facts of case presented issue to jury on murder, despite defendant not asking for instruction and objecting to such instruction. *Crawford v. State*, 515 So. 2d 936, 1987 Miss. LEXIS 2888 (Miss. 1987).

The fact that a defendant has been indicted for capital murder does not preclude the trial court's giving instructions on lesser-included offenses of murder and manslaughter where, under the evidence, a reasonable jury could find the defendant not guilty of capital murder but guilty of one of the lesser-included offenses. *Harveston v. State*, 493 So. 2d 365, 1986 Miss. LEXIS 2589 (Miss. 1986).

Where the evidence is sufficient to convict for murder, the accused cannot complain of the granting of a manslaughter instruction when he has been convicted of manslaughter. *Woods v. State*, 229 Miss.

563, 91 So. 2d 273, 1956 Miss. LEXIS 640 (Miss. 1956).

In a prosecution for murder it was not reversible error for the court to instruct the jury that they could find the defendant guilty of manslaughter. *Mazie v. State*, 54 So. 2d 734 (Miss. 1951).

Granting a manslaughter charge to the state on an indictment for murder, sustained by the state's proof, and where the evidence discloses no elements of manslaughter, is not prejudicial error even though the defendant denies that he did the killing. *Lowry v. State*, 202 Miss. 411, 32 So. 2d 197, 1947 Miss. LEXIS 292 (Miss. 1947).

Where defendant is convicted of manslaughter on a charge of murder, he cannot complain of the giving of a murder instruction, as he was not prejudiced thereby. *Crockerham v. State*, 202 Miss. 25, 30 So. 2d 417, 1947 Miss. LEXIS 236 (Miss. 1947).

66. Failure to limit conviction to manslaughter.

Defendant was not entitled to a manslaughter instruction when his victim was killed in the course of a burglary, because burglary was excepted from the provisions of Miss. Code Ann. § 97-3-27 by Miss. Code Ann. § 97-3-19(2)(e). *Coleman v. State*, 804 So. 2d 1032, 2002 Miss. LEXIS 15 (Miss. 2002).

In a prosecution for murder the court did not err in failing to instruct the jury to restrict its verdict and find the defendant "guilty of manslaughter or not guilty," where the evidence was for the jury to resolve the issue of whether the defendant was guilty of murder, manslaughter, or no crime. *Polk v. State*, 417 So. 2d 930, 1982 Miss. LEXIS 2101 (Miss. 1982).

Where the evidence showed that the decedent was shot and killed by accused in ejecting him from her home, while decedent was committing an unlawful act, a wilful and forbidden trespass, and accused did not shoot him pursuant to her alleged threat that if he came back to the house she would kill him, but because of what transpired after he re-entered the house, the trial court erred in not limiting the issue for the jury to the question of manslaughter or justifiable homicide, and

conviction of murder must be reversed and case remanded for new trial. *Bangren v. State*, 196 Miss. 887, 17 So. 2d 599, 1944 Miss. LEXIS 264 (Miss. 1944), overruled, *Ferrell v. State*, 733 So. 2d 788, 1999 Miss. LEXIS 87 (Miss. 1999).

Where the evidence would support a conviction of manslaughter but did not support a conviction of murder, the court erred in not granting the defendant's request for an instruction limiting his conviction to manslaughter. *Taylor v. State*, 188 Miss. 166, 194 So. 589, 1940 Miss. LEXIS 26 (Miss. 1940).

67. Accessories, accomplices.

Trial court erred by instructing the jury on deliberate design, and defendant was entitled to a new trial, where the instruction incorrectly told the jury that the State had to prove only that defendant committed an assault beyond a reasonable doubt in order to find her criminally liable for any resultant homicide regardless of her intent, and the confusion was heightened by the State's closing argument. *Roby v. State*, 183 So. 3d 857, 2016 Miss. LEXIS 42 (Miss. 2016).

By defendant's own admission, corroborated by testimony, defendant was a principal to the crime of murder and thus he could not have been at the same time an accessory after the fact under Miss. Code Ann. § 97-1-5 and defendant was not entitled to an instruction on such. *Williams v. State*, 994 So. 2d 808, 2008 Miss. App. LEXIS 183 (Miss. Ct. App.), cert. denied, 998 So. 2d 1010, 2008 Miss. LEXIS 665 (Miss. 2008).

In a murder case, the trial court did not err in denying defendant's requested cautionary accomplice jury instruction because defendant's friend was an accessory-after-the-fact, not an accomplice, because she did not agree with defendant to murder the victim, but: (1) she was the lookout during the burial of the victim; (2) she helped defendant clean his bloody body; (3) she saw the victim lying dead by her truck; and (4) she kept quiet about the murder for more than a year until she was confronted by police. *Bailey v. State*, 960 So. 2d 583, 2007 Miss. App. LEXIS 427 (Miss. Ct. App. 2007).

In a murder case under Miss. Code Ann. § 97-3-19(1)(a), a trial court did not err by

refusing to give a cautionary instruction based on the testimony of an accomplice; the testimony of defendant's girlfriend was not unreasonable, self contradictory or substantially impeached, and there was no question as to defendant's guilt since he confessed to the murder of his father. *Clemons v. State*, 952 So. 2d 314, 2007 Miss. App. LEXIS 174 (Miss. Ct. App. 2007), overruled in part, *Williams v. State*, 32 So. 3d 486, 2010 Miss. LEXIS 202 (Miss. 2010).

In a capital murder case, a trial court did not err by refusing to give a cautionary instruction regarding accomplice liability since an eyewitness was charged as an accessory after the fact; moreover, the testimony was corroborated with evidence, such as shell casings found in defendant's home, stolen vehicle keys found on defendant's person, and the finding of the murder weapon near where defendant was arrested. *Ramsey v. State*, 959 So. 2d 15, 2006 Miss. App. LEXIS 764 (Miss. Ct. App. 2006), cert. denied, 958 So. 2d 1232, 2007 Miss. LEXIS 588 (Miss. 2007).

An instruction in a murder prosecution, in which the defendant was tried as an accessory before the fact, stating that "even if the defendant was frightened, coerced, or forced, such is not to be considered by you and is no defense in this case" was erroneous. To be convicted as an accessory, the defendant must possess the mens rea for the commission of the crime, and the precise state of mind of the defendant has great significance in determining the degree of his or her guilt; an accomplice may be convicted of accomplice liability only for those crimes as to which he or she personally has the requisite mental state. The cumulative effect of the instruction was that the defendant was guilty of murder regardless of his mental state; the instruction affirmatively negated the mens rea requirement and should not have been given. *Welch v. State*, 566 So. 2d 680, 1990 Miss. LEXIS 152 (Miss. 1990).

Capital murder defendant is not entitled to have jury separately instructed and separately to consider whether or not defendant is guilty of being accessory after fact. *Johnson v. State*, 477 So. 2d 196, 1985 Miss. LEXIS 2072 (Miss. 1985), cert.

denied, 476 U.S. 1109, 106 S. Ct. 1958, 90 L. Ed. 2d 366 (U.S. 1986).

Although the court's instruction on the matter of accessory before the fact in a prosecution under subsection (2)(e) of this section for murder while in the commission of the crime of rape was in the abstract, such instruction was not unconstitutionally vague where an instruction on accessory before the fact in some form was proper in the instant case, where the instruction, when read with all the instructions, could not have misled the jury. *Ruffin v. State*, 447 So. 2d 113, 1984 Miss. LEXIS 1629 (Miss. 1984).

Death sentence imposed upon codefendant for violation of state capital murder statute is infirm under Eighth Amendment where instructions could have caused reasonable juror to conclude that codefendant's intent to commit murder could be imputed to defendant. *Reddix v. Thigpen*, 728 F.2d 705, 1984 U.S. App. LEXIS 24178 (5th Cir. Miss. 1984).

Where accused was prosecuted under an indictment charging him, jointly with two others, with murder, an instruction that if the jury believed from all the evidence beyond a reasonable doubt that one of the others murdered the deceased, and accused, without being forced or coerced, transported the others in his automobile to where they obtained rifles knowing full well that the others intended to murder deceased, and aided, assisted and encouraged them therein, the accused was guilty as charged, was not erroneous. *West v. State*, 233 Miss. 730, 103 So. 2d 437, 1958 Miss. LEXIS 434 (Miss. 1958).

Where the accused was prosecuted under an indictment charging him, jointly with two others, with murder, accused's tendered instruction that since he was charged by the indictment with the killing of the deceased with malice aforethought with a certain gun, and unless the state had proved the charge beyond all reasonable doubt, the jury should find the defendant not guilty, was properly refused, since it was not supported by the evidence and was contrary to the provisions of Code 1942, § 1995. *West v. State*, 233 Miss. 730, 103 So. 2d 437, 1958 Miss. LEXIS 434 (Miss. 1958).

In murder prosecution instruction for state that if jury believe from evidence

beyond reasonable doubt that defendant did wilfully, unlawfully, feloniously and of his malice aforethought shoot deceased with pistol at time deceased received wounds that caused his death, jury should find defendant guilty even though jury believed that another person was at same time shooting at deceased and jury do not know which person fired shot or shots that actually killed deceased is not objectionable as assuming a conspiracy when evidence shows that defendant was a principal since he was present, aiding and abetting others and evidence is adequate to show defendant guilty individually. *Merrell v. State*, 39 So. 2d 306 (Miss. 1949); *Porter v. State*, 39 So. 2d 307 (Miss. 1949).

68. Cautionary instructions.

Manslaughter instruction which tracks 3 different manslaughter statutes, then states that prosecution must prove them all, need not be given, as requested by defendant in homicide case; nor need cautionary instruction regarding eyewitness identification testimony be given. *Holmes v. State*, 483 So. 2d 684, 1986 Miss. LEXIS 2365 (Miss. 1986).

Where the trial court, in a prosecution under subsection (2)(e) of this section for murder while in the commission of the crime of rape, instructed the jury that the testimony of two individuals who had implicated the defendant was to be considered with great care and caution, an instruction requested by the defendant asserting that it was the defendant's theory of the case that those two individuals had committed the capital murder and had given statements implicating the defendant for the purpose of inducing the prosecutors to allow them to enter guilty pleas to lesser included offenses was cumulative and improper, and the refusal of such instruction was not error. *Ruffin v. State*, 447 So. 2d 113, 1984 Miss. LEXIS 1629 (Miss. 1984).

In a murder prosecution wherein it appeared that at the time of trial sentiment in the community was hostile to the accused, it was reversible error for the trial judge to refuse to instruct on behalf of the accused that dying declarations are a species of hearsay evidence and are not en-

titled to the same credit and force as if the deceased was alive and testifying in the presence of the jury, under oath, and subject to cross-examination, and that the jury alone were the judges of the weight and force of such dying declarations. *Canon v. State*, 244 Miss. 199, 141 So. 2d 251, 1962 Miss. LEXIS 440 (Miss. 1962).

69. Peremptory instructions.

In a murder case under Miss. Code Ann. § 97-3-19(1)(a) the evidence was sufficient where defendant, a bail bondsman, was owed money by the victim, defendant talked about killing the victim, the victim was picked up by defendant shortly before the shooting, defendant drove by the murder scene, and defendant confessed. Therefore, a peremptory instruction was properly denied. *Green v. State*, 982 So. 2d 471, 2008 Miss. App. LEXIS 62 (Miss. Ct. App. 2008).

Jury instruction on offense of murder was not peremptory, as it allowed jury to consider homicide less than murder; instruction allowed jury to decide whether shooting was in self-defense. *Tran v. State*, 681 So. 2d 514, 1996 Miss. LEXIS 432 (Miss. 1996).

If defendant and his witnesses are the only eyewitnesses to homicide and if their version of what happened is both reasonable and consistent with innocence, and if there is no contradiction of that version in physical fact, facts of common knowledge or other credible evidence, then no reasonable juror could find defendant guilty beyond reasonable doubt and, under such circumstances, peremptory instructions must be granted. *Tran v. State*, 681 So. 2d 514, 1996 Miss. LEXIS 432 (Miss. 1996).

Instruction given by court, after jury states that it is hung at vote of 10 votes in favor of murder verdict and 2 in favor of manslaughter verdict which in effect peremptorily directs jury to return manslaughter conviction without regard to personal convictions of jurors is impermissibly coercive where instruction is given after jury has deliberated for equivalent of full day without agreeing and verdict convicting defendant of manslaughter instead of murder is returned within minutes after instruction is given. *Isom v. State*, 481 So. 2d 820, 1985 Miss. LEXIS 2336 (Miss. 1985).

The trial court did not commit reversible error in refusing to grant a peremptory instruction to find the defendant not guilty of murder where he was not convicted of murder, but was convicted of manslaughter, a crime that does not require proof of malice or premeditated design to kill. *Kinhead v. State*, 190 So. 2d 838, 1966 Miss. LEXIS 1397 (Miss. 1966).

70. —Pre-arming instruction.

Circuit court erred in convicting defendant of capital murder because there was no evidence to support the granting of the State's pre-arming instruction, a peremptory instruction for the prosecution, impairing or precluding defendant's right to self-defense, where the record was in conflict as to who initiated a fight in a chance confrontation, and there was no evidence that defendant placed a knife that he bought a month earlier in his pocket with the intent to provoke an altercation with the victim. *Boston v. State*, 234 So. 3d 1231, 2017 Miss. LEXIS 366 (Miss. 2017).

71. Defendant's theory of defense.

Trial court did not abuse its discretion in refusing a jury instruction based on the "castle doctrine" because defendant was not in the immediate premises of a dwelling when he shot his girlfriend's ex-boyfriend; there was no evidence that the ex-boyfriend unlawfully and forcibly entered the girlfriend's dwelling or its immediate premises because the girlfriend voluntarily went outside to speak with him, and he voluntarily went with her. *Shaheed v. State*, 205 So. 3d 1105, 2016 Miss. App. LEXIS 806 (Miss. Ct. App. 2016).

It was error to convict defendant of deliberate-design murder because enough evidence was presented to warrant an accidental jury instruction, and the trial court committed reversible error in denying the instruction; because defendant's right to have his theory of the case presented to a jury was so fundamental, even minimal evidence warranted granting his proposed jury instruction. *Kuebler v. State*, 204 So. 3d 1220, 2016 Miss. LEXIS 462 (Miss. 2016).

Culpable negligence manslaughter and heat-of-passion jury instructions were properly refused in defendant's murder

trial, although manslaughter was the defense's theory of the case, because defendant's theory was without foundation in the evidence where defendant's conduct was deliberate when after leaving the scene of an altercation with the victim's father, defendant went home and retrieved a semiautomatic weapon, returned, and fired multiple times into the victim's apartment. *Keys v. State*, 33 So. 3d 1143, 2009 Miss. App. LEXIS 697 (Miss. Ct. App. 2009), cert. denied, 34 So. 3d 1176, 2010 Miss. LEXIS 228 (Miss. 2010).

Where defendant disarmed his victim and fired the gun in the victim's direction and into a crowded nightclub, killing the victim and another and wounding three others, defendant was not entitled to a jury instruction on accident and misfortune at his trial because defendant acted intentionally and an intention act could not be excused under the doctrine of accident and misfortune. *Roberson v. State*, 19 So. 3d 95, 2009 Miss. App. LEXIS 98 (Miss. Ct. App. 2009).

Where defendant disarmed his victim and fired the gun in the victim's direction and into a crowded nightclub, killing the victim and another and wounding three others, the trial court did not err in refusing to instruct the jury on culpable negligence because the evidence did not support defendant's assertion that he lacked the requisite malice needed to sustain a murder conviction as to the second murder victim. Even if defendant did not intend to specifically kill the second victim, his actions were willful and under circumstances that were likely to result in death or serious bodily injury. *Roberson v. State*, 19 So. 3d 95, 2009 Miss. App. LEXIS 98 (Miss. Ct. App. 2009).

Questioning defense witness during cross-examination about defendant's ability to understand exactly what he was doing on day of murder was relevant, where defendant sought through testimony of witness, who was defendant's teacher, to impress on jury that he had learning disabilities and was consequently weak-minded. *McGowan v. State*, 706 So. 2d 231, 1997 Miss. LEXIS 717 (Miss. 1997).

Accused has right to have his defenses presented to the jury in jury instruction,

but defense must be supported by evidence, however meager it may be. *Blue v. State*, 674 So. 2d 1184, 1996 Miss. LEXIS 304 (Miss.), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517, 1996 U.S. LEXIS 7523 (U.S. 1996).

In absence of any other instruction that presented defendant's theory of defense to jury, trial court improperly failed to place defendant's proffered instruction, on self-defense by use of deadly weapon against larger, unarmed person, in proper form, in light of evidence which supported claim of justification. *Manuel v. State*, 667 So. 2d 590, 1995 Miss. LEXIS 591 (Miss. 1995).

In homicide cases, trial court should instruct jury about defendant's theories of defense, justification, or excuse that are supported by evidence, no matter how meager or unlikely, and trial court's failure to do so is error requiring reversal of judgment of conviction. *Manuel v. State*, 667 So. 2d 590, 1995 Miss. LEXIS 591 (Miss. 1995).

A capital murder defendant was entitled to a "2 theory" instruction where the case was based entirely on circumstantial evidence and there were several facts or circumstances which were susceptible of 2 interpretations, one favorable to the defendant and the other one unfavorable, and therefore the trial court's failure to give the requested 2 theory instructions warranted reversal of the defendant's conviction. *Parker v. State*, 606 So. 2d 1132, 1992 Miss. LEXIS 563 (Miss. 1992), overruled in part, *Goff v. State*, 14 So. 3d 625, 2009 Miss. LEXIS 273 (Miss. 2009).

The failure of a trial court in a capital murder prosecution to grant the defendant an instruction embodying his theory of defense constituted reversible error where the defendant's testimony established an evidentiary predicate for the defenses contained in his requested instructions, and the proffered instructions were the only ones presenting his theories of defense; if the requested instructions were in improper form, it was the duty of the trial court to see that they were placed in proper form for jury submission. *Hester v. State*, 602 So. 2d 869, 1992 Miss. LEXIS 399 (Miss. 1992).

Where the trial court, in a prosecution under subsection (2)(e) of this section for

murder while in the commission of the crime of rape, instructed the jury that the testimony of two individuals who had implicated the defendant was to be considered with great care and caution, an instruction requested by the defendant asserting that it was the defendant's theory of the case that those two individuals had committed the capital murder and had given statements implicating the defendant for the purpose of inducing the prosecutors to allow them to enter guilty pleas to lesser included offenses was cumulative and improper, and the refusal of such instruction was not error. *Ruffin v. State*, 447 So. 2d 113, 1984 Miss. LEXIS 1629 (Miss. 1984).

An instruction to the jury that even if the deceased attempted to have unnatural intercourse with the defendant, but the danger of accomplishment of the crime by the deceased was over and at a time when such danger was not imminent or impending the defendant tied and gagged the deceased, and if the jury finds robbery, then the crime was murder, was proper in presenting defendant's theory of self-defense and the state's theory of felony murder. *Burns v. State*, 228 Miss. 254, 87 So. 2d 681, 1956 Miss. LEXIS 510 (Miss. 1956).

72. Flight as evidence of guilt.

Trial court did not err in granting the State's flight instruction because defendant's flight to dispose of the body was unexplained by anything other than guilt or guilty knowledge; defendant's departure from the jurisdiction for the purpose of disposing of the body was probative of guilty knowledge, it was not an independent explanation for his flight, and his flight was unexplained. *Harrell v. State*, 134 So. 3d 266, 2014 Miss. LEXIS 52 (Miss. 2014).

Jury instruction on flight was warranted in capital murder prosecution by evidence that defendant had left his workplace for another state after assuring authorities that he would be there to talk with them, that defendant had purchased handgun and checked into motel under assumed name and that defendant had remained fugitive for several days until arrested by police; instruction that flight

may be considered as circumstance of guilt or guilty knowledge is appropriate only where that flight is unexplained and somehow probative of guilt or guilty knowledge. *Brown v. State*, 690 So. 2d 276, 1996 Miss. LEXIS 681 (Miss. 1996), cert. denied, 522 U.S. 849, 118 S. Ct. 136, 139 L. Ed. 2d 85, 1997 U.S. LEXIS 5165 (U.S. 1997), rev'd, — So. 3d —, 2017 Miss. LEXIS 524 (Miss. 2017).

Giving of flight instruction was reversible error; defendant was arguing self-defense, and jury heard testimony on defendant's flight, which both defendant and codefendant explained as effort to avoid retribution from homicide victim's friends. *Tran v. State*, 681 So. 2d 514, 1996 Miss. LEXIS 432 (Miss. 1996).

Instruction that flight may be considered as circumstance of guilt or guilty knowledge is appropriate only where that flight is unexplained and somehow probative of guilt or guilty knowledge. *Tran v. State*, 681 So. 2d 514, 1996 Miss. LEXIS 432 (Miss. 1996).

There is two-pronged test for deciding whether flight instruction is appropriate: only unexplained flight merits flight instruction, and flight instructions are to be given only in cases where that circumstance has considerable probative value. *Tran v. State*, 681 So. 2d 514, 1996 Miss. LEXIS 432 (Miss. 1996).

Evidence that defendant and his friends fled scene in victim's taxicab after shooting victim, stole school bus and drove to Chicago, and there attempted to abduct woman and steal her van, was sufficient to warrant flight instruction in capital murder case, despite evidence that defendant had planned to move to Chicago before shooting victim. *Holly v. State*, 671 So. 2d 32, 1996 Miss. LEXIS 15 (Miss.), cert. denied, 518 U.S. 1025, 116 S. Ct. 2565, 135 L. Ed. 2d 1082, 1996 U.S. LEXIS 4179 (U.S. 1996).

Instruction that flight may be considered as circumstance of guilt or guilty knowledge is not appropriate in capital murder prosecution of prison escapee where giving of instruction would require escapee to explain flight and fact that he is prison escapee or not explaining flight and subjecting himself to instruction. *Fuselier v. State*, 468 So. 2d 45, 1985 Miss. LEXIS 2035 (Miss. 1985).

Flight is ordinarily relevant as evidence of guilt and a jury in a murder prosecution should not be instructed that it is not evidence of guilt. *Wright v. State*, 209 Miss. 795, 48 So. 2d 509, 1950 Miss. LEXIS 444 (Miss. 1950).

73. Malice or deliberate design.

Trial court properly denied defendant's motion for a judgment notwithstanding the verdict or alternatively, a new trial because defendant's entitlement to a new trial was neither raised at trial nor on appeal, the jury instruction regarding the mens rea requirement for capital murder of a police officer was a correct statement of the law where deliberate-design and depraved-heart murder had coalesced, and the state supreme court had interpreted the applicable statute to require only a depraved heart. *Fitzpatrick v. State*, 175 So. 3d 515, 2015 Miss. LEXIS 366 (Miss. 2015).

Jury instruction that created a mandatory presumption in defendant's trial on a charge of murder by deliberate design, in violation of Miss. Code Ann. § 97-3-19(1)(a), was error, as the jury could have convicted defendant based upon the presumption as opposed to evidence beyond a reasonable doubt; the error was not harmless. *Williams v. State*, 111 So. 3d 620, 2013 Miss. LEXIS 160 (Miss. 2013).

Because every murder committed with deliberate design was by definition done in the commission of an act imminently dangerous to others, evincing a depraved heart, and because the two versions of murder in Miss. Code Ann. § 97-3-19 (depraved heart and deliberate design) had for all practical purposes coalesced, the trial court did not err when it allowed a depraved heart murder clause to be added to the deliberate design jury instruction. *Young v. State*, 891 So. 2d 813, 2005 Miss. LEXIS 40 (Miss. 2005).

Defendant's right to a fair trial was not violated by a jury instruction given in a capital murder case because it was not required to include a finding on deliberate design since there was no intent to kill required when a person was slain in the course of a robbery. *Ramsey v. State*, 959 So. 2d 15, 2006 Miss. App. LEXIS 764 (Miss. Ct. App. 2006), cert. denied, 958 So.

2d 1232, 2007 Miss. LEXIS 588 (Miss. 2007).

In a case where defendant was convicted of murdering his wife and her son, the jury was properly instructed as to the element of deliberate design because the language complained of had previously been found to be proper; defendant did not put on any credible evidence of a defense so the trial court was not required to instruct the jury on all other circumstances where they could have found the homicides to have been justifiable, excusable, or manslaughter; and the given instruction specifically stated that deliberate design could not be formed at the very moment of the fatal act. *Wortham v. State*, 883 So. 2d 599, 2004 Miss. App. LEXIS 618 (Miss. Ct. App. 2004).

In a murder prosecution, where a manslaughter instruction was neither requested nor given, the State maintained defendant's deliberate design to kill existed well before the shooting, and on the defense theory, it never existed at all because the shooting was accidental, the trial court's granting of a deliberate design instruction was proper. *Shipp v. State*, 847 So. 2d 806, 2003 Miss. LEXIS 275 (Miss. 2003).

An instruction on "deliberate design" was not required where there was no central issue defining the time during which deliberation must have occurred, and there was substantial evidence that defendant had formed the intent well before the killing. *Brown v. State*, 768 So. 2d 312, 1999 Miss. App. LEXIS 706 (Miss. Ct. App. 1999).

"Depraved heart" instruction did not constitute an amendment to indictment charging deliberate design/premeditated murder; the two subsections of murder statute had "coalesced." *Catchings v. State*, 684 So. 2d 591, 1996 Miss. LEXIS 214 (Miss. 1996).

Act which poses risk to only one individual and which results in that individual's death may be deemed depraved heart murder. *Catchings v. State*, 684 So. 2d 591, 1996 Miss. LEXIS 214 (Miss. 1996).

Jury instruction that "deliberate design" meant "to kill, without authority of law and not being legally justifiable, legally excusable or under circumstances

that would reduce the act to a lesser crime" did not improperly state that deliberate design could be formed at very moment of fatal act or improperly cut off defendant's contention that shooting was in self-defense. *Tran v. State*, 681 So. 2d 514, 1996 Miss. LEXIS 432 (Miss. 1996).

Jury instruction in homicide prosecution, that "deliberate design may be presumed from the unlawful and deliberate use of a deadly weapon" was reversible error; facts of shooting were set forth in trial, and while testimony was conflicting, question of malice should have been left for consideration of jury. *Tran v. State*, 681 So. 2d 514, 1996 Miss. LEXIS 432 (Miss. 1996).

In a capital murder prosecution, an instruction on "malice aforethought" was improper where it stated that if the defendant "at the very moment of the fatal shot did so with the deliberate design to take the life of the deceased . . . then it was malice aforethought as if deliberate design had existed in the mind of the defendant for minutes, hours, days or weeks or even years"; however, the instruction was irrelevant and harmless, since there was abundant evidence of premeditation and no evidence that the slaying was a sudden idea of the defendant's. *Thorson v. State*, 653 So. 2d 876, 1994 Miss. LEXIS 600 (Miss. 1994).

In a prosecution for murder, the trial court committed reversible error by giving an instruction stating that "deliberate design" could be formed "at the very moment of the act of violence." *Duvall v. State*, 634 So. 2d 524, 1994 Miss. LEXIS 140 (Miss. 1994).

A jury instruction stating that malice aforethought and a premeditated design to kill must exist in the mind of the defendant but for an instant before the fatal act did not constitute reversible error; the defendant would not have been harmed or prejudiced even if the instruction had stated that malice need only exist at the very moment of the fatal act, where the State's theory of the case was that the defendant lured the victim to his home with the deliberate design to murder him, and the defense theory was that the defendant's shooting of the victim was justifiable homicide in response to his finding

that the victim had broken into his home and was standing in his hallway holding a hammer, since under the State's theory the malice would have existed long before the fatal shooting and under the defense theory it never existed. *Thornhill v. State*, 561 So. 2d 1025, 1989 Miss. LEXIS 486 (Miss. 1989).

An erroneous instruction stating that "malice aforethought" or "deliberate design" need exist in the mind of the accused only for an "instant" was harmless where there was no reasonable factual scenario under which the jury could have reasonably concluded that the defendant's premeditated design to kill, if any, existed in his mind but for an instant before the fatal act, and based on the prosecution's interpretation of the evidence, the premeditated or deliberate design existed well before the shooting while on the defense theory, it never existed. *Blanks v. State*, 542 So. 2d 222, 1989 Miss. LEXIS 165 (Miss. 1989).

In a murder prosecution, a trial court committed reversible error in granting a supplemental instruction after the jury had retired, defining "malice aforethought" from Black's Law Dictionary, which stated that "malice aforethought exists where the person doing the act which causes the death has an intention to cause death or grievous bodily harm to any person" and additionally defined malice aforethought as existing when the defendant has an intention "to commit any felony whatever, has the knowledge that the act will probably cause the death or grievous bodily harm to some person, although he does not desire it or even wishes that it may not be caused . . ." *Nicolaou v. State*, 534 So. 2d 168, 1988 Miss. LEXIS 524 (Miss. 1988).

An instruction on malice should be given only where the evidence has failed to establish the circumstances surrounding the use of a deadly weapon, and, where the facts have been set forth, even on conflicting testimony, the question of malice should be left to the jury. *Carter v. State*, 493 So. 2d 327, 1986 Miss. LEXIS 2533 (Miss. 1986).

Murder instruction which follows "depraved heart" provision of § 97-3-19 need not use words "feloniously," "wilfully," or

"malice aforethought." *Johnson v. State*, 475 So. 2d 1136, 1985 Miss. LEXIS 2238 (Miss. 1985).

Where the accused admitted shooting his paramour, but contended that the killing was accidental, it was reversible error for the court to instruct that malice aforethought might be presumed from the unlawful and deliberate use of a deadly weapon. *Funches v. State*, 246 Miss. 214, 148 So. 2d 710, 1963 Miss. LEXIS 435 (Miss. 1963).

Defendant is not entitled to an instruction defining malice. *Smith v. State*, 237 Miss. 626, 114 So. 2d 676, 1959 Miss. LEXIS 513 (Miss. 1959).

The trial court did not err in giving state's instruction that, if the jury believed from all the evidence in the case beyond a reasonable doubt that the defendant had deliberately shot and killed the deceased with a deadly weapon, malice might be inferred. *Rivers v. State*, 245 Miss. 329, 97 So. 2d 236, 1957 Miss. LEXIS 578 (Miss. 1957).

Where all facts and circumstances surrounding homicide are fully disclosed by evidence, it is reversible error for court to instruct that law presumes malice from use of deadly weapon. *Dickins v. State*, 208 Miss. 69, 43 So. 2d 366, 1949 Miss. LEXIS 409 (Miss. 1949).

Instruction that malice may be implied from nature of weapon and deliberate use of deadly weapon not in necessary self-defense is evidence of malice is proper when defendant has made no explanation of facts surrounding her deliberate use of deadly weapon in inflicting fatal wounds on mother and there is no evidence in case which might change character of killing by showing either justification or excuse. *Dickins v. State*, 208 Miss. 69, 43 So. 2d 366, 1949 Miss. LEXIS 409 (Miss. 1949).

Instructions for state defining malice aforethought is not erroneous on ground that it omits reference to accidental killing when there is little, if anything, in record from which inference could be drawn by jury that killing was accidental and this was matter of defense fully submitted to jury under instruction obtained by defendant. *Price v. State*, 207 Miss. 111, 41 So. 2d 37, 1949 Miss. LEXIS 321 (Miss.), cert. denied, 338 U.S. 844, 70 S.

Ct. 92, 94 L. Ed. 516, 1949 U.S. LEXIS 1836 (U.S. 1949).

Instruction for state that malice will be implied from deliberate use of deadly weapon is not proper where all of the facts are in evidence, but court is entitled to consider the law on the question in determining whether or not issue of murder should be submitted to jury at all. *Smith v. State*, 205 Miss. 283, 38 So. 2d 725, 1949 Miss. LEXIS 431 (Miss. 1949).

Assignment of error as to instruction of the court to find defendant guilty if jury believed beyond reasonable doubt that defendant feloniously and with deliberate design to effect death of victim at a time when neither defendant, nor his common-law wife, were in danger of great personal injury at the hand or design of victim or that there was no imminent danger of such design being accomplished, was not valid as failing to use the statutory language “without authority of law” in view of the facts that the instruction used the word “feloniously,” defendant defined murder in his instruction and defendant’s defense of self-defense was adequately set forth in defendant’s instructions and rejected by the jury’s verdict. *Davis v. State*, 203 Miss. 574, 35 So. 2d 524, 1948 Miss. LEXIS 308 (Miss. 1948).

An instruction to the effect that malice is implied by law from the nature and character of the weapon used, and the deliberate use of a deadly weapon in a difficulty, not in necessary self-defense, or not in necessary defense, or to save the unlawful taking of life, or great bodily harm to, a fellow human being, is in law evidence of malice, disapproved. *Criss v. State*, 202 Miss. 184, 30 So. 2d 613, 1947 Miss. LEXIS 257 (Miss. 1947).

An instruction that malice aforethought did not have to exist in the mind of the slayer for any given length of time, and if at the moment of the fatal stabbing, the defendant cut with deliberate design to take the life of deceased, and not in necessary self-defense, real or apparent, then it was as truly malice and the act was as truly murder as if the deliberate design had existed in the mind of defendant for minutes, hours, days, etc., did not constitute reversible error as being an erroneous definition of “malice aforethought.”

Hudson v. State, 185 Miss. 677, 188 So. 561, 1939 Miss. LEXIS 178 (Miss. 1939).

An instruction in a homicide prosecution was not erroneous for failing to include the element of deliberate design, where the evidence disclosed that at the time of the killing there was not only a conspiracy to rob, but actual participation therein by the accused. *Carrol v. State*, 183 Miss. 1, 183 So. 703, 1938 Miss. LEXIS 211 (Miss. 1938).

An instruction charging the jury that if they believed from the evidence that the accused in company with others, having a common design to rob the deceased, was so engaged when one of the accused’s associates struck the deceased with a deadly weapon killing him, then the jury should find defendant guilty of murder, was not erroneous for failing to include the element of deliberate design. *Carrol v. State*, 183 Miss. 1, 183 So. 703, 1938 Miss. LEXIS 211 (Miss. 1938).

74. Self-defense.

Self-defense jury instruction was properly denied because given the facts and testimony in the record, a jury could not have reasonably concluded that defendant shot the victim in defense of himself or others; eyewitnesses stated that the victim was not directly involved in the fighting but rather a mere bystander, and witness testimony revealed that defendant approached the victim with the firearm, seemingly unprompted. *Hall v. State*, 295 So. 3d 544, 2019 Miss. App. LEXIS 610 (Miss. Ct. App. 2019).

Trial court did not abuse its discretion in responding to the jury’s question as to the definition of depraved heart because the instructions it provided demonstrated the proper rules of law and were not erroneous, and the supplemental instruction was a proper statement of the law. the jury received three separate instructions on self-defense. *Swanagan v. State*, 229 So. 3d 698, 2017 Miss. LEXIS 191 (Miss. 2017).

Trial court did not abuse its discretion by denying defendant’s proffered “stand your ground” instruction because the evidence in the record did not point to an opportunity to retreat, and other instructions adequately covered the general rules

of law pertaining to self-defense. *Shaheed v. State*, 205 So. 3d 1105, 2016 Miss. App. LEXIS 806 (Miss. Ct. App. 2016).

Where defendant disarmed his victim and fired the gun in the victim's direction and into a crowded nightclub, killing the victim and another and wounding three others, defendant was not entitled to a self-defense instruction at his trial on a charge of murder because defendant failed to establish that he feared for his life when he fired into the nightclub. *Roberson v. State*, 19 So. 3d 95, 2009 Miss. App. LEXIS 98 (Miss. Ct. App. 2009).

There was no merit to defendant's claim that a trial court peremptorily found him guilty of burglary by prohibiting him from arguing self-defense where the underlying crime that he was charged with to elevate his murder charge to capital murder under Miss. Code Ann. § 97-3-19(2)(e) was burglary under Miss. Code Ann. § 97-17-23, and Mississippi adhered to the common law rule that an aggressor was precluded from pleading self-defense. As a result, the trial court did not err in denying defendant's attempt to argue self-defense at trial. *Beale v. State*, 2 So. 3d 693, 2008 Miss. App. LEXIS 548 (Miss. Ct. App. 2008), cert. denied, 999 So. 2d 1280, 2009 Miss. LEXIS 90 (Miss. 2009).

Where the jury was given instructions on the right of an individual to repel trespassers from his home and a standard self-defense instruction, the trial court did not err in refusing defendant's request for an instruction on the law relating to defense of habitation; by the defendant's own testimony, the alleged assault against defendant by the victim had advanced to a stage where the distinction between use of deadly force in defense of habitation and use of deadly force in self-defense was no longer relevant to the jury's understanding of the law. *Lester v. State*, 862 So. 2d 582, 2004 Miss. App. LEXIS 6 (Miss. Ct. App. 2004).

Instructions to the jury, when read as a whole, were sufficient where the court specifically instructed that the killing of the victim was justified if committed by the defendant in the lawful defense of his own person. *Evans v. State*, 797 So. 2d 811, 2000 Miss. LEXIS 186 (Miss. 2000).

A trial court in a murder prosecution committed reversible error when it

granted the prosecution's instruction informing the jury that before it could accept the theory of self-defense, it was required to find that the danger was so urgent that the defendant had no "reasonable mode of escape"; this instruction was not supported by law because it deprived the defendant of the right to claim self-defense if he could have avoided the threat to his safety by escaping. *Craig v. State*, 660 So. 2d 1298, 1995 Miss. LEXIS 405 (Miss. 1995).

A trial court in a murder prosecution committed reversible error when it refused the defendant's requested instruction that a person "may stand his ground" without waiving the right to self-defense, so long as "he is in a place where he has a right to be, and is himself in no unlawful enterprise, not the provoker or aggressor in the combat." *Craig v. State*, 660 So. 2d 1298, 1995 Miss. LEXIS 405 (Miss. 1995).

A trial court in a murder prosecution did not err in giving an instruction precluding the jury from considering a claim of self-defense if the jury found that the defendant armed himself and sought the victim with the intent of invoking a difficulty with the victim, or voluntarily entered into a difficulty with the victim with the intent to cause serious bodily harm, where the defendant armed himself with a shotgun while he was in no physical danger from the victim, he drove to the victim's house and honked his automobile horn, he drove by the house several times waiting for the victim to appear, and he claimed that he shot at the victim's feet but the trajectory of the shotgun pellets was upward. *Hart v. State*, 637 So. 2d 1329, 1994 Miss. LEXIS 115 (Miss. 1994).

In a homicide prosecution, the trial court's giving of an "arming" instruction improperly cut off the jury's consideration of self-defense and constituted reversible error where there was testimony to support the defendant's theory of self-defense, and the instruction stated that the defendant could not plead self-defense if he armed himself with a deadly weapon and either confronted the victim with the intention of causing a difficulty with the victim or voluntarily entered into any difficulty with the victim with the intent to cause serious bodily harm; such "arming"

instructions place a higher burden on a defendant to assert a claim of self-defense than is required by law, are looked upon with disfavor, and should rarely be used. *Keys v. State*, 635 So. 2d 845, 1994 Miss. LEXIS 164 (Miss. 1994).

An instruction estopping one from asserting self-defense is not proper except in the few rare cases where all the elements of estoppel are clearly present; the reason for permitting a self-defense theory to be decided by a jury far outweighs the reasons for estopping one from asserting this most basic right. *Thompson v. State*, 602 So. 2d 1185, 1992 Miss. LEXIS 403 (Miss. 1992).

In a prosecution for murder, jury instructions stating that the defendant could not claim the right of self-defense if he armed himself with a gun in advance and provoked the encounter with the victim were not supported by the evidence where the defendant was the owner and operator of a lounge engaged in the business of selling intoxicating liquor to patrons, the victim had been on the premises most of the day armed with a loaded pistol, the defendant requested the victim to take his pistol and leave, the defendant left to run an errand and when he returned the victim was still in the lounge, intoxicated, and in possession of the pistol, and the ensuing fatal encounter involved disputed facts; moreover, the granting of 2 self-defense instructions did not cure the error since the instructions were conflicting. *Thompson v. State*, 602 So. 2d 1185, 1992 Miss. LEXIS 403 (Miss. 1992).

A murder defendant was entitled to an instruction informing the jury that self-defense may be applicable to the defense of another person where the evidence showed that the deceased had threatened the defendant's girlfriend. *Calhoun v. State*, 526 So. 2d 531, 1988 Miss. LEXIS 303 (Miss. 1988).

Failure to give self-defense instruction was not error where record reflected that jury was fully and fairly instructed concerning law of self-defense by other instructions. *Turnage v. State*, 518 So. 2d 1217, 1988 Miss. LEXIS 33 (Miss. 1988).

Refusal to grant instruction that jury should put themselves in place of defen-

dant and judge his acts by facts and circumstances by which he was surrounded at time of difficulty was not erroneous where theory of self-defense was fully covered in another instruction. *Fairman v. State*, 513 So. 2d 910, 1987 Miss. LEXIS 2791 (Miss. 1987).

At trial of wife indicted for murder of her husband, testimony of defendant that during the confrontation, preceding the shooting, victim grabbed her by the hair and pulled her to the ground, pulled her by the hair over to a picnic table and, after setting her on the picnic table, drew her head back, raised his fist to her head and said he was going to kill her, supported the giving of manslaughter instructions. *Mullins v. State*, 493 So. 2d 971, 1986 Miss. LEXIS 2591 (Miss. 1986).

A shotgun with a 30-inch barrel and a shotgun case were irrelevant and inadmissible in evidence at a capital murder trial, where a "riot" gun had been used in the killing. *Stringer v. State*, 491 So. 2d 837, 1986 Miss. LEXIS 2520 (Miss. 1986).

Trial court properly refuses self-defense instruction in homicide case in which uncontraverted testimony is that victim was asleep and had been asleep approximately 30 minutes at time victim was shot and killed. *Merrill v. State*, 482 So. 2d 1147, 1986 Miss. LEXIS 2369 (Miss. 1986).

Self-defense instruction which states that party acting upon mere fear, apprehension or belief, however sincerely entertained acts at own peril in taking life is improper and constitutes reversible prejudicial error where case is close factually and instruction has previously been condemned by Supreme Court of Mississippi number of times. *Flowers v. State*, 473 So. 2d 164, 1985 Miss. LEXIS 2140 (Miss. 1985).

There is no basis upon which to give self-defense instruction when evidence, considered most favorably to capital murder defendant, initial aggressor and ultimate victim of defendant fled after firing shot at defendant, defendant then became aggressor seeking victim out, emptying one gun on victim, striking victim at least 3 times, then obtaining more powerful rifle and firing 3 additional shots, with intent to kill victim. *Lancaster v. State*, 472 So. 2d 363, 1985 Miss. LEXIS 2115 (Miss. 1985).

In a prosecution for murder the court properly denied a requested jury instruction on self-defense, where the court had granted instructions which liberally directed the jurors to put themselves in the defendant's place, authorizing the jurors to determine whether the killing was done under circumstances wrongfully provoked, and otherwise instructing the jury on self-defense so that when these instructions were considered together the jurors were adequately instructed on self-defense. *Polk v. State*, 417 So. 2d 930, 1982 Miss. LEXIS 2101 (Miss. 1982).

In a murder prosecution, an instruction which substantially restricts or cuts off defendant's right to defend upon the ground of self-defense is erroneous and requires the grant of a new trial. *McMullen v. State*, 291 So. 2d 537, 1974 Miss. LEXIS 1726 (Miss. 1974).

In a prosecution of a husband whose defense was that he had accidentally shot his wife while shooting at his father-in-law, instructions permitting the jury to find that accused did not kill his father-in-law in necessary self-defense, but had murdered him, constituted reversible error where accused had already been acquitted of the charge of murdering his father-in-law. *Dykes v. State*, 232 Miss. 379, 99 So. 2d 602, 1957 Miss. LEXIS 484 (Miss. 1957).

In a prosecution of a husband whose defense was that he had accidentally shot his wife while shooting at his father-in-law, the husband, having already been acquitted of the charge of murdering his father-in-law, was entitled to an instruction that if at the time he shot at his father-in-law while acting in necessary self-defense, his wife, without his knowledge, stepped into the line of fire and was accidentally killed, the husband was not guilty of murder. *Dykes v. State*, 232 Miss. 379, 99 So. 2d 602, 1957 Miss. LEXIS 484 (Miss. 1957).

The trial court did not err in refusing defendant's instruction on the disparity in age, size and strength between the deceased and defendant, which was stated in terms of what the evidence showed rather than what the jury believed from the evidence. *Brister v. State*, 231 Miss. 722, 97 So. 2d 654, 1957 Miss. LEXIS 558

(Miss. 1957), cert. denied, 356 U.S. 961, 78 S. Ct. 1000, 2 L. Ed. 2d 1069, 1958 U.S. LEXIS 1072 (U.S. 1958).

Instruction bearing on issue of self-defense held not to exclude doctrine of apparent necessity. *Ashby v. State*, 137 Miss. 133, 102 So. 180, 1924 Miss. LEXIS 216 (Miss. 1924).

Instruction denying the accused provoking difficulty right of self-defense held erroneous, in view of evidence of abandonment of homicidal intent. *Adams v. State*, 136 Miss. 298, 101 So. 437, 1924 Miss. LEXIS 135 (Miss. 1924).

Instruction that to justify shooting on apprehension of threats deceased must have made overt act is proper. *Molphus v. State*, 124 Miss. 584, 87 So. 133, 1920 Miss. LEXIS 551 (Miss. 1920), overruled, *Ray v. State*, 381 So. 2d 1032, 1980 Miss. LEXIS 1930 (Miss. 1980).

Person whose life has been threatened cannot kill unless there is demonstration inducing reasonable man to believe that there is danger; instruction that there is right to kill on first appearance of danger properly refused. *Molphus v. State*, 124 Miss. 584, 87 So. 133, 1920 Miss. LEXIS 551 (Miss. 1920), overruled, *Ray v. State*, 381 So. 2d 1032, 1980 Miss. LEXIS 1930 (Miss. 1980).

Instruction that a man about to be assaulted with deadly weapon might anticipate adversary's action and kill him, erroneously refused. *Leverett v. State*, 112 Miss. 394, 73 So. 273, 1916 Miss. LEXIS 123 (Miss. 1916).

75. Miscellaneous.

Jury instruction which tracked the language of this section, with the sole exception being the use of the word "must" instead of "shall," an immaterial distinction, since both connote a mandatory directive, was adequate and did not deny defendant an opportunity to make his defense. *Bernard v. State*, 288 So. 3d 301, 2019 Miss. LEXIS 403 (Miss. 2019).

Invited-error doctrine prohibited the supreme court from considering whether the trial court erred when it refused to instruct the jury on robbery because defense counsel requested that the trial court not instruct the jury on the elements of robbery. *Thomas v. State*, 249 So. 3d 331, 2018 Miss. LEXIS 272 (Miss. 2018).

Jury was correctly instructed on the elements of attempted-murder because defendants' acts of shooting at the victim with a firearm with the deliberate design to effect his death were acts, which, if accomplished, would constitute first-degree murder; not only did defendants approach the victim with guns drawn, verbally threaten to kill him, and say that they wanted him dead, they fired multiple shots at him as he tried to hide and escape. *Pickett v. State*, 252 So. 3d 40, 2018 Miss. App. LEXIS 54 (Miss. Ct. App.), cert. denied, 250 So. 3d 1271, 2018 Miss. LEXIS 374 (Miss. 2018), cert. denied, — So. 3d —, 2018 Miss. LEXIS 376 (Miss. 2018).

Trial court did not err by giving a jury instruction which include language on both deliberate-design and depraved-heart murder because there was ample evidence to support the instruction. Moreover, defendant told inconsistent stories of what happened, and, regardless of which version of events the jury believed, there was ample proof of reckless and eminently dangerous actions directed by defendant at the victim. *Kuebler v. State*, 205 So. 3d 623, 2015 Miss. App. LEXIS 461 (Miss. Ct. App. 2015), rev'd, 204 So. 3d 1220, 2016 Miss. LEXIS 462 (Miss. 2016).

Defendant's conviction for capital murder with the underlying felony of robbery was reversed because the trial court erred in denying defendant's proffered circumstantial-evidence instruction as he did not confess or admit to any significant element of the crime; and the State did not present direct evidence that defendant was a willing participant in the murder or that he took the victim's personal property from him by violence or by putting him in fear of immediate injury. *Burleson v. State*, 166 So. 3d 499, 2015 Miss. LEXIS 243 (Miss. 2015).

Trial court's failure to instruct the jury as to the elements of the underlying felony of burglary during defendant's trial for capital murder deprived defendant of due process in the form of his right to a jury trial because the failure of a jury to find a criminal defendant guilty on each element of the charged crime led to mandatory reversal; the Constitution gives the courts no discretion, and in Mississippi, the right

to a jury trial must remain inviolate. *Harrell v. State*, 134 So. 3d 266, 2014 Miss. LEXIS 52 (Miss. 2014).

Trial court did not err by granting a jury instruction that combined deliberate design murder with depraved heart murder because the Mississippi Supreme Court held that it was not error to grant a jury instruction which combined the elements of deliberate design murder with the elements of depraved heart murder as stated in Miss. Code Ann. §§ 97-3-19(1)(a) and (1)(b), and there was evidence to support a jury instruction for murder because (1) the State produced evidence showing that defendant was the person who shot his stepson and shot and killed his wife, (2) defendant himself admitted that he perpetrated the shooting, and (3) the State produced evidence of depraved heart murder by establishing that while defendant was engaged in an argument with his wife, he fired shots inside an apartment that contained unarmed individuals and several children. *Readus v. State*, 997 So. 2d 941, 2008 Miss. App. LEXIS 249 (Miss. Ct. App. 2008), cert. denied, 999 So. 2d 852, 2009 Miss. LEXIS 27 (Miss. 2009).

Where appellant was convicted of capital murder while in the commission of a robbery, it was not error to deny a requested jury instruction on the *Weathersby* rule, because (1) the rule was inapplicable since appellant's statements to officers following appellant's arrest were clearly inconsistent with appellant's testimony at trial, and (2) application of the rule was for the court to decide. *Fryou v. State*, 987 So. 2d 461, 2008 Miss. App. LEXIS 205 (Miss. Ct. App. 2008).

Where appellant was convicted of capital murder while in the commission of a robbery, it was not error to deny appellant's requested lesser-included offense jury instruction on manslaughter, because (1) appellant admitted the killing and the robbery so appellant's intent was irrelevant, and (2) the only evidence to support heat of passion was a single comment by the victim about appellant's girlfriend. *Fryou v. State*, 987 So. 2d 461, 2008 Miss. App. LEXIS 205 (Miss. Ct. App. 2008).

Where appellant was convicted of capital murder while in the commission of a robbery, it was not error to deny a re-

quested jury instruction on simple murder, because there was sufficient evidence to convict appellant of capital murder and there was no evidence that would have allowed a jury to convict appellant of simple murder and not find capital murder since appellant admitted that appellant took the victim's truck and told officers that appellant took the victim's wallet. *Fryou v. State*, 987 So. 2d 461, 2008 Miss. App. LEXIS 205 (Miss. Ct. App. 2008).

Three defendants' capital-murder convictions pursuant to Miss. Code Ann. § 97-3-19(2)(e) were appropriate because, although a limiting instruction given to the jury regarding confessions by defendants was not sufficient, no prejudice or manifest injustice resulted as to any defendant; each of the defendants gave sufficient evidence of his individual participation in the robbery of a gun store in his separate statements to support a capital-murder charge. *Anderson v. State*, 5 So. 3d 1088, 2007 Miss. App. LEXIS 677 (Miss. Ct. App. 2007), cert. denied, 11 So. 3d 1250, 2009 Miss. LEXIS 171 (Miss. 2009), cert. denied, 11 So. 3d 1250, 2009 Miss. LEXIS 184 (Miss. 2009), cert. denied, 11 So. 3d 1250, 2009 Miss. LEXIS 177 (Miss. 2009).

In a capital murder case, the fact that the phrase "without authority of law" was not read to the jurors did not mean that the instructions were erroneous because, reading the instructions as a whole, the jury was properly informed of the requisite findings and the proof needed to sustain a conviction. *Ramsey v. State*, 959 So. 2d 15, 2006 Miss. App. LEXIS 764 (Miss. Ct. App. 2006), cert. denied, 958 So. 2d 1232, 2007 Miss. LEXIS 588 (Miss. 2007).

In a capital murder case, a trial court did not err by refusing to give a lesser included offense instruction or by refusing to give a simple murder instruction; aggravated assault was not a lesser included or related offense of robbery, the evidence did not support an obstruction of justice charge, and defendant did not request a simple murder instruction. *Ramsey v. State*, 959 So. 2d 15, 2006 Miss. App. LEXIS 764 (Miss. Ct. App. 2006), cert. denied, 958 So. 2d 1232, 2007 Miss. LEXIS 588 (Miss. 2007).

Trial court did not err in refusing defendant's proffered circumstantial evidence instructions because there was direct evidence of guilt presented at trial; specifically, defendant admitted to no less than two people that he killed his wife and her child. *Wortham v. State*, 883 So. 2d 599, 2004 Miss. App. LEXIS 618 (Miss. Ct. App. 2004).

In defendant's capital murder conviction where defendant was sentenced to death, because Miss. Code Ann. § 47-7-3(1)(f) denied parole eligibility to any person charged, tried, convicted, and sentenced to life imprisonment under the provisions of Miss. Code Ann. § 99-19-101, the trial court did not err in not instructing the jury on life imprisonment with the possibility of parole. *Branch v. State*, 882 So. 2d 36, 2004 Miss. LEXIS 586 (Miss. 2004), cert. denied, 544 U.S. 907, 125 S. Ct. 1595, 161 L. Ed. 2d 282, 2005 U.S. LEXIS 2289 (U.S. 2005).

Inmate's attorneys were not ineffective, in connection with the inmate's capital murder trial, for failing to make an objection to an instruction that death could be imposed if aggravating and mitigating circumstances were of equal weight because as the direct claim was found to be without merit, there could be no claim that the attorneys were ineffective in failing to object to what was an acceptable instruction. *Smith v. State*, 877 So. 2d 369, 2004 Miss. LEXIS 547 (Miss. 2004).

Trial judge did not erroneously instruct the jury in the inmate's capital murder trial that death could be imposed if aggravating and mitigating circumstances were of equal weight because (1) the issue was addressed on direct appeal and found to be without merit, and thus the issue was barred under Miss. Code Ann. § 99-39-21(2), and (2) it also failed under case law. *Smith v. State*, 877 So. 2d 369, 2004 Miss. LEXIS 547 (Miss. 2004).

Inmate's attorneys were not ineffective, in connection with the inmate's capital murder trial, for not requesting an amendment to sentencing instructions because (1) the issue was raised on direct appeal and was found to be without merit, and thus the issue was barred under Miss. Code Ann. § 99-39-21(2), and (2) in any event, there was no showing of deficient

performance. *Smith v. State*, 877 So. 2d 369, 2004 Miss. LEXIS 547 (Miss. 2004).

Trial court did not err in instructing the jury on both depraved heart murder and premeditated murder because under Miss. Code Ann. § 97-3-19, every murder done with the deliberate design of effecting the death of another human being is by definition done in the commission of an act eminently dangerous to others and evincing a depraved heart, regardless of human life. *Schuck v. State*, 865 So. 2d 1111, 2003 Miss. LEXIS 753 (Miss. 2003).

Although all of petitioner death row inmate's arguments were procedurally barred either by res judicata or for failure to raise the arguments earlier, and no intervening case law exempted petitioner from the procedural bar, the court also reviewed petitioner's arguments on the merits; it reiterated its earlier holdings that there were no constitutional deficiencies in the Mississippi murder and death penalty statutes, including those relating to death resulting from child abuse as capital murder, as explained in the jury instructions, and that none of the alleged deficiencies of defense counsel could have affected petitioner's outcome. *Jackson v. State*, 860 So. 2d 653, 2003 Miss. LEXIS 355 (Miss. 2003).

Depraved-heart murder instruction given to the jury was not in error because it failed to include the language "without authority of law" as the instruction properly directed the jury that it was required to find beyond a reasonable doubt that defendants had acted unlawfully; however, the failure of the trial court to instruct the jury to acquit if the jury found that defendants had acted in self-defense, and the failure of the depraved-heart murder instruction to include the words "not in necessary self-defense" constituted reversible error. *Harris v. State*, 2003 Miss. LEXIS 80 (Miss. Feb. 20, 2003), op. withdrawn, sub. op., 861 So. 2d 1003, 2003 Miss. LEXIS 872 (Miss. 2003).

Trial court did not err in refusing defendant's request for a mistrial after a prosecution witness made a brief reference to defendant's being in jail during an interview; jury was given a cautionary instruction and any error was harmless. *Smith v. State*, 835 So. 2d 927, 2002 Miss. LEXIS 298 (Miss. 2002).

Defendant waived his right to claim a violation of his right to speedy trial by requesting a continuance and agreeing that the period of the continuance would not be held against the State. *Smith v. State*, 835 So. 2d 927, 2002 Miss. LEXIS 298 (Miss. 2002).

Loss of evidence did not deprive defendant of due process of law where there was no showing that the loss of a baby bag, some crime scene photographs, the clothing the victim was wearing when her body was discovered, and some other pieces of evidence, was intentional or that the evidence would have been exculpatory. *Smith v. State*, 835 So. 2d 927, 2002 Miss. LEXIS 298 (Miss. 2002).

Where only theory of defense in murder prosecution was self-defense and jury was properly instructed thereon, there was no requirement that court instruct as to other possible theories under which jury could have found homicide to have been justifiable, excusable, or manslaughter. *Tran v. State*, 681 So. 2d 514, 1996 Miss. LEXIS 432 (Miss. 1996).

Refusal to grant murder defendant's request for jury instruction on accident or misfortune was reversible error; under defendant's version of events, he and victim were struggling over gun when it discharged, and thus, it was not sudden combat situation, nor did shooting happen during commission of unlawful act. *Miller v. State*, 677 So. 2d 726, 1996 Miss. LEXIS 331 (Miss. 1996).

Trial court was not required to give circumstantial evidence instruction, where defendant had confessed to friend that he killed victim. *Taylor v. State*, 672 So. 2d 1246, 1996 Miss. LEXIS 193 (Miss.), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379, 1996 U.S. LEXIS 7020 (U.S. 1996).

Separate instruction, that state was required to prove capital murder defendant's guilt of unwitnessed killing to exclusion of every other hypothesis consistent with innocence, was not required on capital murder charge, even though evidence of guilt was circumstantial, given that jury was properly instructed on state's burden as to circumstantial evidence in other instructions. *Jackson v. State*, 672 So. 2d 468, 1996 Miss. LEXIS 718 (Miss. 1996).

Trial court did not mislead jury, in capital murder case involving underlying felony of sexual battery, by instructing that "the fact that the actual moment of the victim's death may have preceded alleged consummation of the underlying felony of Sexual Battery does not void the charge of Capital Murder," even though defendant claimed that jury was misled on intent necessary for capital murder as instruction could be correct statement of law only if jury also found that defendant had formed intent to commit sexual battery; when taken in conjunction with other instructions, jury was clearly informed that it must find defendant intended to kill victim while engaged in commission of sexual battery. *Walker v. State*, 671 So. 2d 581, 1995 Miss. LEXIS 494 (Miss. 1995), cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406, 1996 U.S. LEXIS 7236 (U.S. 1996).

Trial court did not deny due process rights of capital murder defendant by giving instruction that jury had first to acquit defendant on greater charge of capital murder before going on to consider whether defendant had committed lesser crime of murder. *Walker v. State*, 671 So. 2d 581, 1995 Miss. LEXIS 494 (Miss. 1995), cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406, 1996 U.S. LEXIS 7236 (U.S. 1996).

Defendant was not entitled to instruction on robbery as lesser included offense of felony murder; because victim died as result of injuries suffered during robbery, if defendant was found guilty of robbery, she was also guilty of capital murder. *Ballenger v. State*, 667 So. 2d 1242, 1995 Miss. LEXIS 451 (Miss. 1995), cert. denied, 518 U.S. 1025, 116 S. Ct. 2565, 135 L. Ed. 2d 1082, 1996 U.S. LEXIS 4177 (U.S. 1996).

Transitional jury instruction in capital murder prosecution, stating that jury should not consider instruction defining lesser included offense of murder unless it found that defendant was not guilty of capital murder, was proper and appropriate. *Cole v. State*, 666 So. 2d 767, 1995 Miss. LEXIS 595 (Miss. 1995).

A jury instruction in a capital murder prosecution did not violate the due process clause of the 14th Amendment by reliev-

ing the State of the burden of proving intent to commit the underlying felonies where the instruction stated that the defendant should be found guilty if he willfully performed "any act which is an element of the crimes with which he is charged or immediately connected with them or leading to their commission." *Carr v. State*, 655 So. 2d 824, 1995 Miss. LEXIS 56 (Miss. 1995), cert. denied, 516 U.S. 1077, 116 S. Ct. 783, 133 L. Ed. 2d 734, 1996 U.S. LEXIS 547 (U.S. 1996).

In a prosecution for murder, the trial court committed reversible error in refusing a requested defense instruction stating that the defendant had a right to carry a concealed weapon if he had been threatened and had good reason to fear a serious attack from an enemy, and did in fact fear such an attack, where the prosecuting attorney pointed out in his argument before the jury that the victim was not armed, from which the jury might have inferred that the defendant was in the wrong in being armed. *Duvall v. State*, 634 So. 2d 524, 1994 Miss. LEXIS 140 (Miss. 1994).

When an instruction is given on the right to carry a concealed weapon, it should be prefaced with the admonition to the jury that it "should not view as evidence against the defendant that he carried a concealed weapon on his person," because under the law he did have a right to carry a concealed weapon if he had been threatened and had good reason to fear a serious attack from an enemy, and did in fact fear such an attack. *Duvall v. State*, 634 So. 2d 524, 1994 Miss. LEXIS 140 (Miss. 1994).

In a prosecution for capital murder, the trial court's failure to instruct the jury on the lesser included offense of simple murder did not constitute reversible error, even though Mississippi law strongly favors the granting of lesser included offense instructions, where the defendant never requested a lesser included offense instruction and failed to object to the court's failure to give one, the record did not support the defendant's assertion that he was entitled to a lesser included offense instruction because the evidence of the three component crimes in the capital murder charge were so intertwined as to

be virtually inseparable, and any error was cured by the jury's verdict which by necessary implication found the defendant guilty of simple murder. *Conner v. State*, 632 So. 2d 1239, 1993 Miss. LEXIS 541 (Miss. 1993), cert. denied, 513 U.S. 927, 115 S. Ct. 314, 130 L. Ed. 2d 276, 1994 U.S. LEXIS 7088 (U.S. 1994), overruled, *Weatherspoon v. State*, 732 So. 2d 158, 1999 Miss. LEXIS 4 (Miss. 1999).

A trial court did not err in denying a capital murder defendant's proposed circumstantial evidence instruction where there was direct evidence in support of the prosecution's charge, consisting of an eyewitness' testimony and another witness' repetition of the defendant's admission. *Conner v. State*, 632 So. 2d 1239, 1993 Miss. LEXIS 541 (Miss. 1993), cert. denied, 513 U.S. 927, 115 S. Ct. 314, 130 L. Ed. 2d 276, 1994 U.S. LEXIS 7088 (U.S. 1994), overruled, *Weatherspoon v. State*, 732 So. 2d 158, 1999 Miss. LEXIS 4 (Miss. 1999).

A circumstantial evidence instruction was not required in a murder prosecution where witnesses testified as to 2 out-of-court admissions of the murder made by the defendant. While not a "confession," an admission constitutes direct evidence of the crime so that the giving of a circumstantial evidence instruction is not required. *Sudduth v. State*, 562 So. 2d 67, 1990 Miss. LEXIS 235 (Miss. 1990).

A defendant who was convicted of aggravated assault and sentenced to 15 years imprisonment was not entitled to a jury instruction on attempted murder which carries a maximum sentence of 10 years imprisonment, even though the evidence would have supported a conviction for either offense, since there was no view of the evidence under which the defendant might have been found guilty of attempted murder and not guilty of aggravated assault. *McGowan v. State*, 541 So. 2d 1027, 1989 Miss. LEXIS 180 (Miss. 1989).

Failure to challenge instruction or offer another in its place renders this assignment of error meritless, even in context of capital case. *Lockett v. State*, 517 So. 2d 1317, 1987 Miss. LEXIS 2854 (Miss. 1987).

Circumstantial evidence instructions should have been given in capital murder

case where state was without confession and without eyewitnesses to gravamen of offense charged. *Williamson v. State*, 512 So. 2d 868, 1987 Miss. LEXIS 2683 (Miss. 1987), *Walton v. State*, 678 So. 2d 645, 1996 Miss. LEXIS 192 (Miss. 1996).

Capital murder defendant was not entitled to a mistrial because state elicited testimony of his alleged criminal activity in Texas, including an arrest for defrauding an innkeeper, in view of trial judge's instructing jury to disregard such testimony. *Cabello v. State*, 490 So. 2d 852, 1986 Miss. LEXIS 2479 (Miss. 1986).

When indictment charges defendant with capital murder in course of rape and robbery and trial judge's instructions, as requested by state, tell jury that before it can convict defendant it must find that defendant killed victim while in course of committing rape and robbery, state undertakes burden of showing sufficiency of proof to establish both underlying rape and robbery as well as murder. *Fisher v. State*, 481 So. 2d 203, 1985 Miss. LEXIS 2281 (Miss. 1985).

Insanity instruction need not be given on basis of lay witness testimony that murder defendant heard voices, laughed uncontrollably, was depressed, had headaches, and otherwise acted weird. *Johnson v. State*, 475 So. 2d 1136, 1985 Miss. LEXIS 2238 (Miss. 1985).

Jury instruction which contains surplus language serving only to raise state's burden of proof does not prejudice capital murder defendant. *Swanier v. State*, 473 So. 2d 180, 1985 Miss. LEXIS 2155 (Miss. 1985).

Murder defendant whose claim of accidental death of victim by drowning is contradicted by testimony of medical expert showing death by violent blows to head is not entitled to *Weathersby* instruction. *Hammond v. State*, 465 So. 2d 1031, 1985 Miss. LEXIS 1946 (Miss. 1985).

Trial court did not err in murder prosecution in granting an instruction advising the jury that should they convict defendant of manslaughter, the court might sentence defendant to the penitentiary for a term not to exceed 20 years. *Flanagan v. National Fire Ins. Co.*, 277 So. 2d 115, 1973 Miss. LEXIS 1407 (Miss. 1973).

In a murder prosecution, where the full acceptance of the state's evidence would have sustained a finding that the defendant was guilty of murder, but the jury could, and evidently did, find that the defendant shot in the heat of passion, instructions, both as to murder and manslaughter, were proper. *Barnett v. State*, 232 Miss. 208, 98 So. 2d 656, 1957 Miss. LEXIS 461 (Miss. 1957).

Since even though the killing might have been done in the heat of passion, the defendant would have been guilty of manslaughter, the court did not commit reversible error in refusing defendant's instruction as to the burden of proof which would have permitted the jury to acquit if the killing had been done in the heat of passion; especially where, in view of the instructions granted to defendant, error if any, in refusing the instruction was harmless (overruling in part *Blalack v. State*, 79 M 517, 31 So 105). *Rivers v. State*, 245 Miss. 329, 97 So. 2d 236, 1957 Miss. LEXIS 578 (Miss. 1957).

An instruction charging jury that they were required to presume that defendant was innocent from the very beginning of the trial until the case was closed is not proper. *Wright v. State*, 209 Miss. 795, 48 So. 2d 509, 1950 Miss. LEXIS 444 (Miss. 1950).

In murder prosecution, trial court has no duty to give any instructions not requested. *Smith v. State*, 205 Miss. 283, 38 So. 2d 725, 1949 Miss. LEXIS 431 (Miss. 1949).

An instruction that the jury, if it found the defendant guilty, should find that he used a deadly weapon was cured by an instruction that, if it found the defendant guilty of robbery, it should not find that the robbery was with a deadly weapon unless convinced of that fact beyond a reasonable doubt. *Augustine v. State*, 201 Miss. 731, 29 So. 2d 454, 1947 Miss. LEXIS 442 (Miss. 1947).

It was error to charge murder, where facts showing killing done in heat of passion. *Staiger v. State*, 110 Miss. 557, 70 So. 690, 1915 Miss. LEXIS 72 (Miss. 1915).

76. Death penalty.

In defendant's capital murder trial, the language on the verdict form stating that

"if the jury cannot agree on punishment, the court must sentence the defendant to a term of life imprisonment with the possibility of parole" was improper because it was an incorrect statement of law since a life sentence rendered pursuant to Miss. Code Ann. § 99-19-101 will automatically be a life without parole sentence. However such error was harmless because the jury, knowing that it had the life without parole option, chose to impose the death penalty upon defendant. *Hodges v. State*, 912 So. 2d 730, 2005 Miss. LEXIS 164 (Miss.), cert. denied, 546 U.S. 1037, 126 S. Ct. 739, 163 L. Ed. 2d 579, 2005 U.S. LEXIS 8670 (U.S. 2005).

Anytime an individual is charged with murder, he is put on notice that the death penalty may result. *Thorson v. State*, 895 So. 2d 85, 2004 Miss. LEXIS 1350 (Miss. 2004), cert. denied, 546 U.S. 831, 126 S. Ct. 53, 163 L. Ed. 2d 83, 2005 U.S. LEXIS 6177 (U.S. 2005).

77. Aiding And Abetting.

In defendant's murder trial, the instruction simply did not contain the operative language that could have been construed as reading that a defendant found guilty of aiding and abetting with respect to "one element" of the crime was guilty as a principal. Rather, the instruction accurately stated that any person who was present at the commission of the criminal offense and aided, counseled, or encouraged another in the commission of that offense was an "aider and abettor" and was equally guilty with the principal offender. *Dilworth v. State*, 909 So. 2d 731, 2005 Miss. LEXIS 371 (Miss. 2005).

78. Instructions properly denied.

Trial court did not abuse its discretion by refusing defendant's requested two-theory instruction because other jury instructions which the court gave fairly instructed the jury as to the law. Although the defendant's requested two-theory instruction included stronger language concerning circumstantial evidence, it did not provide instruction that was materially different or additional to the law covered in the instructions. *Shelton v. State*, 214 So. 3d 250, 2017 Miss. LEXIS 106 (Miss. 2017).

Trial court properly declined to give a circumstantial evidence instruction in a case in which defendant was convicted of capital murder for killing the victim while in the commission of a robbery because the armed robbery was an essential element of the charge and was proved through direct evidence, eliminating any need for a circumstantial evidence instruction. *Carson v. State*, 125 So. 3d 104, 2013 Miss. App. LEXIS 645 (Miss. Ct. App. 2013).

Trial court properly rejected defendant's requested jury instructions in his trial on a charge of murder, as they were improper statements of the law, and the form of the instructions made them unfairly leading and prejudicial. *Branch v. State*, 118 So. 3d 646, 2013 Miss. App. LEXIS 649 (Miss. Ct. App.), cert. denied, 117 So. 3d 330, 2013 Miss. LEXIS 376 (Miss. 2013).

Conviction for depraved-heart murder was supported by the evidence. Defendant was not acting in the heat of passion, and thus, a manslaughter conviction was not warranted by the evidence, as defendant's own testimony showed that he was not provoked by the victim; he argued merely that he had no part in the victim's murder. *Leggett v. State*, 54 So. 3d 317, 2011 Miss. App. LEXIS 78 (Miss. Ct. App. 2011).

In defendant's murder trial, the trial court did not err in refusing to instruct the jury on the lesser offense of culpable negligence manslaughter because the instruction indicated that the jury could find defendant guilty of the lesser offense if it found that defendant fired his gun toward a group of people and inadvertently hit the victim but defendant unequivocally testified that he targeted the victim and deliberately shot him. *McKinney v. State*, 26 So. 3d 1065, 2009 Miss. App. LEXIS 309 (Miss. Ct. App. 2009), cert. denied, 27 So. 3d 404, 2010 Miss. LEXIS 48 (Miss. 2010).

In defendant's murder trial, the trial court did not err in refusing to instruct the jury on the lesser offense of heat of passion manslaughter because defendant's proposed instruction advised the jury that it could convict defendant of the lesser offense if it found that defendant acted impulsively in the heat of passion after arguing with the victim but no evidence

was introduced that defendant ever spoke with the victim and defendant himself testified that he shot the victim because he was getting into an automobile. *McKinney v. State*, 26 So. 3d 1065, 2009 Miss. App. LEXIS 309 (Miss. Ct. App. 2009), cert. denied, 27 So. 3d 404, 2010 Miss. LEXIS 48 (Miss. 2010).

Trial court did not err in refusing to give a lesser-included offense instruction on manslaughter. Defendant was charged with capital murder during the commission of a robbery, a violation of Miss. Code Ann. § 97-3-19; whether defendant intended to kill the victim was irrelevant. *Banyard v. State*, 47 So. 3d 708, 2009 Miss. App. LEXIS 135 (Miss. Ct. App. 2009), rev'd, 47 So. 3d 676, 2010 Miss. LEXIS 475 (Miss. 2010).

Defendant was not improperly denied heat-of-passion or imperfect self-defense manslaughter jury instructions during his capital murder trial where there was no evidence presented that words were exchanged between defendant and his girlfriend once defendant entered her apartment, and testimony established that defendant hit the girlfriend very quickly upon entering her apartment. Defendant admitted kicking in the door to the apartment, knocking the girlfriend unconscious for a short period of time, and spotting the murder victim in the bedroom, and although he claimed that the murder victim pulled a gun on him, forcing him to resort to self-defense, the gun that the murder victim was alleged to have brandished was never presented at trial. *Beale v. State*, 2 So. 3d 693, 2008 Miss. App. LEXIS 548 (Miss. Ct. App. 2008), cert. denied, 999 So. 2d 1280, 2009 Miss. LEXIS 90 (Miss. 2009).

In defendant's trial for murder in violation of Miss. Code Ann. § 97-3-19(1)(a) and aggravated assault in violation of Miss. Code Ann. § 97-3-7(2)(b), defendant was not entitled to have the requested jury instructions on the lesser-included offense of manslaughter under Miss. Code Ann. § 97-3-35 because defendant requested a self-defense instruction, while the definition of manslaughter required that it was not in necessary self-defense, and there was no evidentiary basis of provocation of a degree to evoke an uncon-

trolled response of anger, rage, hatred, furious resentment or terror. *McCune v. State*, 989 So. 2d 310, 2008 Miss. LEXIS 347 (Miss. 2008).

In a murder case, there was no error in refusing to give an instruction regarding the jury assessing the weight and credibility of the witnesses and an instruction allowing the consideration of whether defendant's taped statements were made of his own free will. The trial judge did not want to single out portions of the evidence and call attention to them; moreover, another instruction covered the jury's function. *Green v. State*, 982 So. 2d 471, 2008 Miss. App. LEXIS 62 (Miss. Ct. App. 2008).

79. Instructions improperly denied.

In a first-degree murder case, the jury should have been instructed on imperfect self-defense, under which an intentional killing could be considered manslaughter if done without malice but under a bona fide (but unfounded) belief that it was necessary to prevent death or great bodily

harm, because, in his statement to the police, defendant averred that he never intended to use the weapon on the victim; that he fired it to get the victim's attention and stop his tantrum; that, after firing the shots, defendant told the victim he would not hurt him, but the victim advanced on him in an attempt to take the weapon; and that defendant's use of the gun was a bad decision, lacking a murderous purpose. *Nelson v. State*, — So. 3d —, 2018 Miss. App. LEXIS 542 (Miss. Ct. App. Oct. 30, 2018), rev'd, 284 So. 3d 711, 2019 Miss. LEXIS 295 (Miss. 2019).

Reversal of defendant's conviction and sentence for second-degree murder and remand of the case to the circuit court for a new trial was appropriate because the trial court's refusal of defendant's request for a circumstantial evidence jury instruction was an abuse of discretion as the State of Mississippi adduced no direct evidence of defendant's guilt. *Moore v. State*, 247 So. 3d 1198, 2018 Miss. LEXIS 176 (Miss. 2018).

RESEARCH REFERENCES

ALR.

Homicide in commission of felony where the killing was the act of one not a participant in the felony. 12 A.L.R.2d 210.

Inference of malice or intent to kill where killing is by blow without weapon. 22 A.L.R.2d 854.

Homicide: causing one, by threats or fright, to leap or fall to his death. 25 A.L.R.2d 1186.

Acquittal on homicide charge as bar to subsequent prosecution for assault and battery or vice versa. 37 A.L.R.2d 1068.

Homicide by fright or shock. 47 A.L.R.2d 1072.

Admissibility on behalf of accused in homicide case of evidence that killing was at victim's request. 71 A.L.R.2d 617.

Necessity that trial court charge upon motive in homicide case. 71 A.L.R.2d 1025.

Admissibility, in homicide prosecution, of evidence as to tests made to ascertain distance from gun to victim when gun was fired. 86 A.L.R.2d 611.

Homicide: presumption of deliberation

or premeditation from the fact of killing. 86 A.L.R.2d 656.

Homicide: identification of victim as person named in indictment or information. 86 A.L.R.2d 722.

Homicide: Failure to provide medical or surgical attention. 100 A.L.R.2d 483.

Mental or emotional condition as diminishing responsibility for crime. 22 A.L.R.3d 1228.

Mental deficiency not amounting to insanity as affecting question of premeditation and deliberation in murder case. 22 A.L.R.3d 1228.

Application of felony-murder doctrine where the felony relied upon is an includible offense with the homicide. 40 A.L.R.3d 1341.

What felonies are inherently or foreseeably dangerous to human life for purposes of felony-murder doctrine. 50 A.L.R.3d 397.

What constitutes attempted murder. 54 A.L.R.3d 612.

Criminal liability where act of killing is done by one resisting felony or other un-

lawful act committed by defendant. 56 A.L.R.3d 239.

What constitutes termination of felony for purpose of felony-murder rule. 58 A.L.R.3d 851.

Homicide as affected by lapse of time between injury and death. 60 A.L.R.3d 1323.

Homicide by withholding food, clothing, or shelter. 61 A.L.R.3d 1207.

Necessity and effect, in homicide prosecution, of expert medical testimony as to cause of death. 65 A.L.R.3d 283.

Proof of live birth in prosecution for killing newborn child. 65 A.L.R.3d 413.

What constitutes "imminently dangerous" act within homicide statute. 67 A.L.R.3d 900.

Degree of homicide as affected by accused's religious or occult belief in harmlessness of ceremonial ritualistic acts directly causing fatal injury. 78 A.L.R.3d 1132.

What constitutes murder by torture. 83 A.L.R.3d 1222.

Spouse's confession of adultery as affecting degree of homicide involved in killing spouse or his or her paramour. 93 A.L.R.3d 925.

Judicial abrogation of felony-murder doctrine. 13 A.L.R.4th 1226.

Modern status of the rules requiring malice "aforethought," "deliberation," or "premeditation" as elements of murder in the first degree. 18 A.L.R.4th 961.

Validity and construction of statute defining homicide by conduct manifesting "depraved indifference". 25 A.L.R.4th 311.

Homicide by causing victim's brain-dead condition. 42 A.L.R.4th 742.

Corporation's criminal liability for homicide. 45 A.L.R.4th 1021.

Homicide: physician's withdrawal of life supports from comatose patient. 47 A.L.R.4th 18.

Application of felony-murder doctrine where person killed was co-felon. 89 A.L.R.4th 683.

Homicide: Liability where death immediately results from treatment or mistreatment of injury inflicted by defendant. 50 A.L.R.5th 467.

Sufficiency of Evidence to Support Homicide Conviction Where No Body Was Produced. 65 A.L.R. 6th 359.

Am. Jur.

40 Am. Jur. 2d, Homicide §§ 36 et seq.

2 Am. Jur. Trials, Investigating Particular Crimes §§ 40-57 (homicide).

3 Am. Jur. Trials, Preparing and Using Photographs in Criminal Cases § 9 (homicide scene).

7 Am. Jur. Trials, Homicide §§ 1 et seq.

40 Am. Jur. Trials 501, Forensic Pathology in Homicide Cases.

3 Am. Jur. Proof of Facts 2d, Homicide Outside of Common Design, §§ 7 et seq. (proof that lethal act of co-felon was outside of, or foreign to, common design); Withdrawal by Aggressor Reviving Right of Self-defense, §§ 9 et seq. (proof of withdrawal by aggressor – subsequent homicide committed in self-defense).

CJS.

40 C.J.S., Homicide §§ 2, 34, 36, 37.

Law Reviews.

Murder and Manslaughter in Mississippi: Unintentional Killings, 71 Miss. L.J. 1, Fall, 2001.

Clark, Juveniles and the death penalty—a square peg in a round hole. 10 Miss. C. L. Rev. 169, Spring, 1990.

1978 Mississippi Supreme Court Review: Criminal Law and Procedure. 50 Miss. L. J. 59, March, 1979.

1984 Mississippi Supreme Court Review: Criminal Law. 55 Miss. L. J. 77, March, 1985.

Practice References.

Ronald L. Schoenberg, Criminal Law Deskbook (Matthew Bender).

§ 97-3-21. Homicide; penalty for first- or second-degree murder or capital murder.

(1) Every person who shall be convicted of first-degree murder shall be sentenced by the court to imprisonment for life in the custody of the Department of Corrections.

(2) Every person who shall be convicted of second-degree murder shall be imprisoned for life in the custody of the Department of Corrections if the punishment is so fixed by the jury in its verdict after a separate sentencing proceeding. If the jury fails to agree on fixing the penalty at imprisonment for life, the court shall fix the penalty at not less than twenty (20) nor more than forty (40) years in the custody of the Department of Corrections.

(3) Every person who shall be convicted of capital murder shall be sentenced (a) to death; (b) to imprisonment for life in the State Penitentiary without parole; or (c) to imprisonment for life in the State Penitentiary with eligibility for parole as provided in Section 47-7-3(1) (f).

HISTORY: Codes, Hutchinson's 1848, ch. 64, art. 12, Title 2 (1); 1857, ch. 64, art. 167; 1871, § 2630; 1880, § 2877; 1892, § 1151; 1906, § 1229; Hemingway's 1917, § 959, 1930, § 987; 1942, § 2217; Laws, 1974, ch. 576, § 7; Laws, 1977, ch. 458, § 1; Laws, 1994, ch. 566, § 3; Laws, 2013, ch. 555, § 2, eff from and after July 1, 2013.

Editor's Notes — Laws of 1994, ch. 566, § 5, provides as follows:

"SECTION 5. The provisions of this act shall apply to any case in which pre-trial, trial or resentencing proceedings take place after July 1, 1994."

Cross References — Construction of the terms "capital case," "capital offense," "capital crime," and "capital murder," see § 1-3-4.

What constitutes the offense of capital murder, see § 97-3-19.

Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see § 97-43-1 et seq.

Requirement that an indictment for capital murder state specifically the section of the code defining the offense alleged to have been committed, see § 99-17-20.

Execution in capital cases, see §§ 99-19-51, 99-19-55.

Separate sentencing procedure to determine punishment in capital cases, see §§ 99-19-101 et seq.

JUDICIAL DECISIONS

ANALYSIS

1. Constitutionality.
2. Validity.
3. Construction and application; generally.
4. Sentencing factors.
5. Plea of guilty.
6. Instructions.
7. Jury.
8. —Qualifications.
9. —Powers and duties.
10. Deferral of sentence.
11. Sentencing hearings.

1. Constitutionality.

As defendant was 15 at the time of the murder and pursuant to Miss. Code Ann. § 47-7-3(1)(h) was not eligible for parole, and as *Miller v. Alabama*, 2012 U.S.

LEXIS 4873, was decided while his appeal was pending, his life sentence was vacated and the case was remanded so the trial court could consider the *Miller* factors before determining sentence. *Parker v. State*, 119 So. 3d 987, 2013 Miss. LEXIS 321 (Miss. 2013).

Miss. Code Ann. § 97-3-21 was not unconstitutionally vague and did not apply to an inmate where the inmate confused parole with conditional release as: (1) Miss. Code Ann. § 47-7-3(1)(f) prohibited parole for an inmate sentenced to life under Miss. Code Ann. § 99-19-101 for capital offenses; (2) since the inmate pled guilty to murder, carrying a life sentence, he was convicted of an other capital offense under Miss. Code Ann. § 1-3-4; and (3) the inmate was eligible to petition for conditional release at age 65 under Miss.

Code Ann. § 47-5-139(1)(a). *Higginbotham v. State*, 114 So. 3d 9, 2012 Miss. App. LEXIS 595 (Miss. Ct. App. 2012), cert. denied, 116 So. 3d 1072, 2013 Miss. LEXIS 317 (Miss. 2013).

2. Validity.

Although appellant, who pleaded guilty to capital murder, argued the circuit court imposed an excessive sentence of life in prison without the possibility of parole, in violation of the statutory maximum, this issue was without merit, as Miss. Code Ann. § 97-3-21 allows for a sentence of life without parole for capital murder. *Rogers v. State*, — So. 3d —, 2015 Miss. App. LEXIS 689 (Miss. Ct. App. Dec. 8, 2015).

Based on *Miller v. Alabama*, 132 S. Ct. 2445 (2012), *Parker v. State*, 119 So. 3d 987 (Miss. 2013), and *Jones v. State*, 122 So. 3d 698 (Miss. 2013), an inmate who was 17 years old at the time he was involved in the robbery that led to his capital murder guilty plea and a sentence of life in prison without eligibility for parole was entitled to a new sentencing hearing to consider a sentence that would allow parole. *Thomas v. State*, 130 So. 3d 157, 2014 Miss. App. LEXIS 16 (Miss. Ct. App. 2014).

Defendant's mandatory life sentence, imposed pursuant to Miss. Code Ann. § 97-3-21 after his murder conviction, was not cruel and unusual punishment for purposes of U.S. Const. amend. VIII and Miss. Const. art. 3, § 28 even though defendant was 14 years old at the time of the offense because Miss. Code Ann. § 97-3-21 did not afford the trial judge any sentencing discretion or make an exception for a defendant of tender years. *Evans v. State*, 109 So. 3d 1056, 2011 Miss. App. LEXIS 343 (Miss. Ct. App. 2011), rev'd, 109 So. 3d 1044, 2013 Miss. LEXIS 31 (Miss. 2013).

Defendant asserted that he was improperly sentenced to life imprisonment without the possibility of parole for murder; however, that was the sentence for capital murder. Because defendant was only sentenced to life imprisonment, not to life without the possibility of parole, under Miss. Code Ann. § 97-3-21, defendant's sentence for murder under Miss. Code Ann. § 97-3-19(1) was proper. *Staten v.*

State, 989 So. 2d 938, 2008 Miss. App. LEXIS 76 (Miss. Ct. App.), cert. denied, 993 So. 2d 832, 2008 Miss. LEXIS 400 (Miss. 2008).

Appellant's motion for post-conviction relief was properly denied as untimely filed because appellant's sentence of life without parole, under Miss. Code Ann. § 97-3-21, following his plea of guilty to capital murder, did not violate his constitutional right against ex post facto application of the law because (1) the Supreme Court of Mississippi previously held that the imposition of the new sentencing option of life without parole did not violate the prohibition against ex post facto laws, and (2) sentencing under Miss. Code Ann. § 97-3-21 clearly and lawfully directed capital defendants whose pretrial, trial, or resentencing proceedings took place after July 1, 1994, to have their sentencing juries given the option of life without parole in addition to life with the possibility of parole and death. *Randall v. State*, 987 So. 2d 453, 2008 Miss. App. LEXIS 110 (Miss. Ct. App. 2008).

Thirteen-year-old defendant's automatic life sentence for murder under Miss. Code Ann. § 97-3-21 was proper because the sentence was not discretionary and had previously been held constitutional. *Edmonds v. State*, 2006 Miss. App. LEXIS 88 (Miss. Ct. App. Jan. 31, 2006), op. withdrawn, sub. op., 955 So. 2d 864, 2006 Miss. App. LEXIS 311 (Miss. Ct. App. 2006).

Trial court properly dismissed defendant's post-conviction motion without a hearing where defendant's post-conviction motion revealed that he knew the sentence he would get for murder, which was a mandatory sentence of life imprisonment, as required by Miss. Code Ann. § 97-3-21; no promises regarding parole or a specific lesser sentence had been made to him. *Booker v. State*, 954 So. 2d 448, 2006 Miss. App. LEXIS 864 (Miss. Ct. App. 2006).

Defendant was convicted of murder and sentenced to life imprisonment because it was the only possible sentence available for convicted murderers, Miss. Code Ann. § 97-3-21; thus, the trial court did not err in sentencing defendant to life imprisonment. *Jackson v. State*, 924 So. 2d 531,

2005 Miss. App. LEXIS 451 (Miss. Ct. App. 2005), cert. denied, 927 So. 2d 750, 2006 Miss. LEXIS 175 (Miss. 2006).

Defendant's sentence was not excessive and unconstitutional because, since the trial court imposed a sentence within the statutory limitations provided by Miss. Code Ann. § 97-3-21, the sentence was appropriate, and there was no error. *Glass v. State*, 856 So. 2d 762, 2003 Miss. App. LEXIS 944 (Miss. Ct. App. 2003).

The application of the capital sentencing statute, as amended this section, ameliorated the stark options that were presented to pre-amendment juries, and, therefore, the retroactive application of the statute does not give rise to an illegal ex post facto law. *West v. State*, 725 So. 2d 872 (Miss. 1998), overruled by *Wilson v. State*, 194 So. 3d 855 (Miss. 2016), to the extent that *West* improperly changed Section 99-19-33 to substitute the word 'shall' for the word 'may' in the first sentence, thereby issuing a holding that would hold trial courts in error for sentencing a defendant under the older of two sentencing statutes.

The amendment of this section to include life imprisonment without parole as a possible sentence was ameliorative and not onerous as the amendment did not increase the possible penalty for murder; thus, the application of the amended statute in the prosecution of a defendant for a murder that occurred before the effective date of the amendment did not violate the ex post facto clause of the federal constitution. *Tavares v. State*, 725 So. 2d 803, 1998 Miss. LEXIS 277 (Miss. 1998).

A defendant's right to be shielded from double jeopardy was violated where the defendant was convicted and punished for both kidnapping under § 97-3-53 and capital murder while engaged in the crime of kidnapping under § 97-3-19(2)(e); since the defendant was indicted, tried and found guilty of capital murder under § 97-3-19(2)(e) with the kidnapping as the underlying felony, and thereafter exposed to trial for his life, the State was precluded from punishing him further for the § 97-3-53 kidnapping. *Meeks v. State*, 604 So. 2d 748, 1992 Miss. LEXIS 400 (Miss. 1992).

The imposition of the death penalty against a mentally retarded defendant

with the functional equivalent of a 7-year-old did not violate the cruel and unusual punishment clause of the Eighth Amendment, where the jury was instructed as to the mitigating factors enumerated in § 99-19-101(6)(b), (f) and (g) and these 3 mitigating factors were argued to the jury, so that the jury was provided a vehicle, through appropriate jury instructions and argument, to consider and give effect to the mitigating evidence of the defendant's mental retardation in rendering its sentencing decision. *Jones v. State*, 602 So. 2d 1170, 1992 Miss. LEXIS 345 (Miss. 1992).

The capital murder statute, this section, is not unconstitutional. In re *Hill*, 460 So. 2d 792, 1984 Miss. LEXIS 2003 (Miss. 1984).

This section and § 99-19-101 are not unconstitutional and violative of the Eighth and Fourteenth Amendments to the United States Constitution on the ground that they do not allow the jury to sentence a defendant to life imprisonment without parole, since the legislature's decision to provide two alternative penalties, with clear guidelines for the application of each, was unquestionably within their proper discretion. *Smith v. State*, 419 So. 2d 563, 1982 Miss. LEXIS 2112 (Miss. 1982), cert. denied, 460 U.S. 1047, 103 S. Ct. 1449, 75 L. Ed. 2d 803, 1983 U.S. LEXIS 4278 (U.S. 1983).

The felony murder statute (§ 97-3-19) is constitutional despite the language permitting the imposition of death upon one who harbors no specific intent to kill. Furthermore, since this section places no statutory limitations on the mitigating factors that may be considered in the capital sentencing process, it suffers no constitutional infirmities. *Culberson v. State*, 379 So. 2d 499, 1979 Miss. LEXIS 2528 (Miss. 1979), cert. denied, 449 U.S. 986, 101 S. Ct. 406, 66 L. Ed. 2d 250, 1980 U.S. LEXIS 3943 (U.S. 1980); *Lockett v. Ohio*, 438 U.S. 586, 98 S. Ct. 2954, 57 L. Ed. 2d 973, 1978 U.S. LEXIS 133 (U.S. 1978).

State statute which imposed mandatory death penalty for first-degree murder, which included any willful, deliberate, and premeditated killing, and any murder committed in perpetrating or attempting to perpetrate a felony, constituted a viola-

tion of the prohibition against the infliction of cruel and unusual punishment under the Eighth and Fourteenth Amendments of the United States Constitution. *Woodson v. North Carolina*, 428 U.S. 280, 96 S. Ct. 2978, 49 L. Ed. 2d 944, 1976 U.S. LEXIS 85 (U.S. 1976).

Imposition of death penalty did not constitute cruel and unusual treatment under statutes which provided (1) if defendant is found guilty of first degree murder, a separate presentence hearing is held before the jury, where arguments may be presented and where any evidence deemed relevant to sentencing may be admitted and must include matters relating to 8 aggravating and 7 mitigating circumstances specified in said statutes, (2) the jury is directed to weigh such circumstances and return an advisory verdict as to the sentence, to be determined by a majority vote, (3) the actual sentence is determined by the trial judge, who is also directed to weigh the statutory aggravating and mitigating circumstances, (4) if a death sentence is imposed, the trial court must set forth in writing its fact findings that sufficient statutory aggravating circumstances exist and are not outweighed by statutory mitigating circumstances, and (5) a death sentence is automatically reviewed by the Supreme Court of Florida, which considers its functions to be guarantee that the aggravating and mitigating reasons present in one case will reach a similar result to that reached under similar circumstances in another case. *Proffitt v. Florida*, 428 U.S. 242, 96 S. Ct. 2960, 49 L. Ed. 2d 913, 1976 U.S. LEXIS 83 (U.S. 1976).

The prohibition against the infliction of cruel and unusual punishment under the Eighth and Fourteenth Amendments of the United States Constitution is not violated by the imposition of the death penalty for the crime of murder under a state's statutory scheme whereby (1) capital homicides are limited to intentional and knowing murders committed in the five specified situations of murder of a peace officer or fireman, murder committed in the course of kidnapping, burglary, robbery, forcible rape, or arson, murder committed while escaping or attempting to escape from a penal institution, murder

committed for remuneration, and murder committed by a prison inmate when the victim is a prison employee; (2) if a defendant is convicted of a capital offense, a separate presentence hearing must be held before the jury, where any relevant evidence may be introduced and arguments may be presented for or against the death sentence; (3) the jury must answer the questions (a) whether or not the defendant's conduct that caused the death was committed deliberately and with the reasonable expectation that the death of the deceased or another would result, (b) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society, and (c) if raised by the evidence, whether or not the defendant's conduct in killing the deceased was unreasonable in response to the provocation, if any, by the deceased; (4) if the jury finds that the state has proved beyond a reasonable doubt that the answer to each of the pertinent questions is yes, then the death sentence is imposed, but if the jury finds that the answer to any question is no, then a sentence of life imprisonment results; and (5) death sentences are given expedited review on appeal. *Jurek v. Texas*, 428 U.S. 262, 96 S. Ct. 2950, 49 L. Ed. 2d 929, 1976 U.S. LEXIS 84 (U.S. 1976).

The prohibition against the infliction of cruel and unusual punishment under the Eighth and Fourteenth Amendments is not violated by the imposition of the death penalty for the crime of murder under a state's statutory scheme whereby (1) guilt or innocence is determined, either by a jury or the trial judge, in the first stage of a bifurcated trial, with the judge being required to charge the jury as to any lesser included offenses when supported by any view of the evidence, (2) after a verdict, finding, or plea of guilty, a presentence hearing as conducted, where the jury (or judge in a case tried without a jury) hears argument and additional evidence in mitigation or aggravation of punishment, (3) at least one of 10 aggravating circumstances specified in the statute must be found to exist beyond a reasonable doubt, and must be designated in writing, before the jury (or judge) may

elect to impose the death sentence on a defendant convicted of murder, the trial judge and jury cases being bound by the jury's recommended sentence, (4) on automatic appeal of a death sentence, the state's highest court must determine whether the sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor, whether the evidence supported the finding of a statutory aggravating circumstance, and whether the death sentence was excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant, and (5) if a death sentence is affirmed, the decision of the state's highest court must include reference to similar cases that the court considered. *Gregg v. Georgia*, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859, 1976 U.S. LEXIS 82 (U.S. 1976).

In view of the decision of the Supreme Court of the United States in *Furman v. Georgia*, 408 U.S. 238, 33 L. Ed. 2d 346, 92 S. Ct. 2726, reh den 409 U.S. 902, 34 L. Ed. 2d 163, 93 S. Ct. 89 and on remand 229 Ga 731, 194 SE2d 410, declaring the death penalty to be a cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution, the death penalty can no longer be imposed under Code 1942, § 2217. *Capler v. State*, 268 So. 2d 338, 1972 Miss. LEXIS 1192 (Miss. 1972); *Peterson v. State*, 268 So. 2d 335, 1972 Miss. LEXIS 1190 (Miss. 1972).

Verdict fixing defendant's punishment of life imprisonment, without specifying place, held valid. *Harper v. State*, 98 So. 534 (Miss. 1924).

3. Construction and application; generally.

Defendant's sentence of life imprisonment without parole exceeded the statutory maximum under Miss. Code Ann. § 97-3-21 where defendant was indicted and convicted of deliberate-design murder pursuant to Miss. Code Ann. § 97-3-19. *Parker v. State*, 30 So. 3d 1222, 2010 Miss. LEXIS 161 (Miss. 2010).

Defendant's sentence of life imprisonment without eligibility for parole after he was convicted of murder was proper because he was convicted of the violent

crime of murder after January 1, 2000, and was not eligible for parole; nor did the appellate court find that his sentence was grossly disproportionate to the crime committed. *Fannings v. State*, 997 So. 2d 953, 2008 Miss. App. LEXIS 790 (Miss. Ct. App. 2008).

Trial court erred in not instructing the jury that life without the possibility of parole was an option under Miss. Code Ann. § 97-3-21 because, while the crime occurred prior to the amendment adding that option, the trial took place after the amendment, and under Miss. Code Ann. § 99-19-1, it had previously been held that § 97-3-21 clearly and lawfully directed capital defendants whose pre-trial, trial or resentencing proceedings took place after July 1, 1994, to have their sentencing juries given the option of life without parole in addition to life with the possibility of parole and death. *Rubenstein v. State*, 941 So. 2d 735, 2006 Miss. LEXIS 411 (Miss. 2006).

While it is true that Miss. Code Ann. § 97-3-21 provided three sentencing alternatives; the death penalty, life imprisonment without parole, and life imprisonment with the possibility of parole; a life sentence rendered pursuant to Miss. Code Ann. § 99-19-101 will automatically be a life without parole sentence. This is an inconsistency in the statutes that needs to be addressed by the Legislature. *Hodges v. State*, 912 So. 2d 730, 2005 Miss. LEXIS 164 (Miss.), cert. denied, 546 U.S. 1037, 126 S. Ct. 739, 163 L. Ed. 2d 579, 2005 U.S. LEXIS 8670 (U.S. 2005).

Although defendant, convicted of murder, argued that he was improperly sentenced to life imprisonment without parole as a habitual offender, the appellate court found no evidence that defendant was sentenced as a habitual offender; rather, the appellate court found that Miss. Code Ann. § 97-3-21 (2000) provided for a life sentence following a conviction for murder. *Poindexter v. State*, 856 So. 2d 296, 2003 Miss. LEXIS 377 (Miss. 2003).

Reading Miss. Code Ann. §§ 97-3-21, 99-19-101(1), 47-7-3(1)(f), together indicates that a defendant on trial for capital murder may be sentenced only to death or to life imprisonment without the eligibil-

ity of parole. *Flowers v. State*, 842 So. 2d 531, 2003 Miss. LEXIS 149 (Miss. 2003).

When read in *pari materia*, this section and § 47-7-3 provide juries with the option of sentencing capital defendants to life without parole as long as any proceeding, from pretrial through resentencing, that followed the actual charge occurred after July 1, 1994; simultaneously, the two statutes preclude the parole board from granting parole to any capital defendant who was charged after July 1, 1994. *West v. State*, 725 So. 2d 872 (Miss. 1998), overruled by *Wilson v. State*, 194 So. 3d 855 (Miss. 2016), to the extent that *West* improperly changed Section 99-19-33 to substitute the word 'shall' for the word 'may' in the first sentence, thereby issuing a holding that would hold trial courts in error for sentencing a defendant under the older of two sentencing statutes.

Sentence of death imposed on defendant who shot store clerk four times during commission of armed robbery was not excessive or disproportionate to other similar cases in which such sentence had been imposed. *Brown v. State*, 682 So. 2d 340, 1996 Miss. LEXIS 427 (Miss. 1996), cert. denied, 520 U.S. 1127, 117 S. Ct. 1271, 137 L. Ed. 2d 348, 1997 U.S. LEXIS 1821 (U.S. 1997).

In order to impose death sentence, jury must determine that defendant either actually killed, attempted to kill, and intended that killing take place, or intended that lethal force would be employed. *Blue v. State*, 674 So. 2d 1184, 1996 Miss. LEXIS 304 (Miss.), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517, 1996 U.S. LEXIS 7523 (U.S. 1996).

Upon determining that defendant actually killed or intended that a killing take place, jury must identify and weigh aggravating circumstances against mitigating circumstances which it has identified and, if it is unable to find aggravating circumstance or determines that aggravating circumstance is outweighed by mitigating circumstances, death penalty is statutorily barred. *Blue v. State*, 674 So. 2d 1184, 1996 Miss. LEXIS 304 (Miss.), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517, 1996 U.S. LEXIS 7523 (U.S. 1996).

It is suggestive to provide signature line only under the verdict for death penalty.

Blue v. State, 674 So. 2d 1184, 1996 Miss. LEXIS 304 (Miss.), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517, 1996 U.S. LEXIS 7523 (U.S. 1996).

Verdict form which provided for signature only under the death penalty and not under life sentence verdict was harmless where jury was instructed prior to deliberations that death penalty was not the only option. *Blue v. State*, 674 So. 2d 1184, 1996 Miss. LEXIS 304 (Miss.), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517, 1996 U.S. LEXIS 7523 (U.S. 1996).

Sentence of death imposed upon 17-year-old defendant with IQ of 67 who struck victim with baseball bat, inserted it into her anus, and had sex with her after she was dead was not disproportionate. *Blue v. State*, 674 So. 2d 1184, 1996 Miss. LEXIS 304 (Miss.), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517, 1996 U.S. LEXIS 7523 (U.S. 1996).

Although third postconviction relief petition to vacate sentence and resentence would generally have been successive writ barred and procedurally barred, imposition of sentence of life imprisonment without benefit of parole for murder, imposed when statute did not permit or provide for said sentence, was unenforceable sentence and plain error, capable of being addressed. *Stevenson v. State*, 674 So. 2d 501, 1996 Miss. LEXIS 212 (Miss. 1996).

Trial court was required to conduct habitual offender hearing prior to sentencing of defendant for capital murder, in order to make jury aware that, as a habitual offender, defendant could have been sentenced to life imprisonment without possibility of parole. *Taylor v. State*, 672 So. 2d 1246, 1996 Miss. LEXIS 193 (Miss.), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379, 1996 U.S. LEXIS 7020 (U.S. 1996).

Trial court's failure to hold habitual offender hearing for defendant convicted of capital murder, which would have allowed jury to sentence defendant to life imprisonment without possibility of parole, required vacatur of death sentence and remand for new sentencing trial with proper instructions. *Taylor v. State*, 672 So. 2d 1246, 1996 Miss. LEXIS 193 (Miss.), cert. denied, 519 U.S. 994, 117 S.

Ct. 486, 136 L. Ed. 2d 379, 1996 U.S. LEXIS 7020 (U.S. 1996).

Autopsy photographs may be admitted during sentencing phase of capital murder prosecution on issue of whether crime was especially heinous, atrocious or cruel, even if photographs were inadmissible during guilt phase. *Jackson v. State*, 672 So. 2d 468, 1996 Miss. LEXIS 718 (Miss. 1996).

Capital murder defendant was not entitled to make racial arguments against death penalty, even if racial arguments to jury are appropriate, in absence of racial bias claims, proof of bias, and in absence of any potential bias on basis of race of victims. *Jackson v. State*, 672 So. 2d 468, 1996 Miss. LEXIS 718 (Miss. 1996).

Death sentence was not excessive or disproportionate for defendant convicted of fatal stabbing of 4 children and inflicting life-threatening wounds upon an adult and another child while in search of money kept in residence. *Jackson v. State*, 672 So. 2d 468, 1996 Miss. LEXIS 718 (Miss. 1996).

Imposition of death penalty on defendant who killed victim during course of robbery was not disproportionate to penalty imposed in similar cases, although defendant was 17 years old at time of offense, had disadvantaged background and had low IQ. *Holly v. State*, 671 So. 2d 32, 1996 Miss. LEXIS 15 (Miss.), cert. denied, 518 U.S. 1025, 116 S. Ct. 2565, 135 L. Ed. 2d 1082, 1996 U.S. LEXIS 4179 (U.S. 1996).

Prosecutor in capital murder case did not utilize absence of mercy instruction to improperly argue that jurors could not consider mercy or sympathy in their deliberations; prosecutor was allowed to argue that defendant was not deserving of sympathy and jurors had been informed by court that statements of counsel were not evidence, and that they must follow court's instructions and consider evidence presented. *Walker v. State*, 671 So. 2d 581, 1995 Miss. LEXIS 494 (Miss. 1995), cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406, 1996 U.S. LEXIS 7236 (U.S. 1996).

Prosecutor did not impermissibly suggest that it was state Supreme Court, rather than jury, that had responsibility of

imposing death sentence, when prosecution commented that death penalty had "been through the courts" and had been "honed and sharpened and brought into keen focus." *Walker v. State*, 671 So. 2d 581, 1995 Miss. LEXIS 494 (Miss. 1995), cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406, 1996 U.S. LEXIS 7236 (U.S. 1996).

Proportionality requirement was satisfied in capital murder case involving kidnapping of stranger, sexual assault prior to killing, and efforts to hide body and obscure evidence; death penalty had been given, and found to be proportional, in another case involving same elements. *Walker v. State*, 671 So. 2d 581, 1995 Miss. LEXIS 494 (Miss. 1995), cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406, 1996 U.S. LEXIS 7236 (U.S. 1996).

Imposition of death penalty, on defendant convicted for kidnapping, sexually assaulting and killing victim, was not disproportionate even though accomplice who provided evidence against defendant received sentence of life imprisonment; it was defendant's idea to take victim to deserted location, and defendant had been actual perpetrator of assaults, other than one rape perpetrated by accomplice. *Walker v. State*, 671 So. 2d 581, 1995 Miss. LEXIS 494 (Miss. 1995), cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406, 1996 U.S. LEXIS 7236 (U.S. 1996).

Sentence of death, imposed on defendant convicted of killing prison guard, was not excessive or disproportionate to other similar cases in which death sentence had been imposed. *Russell v. State*, 670 So. 2d 816, 1995 Miss. LEXIS 617 (Miss. 1995), cert. denied, 519 U.S. 982, 117 S. Ct. 436, 136 L. Ed. 2d 333, 1996 U.S. LEXIS 6884 (U.S. 1996), cert. dismissed, 520 U.S. 1249, 117 S. Ct. 2406, 137 L. Ed. 2d 1064, 1997 U.S. LEXIS 3537 (U.S. 1997).

Trial court acted within its discretion at death penalty phase of trial in excluding, as irrelevant, psychological report that allegedly showed that it was probable that accomplice, rather than defendant, was mastermind behind robbery and murder of victim, in absence of evidence that accomplice had any kind of dominating in-

fluence over defendant. *Ballenger v. State*, 667 So. 2d 1242, 1995 Miss. LEXIS 451 (Miss. 1995), cert. denied, 518 U.S. 1025, 116 S. Ct. 2565, 135 L. Ed. 2d 1082, 1996 U.S. LEXIS 4177 (U.S. 1996).

Death penalty was not disproportionate sentence for felony murder, where defendant instigated and planned robbery of victim, she had several opportunities to back out of robbery, she provided guns to accomplices to use against victim, and she burned victim's house to cover her guilt. *Ballenger v. State*, 667 So. 2d 1242, 1995 Miss. LEXIS 451 (Miss. 1995), cert. denied, 518 U.S. 1025, 116 S. Ct. 2565, 135 L. Ed. 2d 1082, 1996 U.S. LEXIS 4177 (U.S. 1996).

Prosecutor's comparison of defendant to Charles Manson at death penalty phase was not so improper as to require reversal; prosecutor did not call defendant names, did not vilify her, did not try to enrage jury, and did not go into details of Manson's crimes. *Ballenger v. State*, 667 So. 2d 1242, 1995 Miss. LEXIS 451 (Miss. 1995), cert. denied, 518 U.S. 1025, 116 S. Ct. 2565, 135 L. Ed. 2d 1082, 1996 U.S. LEXIS 4177 (U.S. 1996).

Prosecutor's comment at death penalty phase of trial that defendant had "turn[ed] to a life of crime" was not so improper as to require reversal; evidence in record indicated that defendant was serving sentence for armed robbery, and defendant had just been found guilty of capital murder. *Ballenger v. State*, 667 So. 2d 1242, 1995 Miss. LEXIS 451 (Miss. 1995), cert. denied, 518 U.S. 1025, 116 S. Ct. 2565, 135 L. Ed. 2d 1082, 1996 U.S. LEXIS 4177 (U.S. 1996).

Exception to general rule that state may not mention possibility of appellate review exists where statement is made in response to statement of defense counsel. *Ballenger v. State*, 667 So. 2d 1242, 1995 Miss. LEXIS 451 (Miss. 1995), cert. denied, 518 U.S. 1025, 116 S. Ct. 2565, 135 L. Ed. 2d 1082, 1996 U.S. LEXIS 4177 (U.S. 1996).

Defense counsel's comments that Charles Manson murders were more gruesome than that committed by defendant, yet Manson had not received death penalty, opened door for prosecution to mention appellate review by stating that

death penalty had been imposed in Manson case but that death penalty statute had later been held unconstitutional. *Ballenger v. State*, 667 So. 2d 1242, 1995 Miss. LEXIS 451 (Miss. 1995), cert. denied, 518 U.S. 1025, 116 S. Ct. 2565, 135 L. Ed. 2d 1082, 1996 U.S. LEXIS 4177 (U.S. 1996).

A capital murder defendant could not be sentenced to life imprisonment without the possibility of parole pursuant to a plea bargain agreement, since this section does not provide such a penalty; the provision in the plea bargain providing for life without parole was not a permissible option under the statute, and therefore the court had no authority to issue such a sentence, and the plea contract was invalid as against public policy. *Patterson v. State*, 660 So. 2d 966, 1995 Miss. LEXIS 377 (Miss. 1995), overruled in part, *Twillie v. State*, 892 So. 2d 187, 2004 Miss. LEXIS 1322 (Miss. 2004).

In the sentencing phase of a capital murder prosecution, the court properly allowed the introduction of a third party's statement that the third party killed the victims, as well as the third party's further statement indicating that the defendant killed the victims; both the inculpatory and exculpatory portions of the statement were relevant to mitigating circumstances. *Carr v. State*, 655 So. 2d 824, 1995 Miss. LEXIS 56 (Miss. 1995), cert. denied, 516 U.S. 1077, 116 S. Ct. 783, 133 L. Ed. 2d 734, 1996 U.S. LEXIS 547 (U.S. 1996).

In the sentencing phase of a capital murder prosecution, the trial court did not err in refusing to admit expert testimony regarding the defendant's polygraph tests; polygraph tests and their results are inadmissible under Mississippi law. *Carr v. State*, 655 So. 2d 824, 1995 Miss. LEXIS 56 (Miss. 1995), cert. denied, 516 U.S. 1077, 116 S. Ct. 783, 133 L. Ed. 2d 734, 1996 U.S. LEXIS 547 (U.S. 1996).

A prosecutor's biblical references during closing argument at the sentencing phase of a capital murder prosecution did not deprive the defendant of a fair trial, as the comments were within the "broad latitude" afforded counsel in closing argument. *Carr v. State*, 655 So. 2d 824, 1995 Miss. LEXIS 56 (Miss. 1995), cert. denied,

516 U.S. 1077, 116 S. Ct. 783, 133 L. Ed. 2d 734, 1996 U.S. LEXIS 547 (U.S. 1996).

In imposing a sentence of death in a capital murder case, the fact that the jury's specific written findings supporting its verdict were "parroted" from the sentencing forms did not render the verdict ambiguous in violation of the 6th and 14th Amendments to the United States Constitution and Article 3, § 24 of the Mississippi Constitution. *Carr v. State*, 655 So. 2d 824, 1995 Miss. LEXIS 56 (Miss. 1995), cert. denied, 516 U.S. 1077, 116 S. Ct. 783, 133 L. Ed. 2d 734, 1996 U.S. LEXIS 547 (U.S. 1996).

The Eighth Amendment was not violated by a judge's imposition of the death penalty pursuant to a statute requiring the sentencing judge to consider an advisory jury verdict, where the jury recommended life imprisonment without parole, but the judge concluded that the aggravating circumstance that the murder was committed for pecuniary gain outweighed the mitigating circumstances, since (1) the Eighth Amendment does not require a state to define the weight that a judge must accord an advisory verdict, and (2) the Constitution permits a judge, acting alone, to impose a capital sentence, and thus is not offended when a state further requires a judge to consider a jury's recommendation and trusts the judge to give proper weight to such recommendation. *Harris v. Alabama*, 513 U.S. 504, 115 S. Ct. 1031, 130 L. Ed. 2d 1004, 1995 U.S. LEXIS 1623 (U.S. 1995).

In the sentencing phase of a capital murder prosecution, the trial judge abused his discretion in denying the defendant's request for 25 minutes for closing argument and granting him 15 minutes "to the side." A defendant must be allowed, within reason, whatever time he or she believes is necessary to seek a penalty less than death, and the defendant's request for 25 minutes was within reason. *Willie v. State*, 585 So. 2d 660, 1991 Miss. LEXIS 454 (Miss. 1991).

In the sentencing phase of a capital murder prosecution, it was not error for the district attorney to ask the defendant to take the murder weapon, stick it in his pants, then pull it out, aim it and pull the trigger, where the district attorney was

having the defendant demonstrate the time it took him to go through those motions in response to the defendant's contention that he shot the victim on a sudden impulse. *Turner v. State*, 573 So. 2d 657, 1990 Miss. LEXIS 792 (Miss. 1990), cert. denied, 500 U.S. 910, 111 S. Ct. 1695, 114 L. Ed. 2d 89, 1991 U.S. LEXIS 2522 (U.S. 1991).

In the sentencing phase of a capital murder prosecution, the district attorney's question during cross-examination of the defendant asking whether the thought of the victim having a Christian burial ever crossed his mind, and the district attorney's reference to a Christian burial during his closing argument did not constitute error. *Turner v. State*, 573 So. 2d 657, 1990 Miss. LEXIS 792 (Miss. 1990), cert. denied, 500 U.S. 910, 111 S. Ct. 1695, 114 L. Ed. 2d 89, 1991 U.S. LEXIS 2522 (U.S. 1991).

A capital murder defendant was not entitled to have a separate jury impaneled to hear the evidence at the penalty phase. *Minnick v. State*, 551 So. 2d 77, 1988 Miss. LEXIS 612 (Miss. 1988), rev'd, 498 U.S. 146, 111 S. Ct. 486, 112 L. Ed. 2d 489, 1990 U.S. LEXIS 6118 (U.S. 1990), overruled, *Willie v. State*, 585 So. 2d 660, 1991 Miss. LEXIS 454 (Miss. 1991).

It was within the judge's discretion to impose a life sentence on a 17-year-old murder defendant despite the discretion afforded by the Youth Court Act. *Reed v. State*, 526 So. 2d 538, 1988 Miss. LEXIS 315 (Miss. 1988).

Refusal of the trial judge in a homicide prosecution to grant the simple murder instruction was harmless error since, if defendant had been found guilty of simple murder, instead of capital murder, the sentence would have been the same under this section. *Fairchild v. State*, 459 So. 2d 793, 1984 Miss. LEXIS 1983 (Miss. 1984).

The Mississippi Supreme Court's interpretation of this section as permissive is, as a matter of law, not reviewable by District Court and raises no federal constitutional question. *Irving v. Hargett*, 518 F. Supp. 1127, 1981 U.S. Dist. LEXIS 13465 (N.D. Miss. 1981).

A conviction in a murder prosecution would be reversed where the trial court permitted the jury to be led to believe that

a coconspirator who testified against defendant would be prosecuted, even though the court and the prosecution knew that he had been granted immunity. *King v. State*, 363 So. 2d 269, 1978 Miss. LEXIS 2186 (Miss. 1978).

A capital case is any case where the permissible punishment prescribed by the legislature is death, even though such penalty may not be inflicted since the decision of the United States Supreme Court in *Furman v. Georgia*, 408 U.S. 238, 33 L. Ed. 2d 346, 92 S. Ct. 2726, reh den 409 U.S. 902, 34 L. Ed. 2d 163, 93 S. Ct. 89 and on remand 229 Ga 731, 194 SE2d 410. *Hudson v. McAdory*, 268 So. 2d 916, 1972 Miss. LEXIS 1216 (Miss. 1972).

A case where the permissible punishment is death is a capital case, in which the state and the defendant are each entitled to 12 peremptory challenges to prospective jurors, and where the state in a homicide prosecution did not inquire of prospective jurors on voir dire if they had any conscientious scruples against infliction of the death penalty, this did not constitute a waiver of death penalty and thereby limit the state and the defendant to six peremptory challenges each, on the ground that the case was no longer a capital case. *Shorter v. State*, 257 So. 2d 236, 1972 Miss. LEXIS 1454 (Miss. 1972).

It is not necessary that the same jury that rendered the verdict of guilty against a defendant indicted for murder shall also determine the question of his punishment. *Irving v. State*, 228 So. 2d 266, 1969 Miss. LEXIS 1382 (Miss. 1969), vacated, 408 U.S. 935, 92 S. Ct. 2857, 33 L. Ed. 2d 751, 1972 U.S. LEXIS 2304 (U.S. 1972).

The defendant was not entitled to another trial on the issue of his guilt, where he had been lawfully determined to be guilty of murder but it was necessary to relitigate the question of penalty. *Rouse v. State*, 222 So. 2d 145, 1969 Miss. LEXIS 1523 (Miss. 1969).

Under this section [Code 1942, § 2217], when the jury has returned the death penalty upon a verdict of guilty in a murder case, the trial judge has no alternative except to sentence the prisoner to death. *Ray v. R. G. Le Tourneau, Inc.*, 220 So. 2d 837, 1969 Miss. LEXIS 1481 (Miss. 1969).

Motion for new trial in prosecution for homicide on ground of compromise verdict

was held properly denied although verdict certified that jury was unable to agree as to punishment, since the record did not show defendant offered any juror as witness to sustain his motion but simply filed an unsworn motion for new trial averring that no member of the jury voted for death sentence and that there was no disagreement among the jurors as to the punishment, and since members of the jury cannot be offered as witnesses to impeach their own verdict. *Calvin v. State*, 206 Miss. 94, 39 So. 2d 772, 1949 Miss. LEXIS 245 (Miss. 1949).

Argument of the prosecuting attorney, approved by the trial court, in a murder prosecution, that there was no use for the jury to return a manslaughter verdict, or one for a life sentence, because the accused was already serving a life sentence in the state penitentiary and that anything less than the death penalty would not be any punishment, was reversible error. *Hartfield v. State*, 186 Miss. 75, 189 So. 530, 1939 Miss. LEXIS 220 (Miss. 1939).

4. Sentencing factors.

Circuit court applied the correct legal standard and did not abuse its discretion in sentencing defendant to life without parole for murder, to which he pleaded guilty when he was 16 years old; sentencing authorities were not required to make specific findings of permanent incorrigibility or irretrievable depravity in juvenile resentencings, the circuit court weighed the proper factors, heard testimony, witnessed defendant's demeanor firsthand, and determined the evidence supported a life without parole sentence. *Ealy v. State*, — So. 3d —, 2019 Miss. App. LEXIS 542 (Miss. Ct. App. Nov. 5, 2019).

Trial court acted within its authority by sentencing defendant to life in prison because after considering the factors set forth by the United State Supreme Court, it had the authority to sentence defendant to life in prison or life in prison with eligibility for parole; the trial court afforded defendant a hearing and sentenced him after considering and taking into account each factor. *Chandler v. State*, 242 So. 3d 65, 2018 Miss. LEXIS 122 (Miss. 2018), cert. denied, — U.S. —, 139 S. Ct.

790, 202 L. Ed. 2d 569, 2019 U.S. LEXIS 486 (U.S. 2019).

In a post-conviction relief proceeding in which a pro se state inmate had been indicted for capital murder and pled guilty to the reduced charge of murder, in violation of Miss. Code Ann. § 97-3-19(1)(a), the only exception that he alleged allowed him to file a successive writ was the existence of an intervening decision. With regard solely to his proposed unconstitutional life sentence, he argued that the Apprendi decision and the Blakely decision satisfied the intervening-decision exception; however, those decisions did not provide any support for his claim since life was the only sentence available under Miss. Code Ann. § 97-3-21. *Glass v. State*, 45 So. 3d 1200, 2010 Miss. App. LEXIS 126 (Miss. Ct. App.), cert. denied, 49 So. 3d 636, 2010 Miss. LEXIS 554 (Miss. 2010).

Defendant's argument that it was error for the trial court to sentence him to life in prison without possibility of parole was improper; after the trial court set aside the jury's sentence of death, it had only one choice, which was the lesser sentence of life without the possibility of parole. Sentences that did not exceed the maximum term allowed by statute are not considered grossly disproportionate and are not disturbed on appeal. *Maye v. State*, 49 So. 3d 1140, 2009 Miss. App. LEXIS 807 (Miss. Ct. App. 2009), vacated, 49 So. 3d 1124, 2010 Miss. LEXIS 622 (Miss. 2010).

Defendant's life sentence for murder under Miss. Code Ann. § 97-3-21 was not cruel and unusual punishment because the jury was instructed on the crimes of murder and manslaughter, the jury could have properly found defendant guilty of murder without defendant's actually having fired the gun that killed the victim, and the sentence did not exceed the statutory maximum. *Trotter v. State*, 9 So. 3d 402, 2008 Miss. App. LEXIS 570 (Miss. Ct. App. 2008).

Had defendant not pled guilty to manslaughter and demanded to go to trial for murder, he still possessed no right for a jury to decide his sentence, as the sentence was mandatory; defendant forfeited no right to have a jury decide his sentence

by pleading guilty to the lesser crime of manslaughter. *Smith v. State*, 922 So. 2d 43, 2006 Miss. App. LEXIS 126 (Miss. Ct. App. 2006).

Death sentence for capital murder was affirmed because the statutory aggravating factors of engaging in the commission of or attempting to commit the crime of rape and committing a heinous, atrocious or cruel crime in the murder of the victim were proven beyond a reasonable doubt. *Powers v. State*, 883 So. 2d 20, 2003 Miss. LEXIS 850 (Miss. 2003), cert. denied, 543 U.S. 1155, 125 S. Ct. 1297, 161 L. Ed. 2d 121, 2005 U.S. LEXIS 1584 (U.S. 2005).

Sentencing court in bifurcated capital murder prosecution properly allowed jury to consider, as aggravating circumstance, whether capital offense was committed while defendant was engaged in commission of armed robbery, notwithstanding fact that robbery was also element of capital murder for which defendant was being prosecuted. *Brown v. State*, 682 So. 2d 340, 1996 Miss. LEXIS 427 (Miss. 1996), cert. denied, 520 U.S. 1127, 117 S. Ct. 1271, 137 L. Ed. 2d 348, 1997 U.S. LEXIS 1821 (U.S. 1997).

Sentencing court in bifurcated capital murder prosecution properly allowed jury to consider, as aggravating circumstance, whether defendant shot victim in order to avoid or prevent lawful arrest; record was devoid of any reference showing that defendant was disguised when he entered or left store at which shooting took place, and fellow prison inmate claimed that defendant told him that he shot victim because he believed she was stalling and seemed like she was reaching for something. *Brown v. State*, 682 So. 2d 340, 1996 Miss. LEXIS 427 (Miss. 1996), cert. denied, 520 U.S. 1127, 117 S. Ct. 1271, 137 L. Ed. 2d 348, 1997 U.S. LEXIS 1821 (U.S. 1997).

If there is evidence from which it may be reasonably inferred that substantial reason for killing was to conceal identity of killer or killers or to "cover their tracks" so as to avoid apprehension and eventual arrest by authorities, then it is proper for court to allow jury to consider aggravating circumstance of avoiding or preventing lawful arrest. *Brown v. State*, 682 So. 2d 340, 1996 Miss. LEXIS 427 (Miss. 1996),

cert. denied, 520 U.S. 1127, 117 S. Ct. 1271, 137 L. Ed. 2d 348, 1997 U.S. LEXIS 1821 (U.S. 1997).

Evidence pertaining to when defendant in capital murder case would be released on parole if sentenced to life in prison is merely speculative and should not be admitted for consideration at sentencing hearing. *Blue v. State*, 674 So. 2d 1184, 1996 Miss. LEXIS 304 (Miss.), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517, 1996 U.S. LEXIS 7523 (U.S. 1996).

Where defendant was charged with two acts of sexual battery, one of which constituted the underlying felony to the capital murder and the other of which served as the basis of separate sexual battery conviction, the latter aggravated the crime and narrowed the class of defendants eligible for the death penalty substantially. *Blue v. State*, 674 So. 2d 1184, 1996 Miss. LEXIS 304 (Miss.), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517, 1996 U.S. LEXIS 7523 (U.S. 1996).

Robbery, by definition, is committed for pecuniary gain and thus robbery and pecuniary gain cannot be used as two separate aggravating circumstances in capital murder prosecution. *Blue v. State*, 674 So. 2d 1184, 1996 Miss. LEXIS 304 (Miss.), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517, 1996 U.S. LEXIS 7523 (U.S. 1996).

Individual can have prior conviction involving use of threat or violence and yet not be under sentence of imprisonment, and individual can be under sentence of imprisonment and yet not have prior conviction involving use of threat or violence, so that both aggravating circumstances may be used, even when they are based on the same offense. *Blue v. State*, 674 So. 2d 1184, 1996 Miss. LEXIS 304 (Miss.), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517, 1996 U.S. LEXIS 7523 (U.S. 1996).

Indictment charging defendant with aggravated assault was best evidence to prove that defendant had been convicted of felony involving use of threat or violence, provided that it was properly certified. *Blue v. State*, 674 So. 2d 1184, 1996 Miss. LEXIS 304 (Miss.), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517, 1996 U.S. LEXIS 7523 (U.S. 1996).

Indictment which bore signature of county clerk who attested to its origins was properly certified and thus admissible in capital murder prosecution to prove that defendant had prior conviction for felony involving use of threat or violence. *Blue v. State*, 674 So. 2d 1184, 1996 Miss. LEXIS 304 (Miss.), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517, 1996 U.S. LEXIS 7523 (U.S. 1996).

Indictment which led to defendant's conviction for aggravated assault was relevant in capital murder prosecution to prove that defendant had prior conviction for felony involving use of threat or violence and to prove that defendant was under sentence of imprisonment at the time of the murder with which he was charged. *Blue v. State*, 674 So. 2d 1184, 1996 Miss. LEXIS 304 (Miss.), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517, 1996 U.S. LEXIS 7523 (U.S. 1996).

Prosecution had no burden to bear with respect to proof that aggravated assault was a crime of violence and could be considered as an aggravating circumstance as such in capital murder prosecution, as aggravated assault by its very definition signifies violence. *Blue v. State*, 674 So. 2d 1184, 1996 Miss. LEXIS 304 (Miss.), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517, 1996 U.S. LEXIS 7523 (U.S. 1996).

Mental retardation is not a bar to execution of one convicted of capital murder, but is only a mitigating circumstance. *Blue v. State*, 674 So. 2d 1184, 1996 Miss. LEXIS 304 (Miss.), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517, 1996 U.S. LEXIS 7523 (U.S. 1996).

Finding of aggravating circumstance in death penalty case that defendant was under sentence of imprisonment at time of murder was supported by evidence provided in guilt phase that defendant was on parole for life sentence. *Taylor v. State*, 672 So. 2d 1246, 1996 Miss. LEXIS 193 (Miss.), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379, 1996 U.S. LEXIS 7020 (U.S. 1996).

Finding of aggravating factor in death penalty case that defendant had been previously convicted of felony involving use or threat of violence was supported by evi-

dence that defendant had previously been convicted of murder and aggravated assault, even though aggravated assault conviction had occurred after murder for which defendant was being sentenced to death. *Taylor v. State*, 672 So. 2d 1246, 1996 Miss. LEXIS 193 (Miss.), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379, 1996 U.S. LEXIS 7020 (U.S. 1996).

Jury was not entitled to consider aggravating factor in death penalty case that defendant had committed murder while engaged in commission of kidnapping or flight after kidnapping; victim's body was found in car with windows open approximately 2 months after her disappearance, which did not provide sufficient evidence beyond a reasonable doubt that defendant had kidnapped victim. *Taylor v. State*, 672 So. 2d 1246, 1996 Miss. LEXIS 193 (Miss.), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379, 1996 U.S. LEXIS 7020 (U.S. 1996).

Jury was not entitled to consider aggravating factor in death penalty case that defendant had committed murder for purpose of avoiding or preventing lawful arrest; there was no evidence that desire to avoid apprehension and arrest was a substantial reason for victim's murder. *Taylor v. State*, 672 So. 2d 1246, 1996 Miss. LEXIS 193 (Miss.), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379, 1996 U.S. LEXIS 7020 (U.S. 1996).

Instruction in death penalty case which included all mitigating factors contained in statute except "age of the defendant" was proper; "age of the defendant" factor would fall under "catch-all" mitigating circumstance. *Taylor v. State*, 672 So. 2d 1246, 1996 Miss. LEXIS 193 (Miss.), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379, 1996 U.S. LEXIS 7020 (U.S. 1996).

Capital murder aggravating circumstance, that defendant knowingly created a "great risk of death to many persons," applied to defendant who stabbed 4 children to death and inflicted life-threatening stab wounds on one adult and another child. *Jackson v. State*, 672 So. 2d 468, 1996 Miss. LEXIS 718 (Miss. 1996).

Capital murder aggravating factor for when defendant knowingly creates great

risk of death to many persons applies when there are multiple victims; aggravating factor is not limited to instances when there is a great risk to those other than intended victims. *Jackson v. State*, 672 So. 2d 468, 1996 Miss. LEXIS 718 (Miss. 1996).

Considering underlying crime of felonious abuse as aggravating factor during sentencing of capital murder defendant did not fail to narrow class of defendants eligible for death penalty, in violation of Eighth Amendment; fact that aggravating circumstance duplicates element of crime does not make death sentence constitutionally infirm. *Jackson v. State*, 672 So. 2d 468, 1996 Miss. LEXIS 718 (Miss. 1996).

Certified copy of indictment and judgment and testimony of police officers present at incident justified use of capital murder defendant's prior violent felony as aggravating circumstance, even if gun used during incident was inoperable and separate kidnapping charges were dropped. *Jackson v. State*, 672 So. 2d 468, 1996 Miss. LEXIS 718 (Miss. 1996).

Prosecution in capital murder case could establish aggravating factor of avoiding arrest, by introducing testimony and photograph of police crime expert showing that body of victim had been burned in hands and pubic area, in order to preclude identification of victim by fingerprints or of perpetrator through pubic hair combings, even though defendant claimed that burning taking place after murder had been completed did not show that murder was undertaken to cover up earlier crimes including sexual assault; "avoiding arrest" aggravator extended also to avoiding arrest for killing. *Walker v. State*, 671 So. 2d 581, 1995 Miss. LEXIS 494 (Miss. 1995), cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406, 1996 U.S. LEXIS 7236 (U.S. 1996).

Evidence supported avoidance of arrest as aggravating factor in penalty phase of capital murder case; defendant began asking victim if she wanted to live or die from moment that she, defendant and accomplice arrived at lake, he expressly informed accomplice they were going to have to kill victim, after victim was dead defendant doused body with gasoline and

burned victim, with special emphasis on hands and pubic area so as to preclude identification through fingerprints, fiber and pubic hair comparisons. *Walker v. State*, 671 So. 2d 581, 1995 Miss. LEXIS 494 (Miss. 1995), cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406, 1996 U.S. LEXIS 7236 (U.S. 1996).

Prosecutor did not make improper statement of law, in closing argument of penalty phase in capital murder case, that matters in mitigation carry less weight than matters of aggravation; remarks were supported by law which holds that aggravating factors must be found beyond reasonable doubt, while mitigating factors may simply be found. *Walker v. State*, 671 So. 2d 581, 1995 Miss. LEXIS 494 (Miss. 1995), cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406, 1996 U.S. LEXIS 7236 (U.S. 1996).

"Pen packs" detailing defendant's prior offense were relevant during penalty phase of capital murder trial to prove 2 aggravating circumstances, that defendant was previously convicted of another capital offense or felony involving use or threat of force and that defendant committed capital offense while under sentence of imprisonment, where such evidence was not offered to impeach defendant or any of his witnesses. *Russell v. State*, 670 So. 2d 816, 1995 Miss. LEXIS 617 (Miss. 1995), cert. denied, 519 U.S. 982, 117 S. Ct. 436, 136 L. Ed. 2d 333, 1996 U.S. LEXIS 6884 (U.S. 1996), cert. dismissed, 520 U.S. 1249, 117 S. Ct. 2406, 137 L. Ed. 2d 1064, 1997 U.S. LEXIS 3537 (U.S. 1997).

Indictment contained in defendant's "pen pack" was relevant and admissible during penalty phase of capital murder case to show that defendant's previous escape was crime of violence for purposes of statutory aggravating factor. *Russell v. State*, 670 So. 2d 816, 1995 Miss. LEXIS 617 (Miss. 1995), cert. denied, 519 U.S. 982, 117 S. Ct. 436, 136 L. Ed. 2d 333, 1996 U.S. LEXIS 6884 (U.S. 1996), cert. dismissed, 520 U.S. 1249, 117 S. Ct. 2406, 137 L. Ed. 2d 1064, 1997 U.S. LEXIS 3537 (U.S. 1997).

State has right and requirement, in death penalty resentencing cases, to put on evidence impacting Enmund factors,

relating to circumstances surrounding victim's death. *Russell v. State*, 670 So. 2d 816, 1995 Miss. LEXIS 617 (Miss. 1995), cert. denied, 519 U.S. 982, 117 S. Ct. 436, 136 L. Ed. 2d 333, 1996 U.S. LEXIS 6884 (U.S. 1996), cert. dismissed, 520 U.S. 1249, 117 S. Ct. 2406, 137 L. Ed. 2d 1064, 1997 U.S. LEXIS 3537 (U.S. 1997).

State, in its case in chief during penalty phase of capital murder case, is permitted to introduce evidence relevant to one or more of 8 statutory aggravating circumstances along with evidence from guilt phase relevant to Enmund factors, regarding circumstances surrounding victim's death. *Russell v. State*, 670 So. 2d 816, 1995 Miss. LEXIS 617 (Miss. 1995), cert. denied, 519 U.S. 982, 117 S. Ct. 436, 136 L. Ed. 2d 333, 1996 U.S. LEXIS 6884 (U.S. 1996), cert. dismissed, 520 U.S. 1249, 117 S. Ct. 2406, 137 L. Ed. 2d 1064, 1997 U.S. LEXIS 3537 (U.S. 1997).

Evidence of detailed circumstances of underlying murder was admissible at resentencing in capital murder case to support Enmund factors, concerning whether defendant actually killed, attempted to kill, intended that killing take place and contemplated that lethal force would be employed. *Russell v. State*, 670 So. 2d 816, 1995 Miss. LEXIS 617 (Miss. 1995), cert. denied, 519 U.S. 982, 117 S. Ct. 436, 136 L. Ed. 2d 333, 1996 U.S. LEXIS 6884 (U.S. 1996), cert. dismissed, 520 U.S. 1249, 117 S. Ct. 2406, 137 L. Ed. 2d 1064, 1997 U.S. LEXIS 3537 (U.S. 1997).

Jury's finding that defendant "intended that a killing take place," which allowed imposition of death penalty, was supported by evidence that defendant gave guns to 2 accomplices, even though accomplices testified that while planning robbery, they had discussed that victim should not be hurt. *Ballenger v. State*, 667 So. 2d 1242, 1995 Miss. LEXIS 451 (Miss. 1995), cert. denied, 518 U.S. 1025, 116 S. Ct. 2565, 135 L. Ed. 2d 1082, 1996 U.S. LEXIS 4177 (U.S. 1996).

Defendant was not entitled to instruction on mitigating circumstance in death penalty phase that she would be 70 years old before she would have been eligible for parole; defendant's age at time she would be eligible for parole, if given life sentence, was speculative. *Ballenger v. State*, 667

So. 2d 1242, 1995 Miss. LEXIS 451 (Miss. 1995), cert. denied, 518 U.S. 1025, 116 S. Ct. 2565, 135 L. Ed. 2d 1082, 1996 U.S. LEXIS 4177 (U.S. 1996).

Defendant was not entitled to have listed as mitigating circumstance the fact that none of her 3 accomplices had received death penalty; jury was aware that none of her accomplices had received death penalty, and trial court informed jury that it should not limit its consideration to those mitigating circumstances listed. *Ballenger v. State*, 667 So. 2d 1242, 1995 Miss. LEXIS 451 (Miss. 1995), cert. denied, 518 U.S. 1025, 116 S. Ct. 2565, 135 L. Ed. 2d 1082, 1996 U.S. LEXIS 4177 (U.S. 1996).

Submission to jury of “especially heinous, atrocious or cruel” aggravating factor in capital murder prosecution without limiting instruction violated Eighth Amendment. *Cole v. State*, 666 So. 2d 767, 1995 Miss. LEXIS 595 (Miss. 1995).

In the penalty phase of a capital murder prosecution, the prosecutor’s comment that “we have never heard one single witness say he ever felt sorry for what he did” was not impermissible, as it was simply an argument that none of the defendant’s mitigation witnesses indicated that the defendant was sorry for killing the victim, and was not an argument for “lack of remorse” as an aggravating factor. *Davis v. State*, 660 So. 2d 1228, 1995 Miss. LEXIS 287 (Miss. 1995), cert. denied, 517 U.S. 1192, 116 S. Ct. 1684, 134 L. Ed. 2d 785, 1996 U.S. LEXIS 3101 (U.S. 1996).

In the sentencing phase of a capital murder prosecution, there was sufficient evidence to warrant an instruction on the “especially heinous, atrocious or cruel” aggravating circumstance where the victims’ bodies had contusions, one victim’s finger had been cut off after he died, and the victims suffered painful deaths. *Carr v. State*, 655 So. 2d 824, 1995 Miss. LEXIS 56 (Miss. 1995), cert. denied, 516 U.S. 1077, 116 S. Ct. 783, 133 L. Ed. 2d 734, 1996 U.S. LEXIS 547 (U.S. 1996).

In the sentencing phase of a capital murder prosecution, there was sufficient evidence to warrant an instruction on the “avoiding lawful arrest” aggravating circumstance where all 4 of the victims had been shot, 3 of them had been bound, a

truck belonging to one of the victims was found loaded with his possessions, the victims’ home was burned to the ground as a result of an incendiary device, and there was testimony that the defendant’s accomplice said they had to burn down the house to destroy the evidence. *Carr v. State*, 655 So. 2d 824, 1995 Miss. LEXIS 56 (Miss. 1995), cert. denied, 516 U.S. 1077, 116 S. Ct. 783, 133 L. Ed. 2d 734, 1996 U.S. LEXIS 547 (U.S. 1996).

A trial judge in a murder prosecution was well within his discretion in sentencing the 14-year-old defendant to life imprisonment for aiding and abetting in the murder, in spite of the defendant’s argument that the judge abused his discretion by not stating in the record his reasons for declining to utilize possible alternative criminal sanctions for juvenile offenders provided for in § 43-21-159 of the Youth Court Act, where the judge stated that he was very much aware of the requirements in *May v. State* (Miss. 1981) 398 So. 2d 1331 because of the many cases he had handled dealing with teenagers charged with capital offenses; although minimal, the trial court adequately addressed the reasons for not utilizing the alternatives afforded. *Swinford v. State*, 653 So. 2d 912, 1995 Miss. LEXIS 90 (Miss. 1995).

A sentence of death was not so disproportionate as to require reversal, in spite of the defendant’s argument that his mental condition and emotional history, including a diagnosis of schizophrenia, his pre-trial suicidal “gesture,” and his “limited intelligence,” mitigated against a sentence of death where the record did not indicate that the defendant was ever diagnosed as suffering from paranoid schizophrenia, a report from a mental hospital, at which the defendant was examined prior to trial, stated that the defendant exhibited few, if any, symptoms of schizophrenia and that he knew the difference between right and wrong in relation to his actions, and a community health center placed the defendant’s level of intelligence on the low side of average. *Conner v. State*, 632 So. 2d 1239, 1993 Miss. LEXIS 541 (Miss. 1993), cert. denied, 513 U.S. 927, 115 S. Ct. 314, 130 L. Ed. 2d 276, 1994 U.S. LEXIS 7088 (U.S. 1994), overruled, *Weatherspoon v. State*,

732 So. 2d 158, 1999 Miss. LEXIS 4 (Miss. 1999).

In the sentencing phase of a capital murder prosecution, the trial court did not err by excluding mitigating evidence in the form of testimony from the defendant's sister regarding incidents when the defendant "heard voices" where a proper foundation was not laid in that the trial court had no reason to believe that the witness had any independent knowledge of the events aside from her brother's telling her about them, the record was devoid of any medical testimony indicating that the defendant was schizophrenic at the time of the murder, and no medical experts testified on the defendant's behalf. *Conner v. State*, 632 So. 2d 1239, 1993 Miss. LEXIS 541 (Miss. 1993), cert. denied, 513 U.S. 927, 115 S. Ct. 314, 130 L. Ed. 2d 276, 1994 U.S. LEXIS 7088 (U.S. 1994), overruled, *Weatherspoon v. State*, 732 So. 2d 158, 1999 Miss. LEXIS 4 (Miss. 1999).

In the sentencing phase of a capital murder prosecution, the prosecutor's comments during closing argument portraying the victim as a "grandmother" who left home "wearing her mother's day present ring on her finger," and asking the jury not to forget the victim "because she deserves justice" did not constitute an impermissible argument to sentence the defendant to death out of vengeance and sympathy for the victim; the introduction of evidence concerning the background and character of the victim and the impact of the crime on the victim's family is not prohibited, as such evidence may be relevant to the jury's decision as to whether the death penalty should be imposed. *Conner v. State*, 632 So. 2d 1239, 1993 Miss. LEXIS 541 (Miss. 1993), cert. denied, 513 U.S. 927, 115 S. Ct. 314, 130 L. Ed. 2d 276, 1994 U.S. LEXIS 7088 (U.S. 1994), overruled, *Weatherspoon v. State*, 732 So. 2d 158, 1999 Miss. LEXIS 4 (Miss. 1999).

In the sentencing phase of a capital murder prosecution, the trial court did not err in permitting evidence that the victim was 26 years old, had a 7-year-old son, had been married for 4 years, and was very shy and did not like to wear dresses because they exposed her legs where the evidence was proper and necessary to the

"development of the case and true characteristics of the victim" and could not serve in any way to incite the jury. *Jenkins v. State*, 607 So. 2d 1171, 1992 Miss. LEXIS 576 (Miss. 1992).

A trial court's failure to hold a capital murder defendant's habitual offender status hearing prior to the sentencing phase of the trial did not warrant vacation of the defendant's life sentence, which was to be served without eligibility for parole by virtue of the defendant's habitual offender status, and remand for a new jury imposition of a life sentence with the possibility of parole, since the jury did not impose the death sentence on the defendant but instead sentenced him to life without parole. *Gray v. State*, 605 So. 2d 791, 1992 Miss. LEXIS 481 (Miss. 1992).

A trial court erred when it allowed the prosecutor to repeatedly explore the defendant's propensity for future crimes during the sentencing phase of a capital murder prosecution, since propensity to commit future crimes is not one of the 8 aggravating circumstances authorized by § 99-19-101(5). *Balfour v. State*, 598 So. 2d 731, 1992 Miss. LEXIS 131 (Miss. 1992).

In the sentencing phase of a capital murder prosecution, the trial court did not err in excluding testimony of the defendant's family as to the impact of a death sentence on them, testimony of the family of a man who had been convicted of capital murder and executed as to the impact of his death sentence and execution on them, and testimony of the defendant's attorney about events surrounding the execution of that man, whom he had represented on appeal; such testimony is not relevant to the consideration of whether the death sentence should be imposed. *Turner v. State*, 573 So. 2d 657, 1990 Miss. LEXIS 792 (Miss. 1990), cert. denied, 500 U.S. 910, 111 S. Ct. 1695, 114 L. Ed. 2d 89, 1991 U.S. LEXIS 2522 (U.S. 1991).

In a capital murder trial, the habitual offender status phase must be conducted prior to the sentencing phase. At the sentencing phase, the jury shall be entitled to know by instruction whether the defendant is eligible for parole. *Turner v. State*, 573 So. 2d 657, 1990 Miss. LEXIS 792 (Miss. 1990), cert. denied, 500 U.S. 910,

111 S. Ct. 1695, 114 L. Ed. 2d 89, 1991 U.S. LEXIS 2522 (U.S. 1991).

The new rule announced in *Willie v. State* (Miss. 1991) 585 So. 2d 660—that a jury may not “doubly weigh the commission of the underlying felony and the motive behind the underlying felony as separate aggravators” when determining the sentence to be imposed in a capital murder case—is to be applied prospectively from July 24, 1991; thus, the new rule did not apply to a defendant who was tried, convicted and sentenced to death before July 24, 1991. *Davis v. State*, 660 So. 2d 1228, 1995 Miss. LEXIS 287 (Miss. 1995), cert. denied, 517 U.S. 1192, 116 S. Ct. 1684, 134 L. Ed. 2d 785, 1996 U.S. LEXIS 3101 (U.S. 1996).

Testimony during the sentencing phase of a capital murder prosecution as to the victim’s housekeeping habits did not constitute inadmissible victim impact statements where the evidence was offered to support the State’s proof of an attempted robbery inasmuch as the victim was found in her home which was in a state of disarray. *Shell v. State*, 554 So. 2d 887, 1989 Miss. LEXIS 492 (Miss. 1989), rev’d, in part, 498 U.S. 1, 111 S. Ct. 313, 112 L. Ed. 2d 1, 1990 U.S. LEXIS 5501 (U.S. 1990).

In the sentencing phase of a capital murder prosecution, the trial court did not abuse its discretion in excluding the prison record of the defendant’s accomplice who allegedly dominated the defendant and forced him to commit the murders since the prison record did nothing to focus on the defendant’s character or susceptibility to domination or on the circumstances of the crime. *Minnick v. State*, 551 So. 2d 77, 1988 Miss. LEXIS 612 (Miss. 1988), rev’d, 498 U.S. 146, 111 S. Ct. 486, 112 L. Ed. 2d 489, 1990 U.S. LEXIS 6118 (U.S. 1990), overruled, *Willie v. State*, 585 So. 2d 660, 1991 Miss. LEXIS 454 (Miss. 1991).

During the sentencing phase of a murder trial, evidence that the defendant had declared bankruptcy and was separated from his wife was admissible to rebut the defendant’s testimony that he had a steady job and loved his family. *Cole v. State*, 525 So. 2d 365, 1987 Miss. LEXIS 2655 (Miss. 1987), cert. denied, 488 U.S.

934, 109 S. Ct. 330, 102 L. Ed. 2d 348, 1988 U.S. LEXIS 4775 (U.S. 1988).

Although the facts of a homicide have been proved by direct evidence and the judge deems the fact of guilt clearly established and the plea is insanity, nevertheless under this section the defendant may offer evidence of his good character for peace. *Maston v. State*, 83 Miss. 647, 36 So. 70, 1903 Miss. LEXIS 86 (Miss. 1903).

5. Plea of guilty.

Defendant’s unsupported allegation that his guilty plea to the murder of his girlfriend was involuntary and the result of coercion by his attorney could properly be rejected by the trial court in considering defendant’s motion for postconviction relief without the holding of an evidentiary hearing as defendant’s claim was not supported by the record; the trial court could properly impose a life sentence without referring the matter to a jury. *Riley v. State*, 848 So. 2d 888, 2003 Miss. App. LEXIS 196 (Miss. Ct. App. 2003).

A trial court erred in allowing a defendant to plead guilty to both capital murder and the underlying felony of burglary which elevated the murder to capital murder; sentencing the defendant separately for both felony murder and the underlying felony violated his right against double jeopardy. *Fuselier v. State*, 654 So. 2d 519, 1995 Miss. LEXIS 222 (Miss. 1995).

6. Instructions.

Jury instruction that required the jury to find that defendant killed the victim unnecessarily while the victim was committing an unlawful act followed the language of Miss. Code Ann. § 97-3-31 and should have followed the language of Miss. Code Ann. § 97-3-29 more closely in order to avoid any confusion with § 97-3-29; however, since both statutes applied to the facts, the instructions fairly announced the applicable rules of law. *Newell v. State*, 175 So. 3d 1260, 2015 Miss. LEXIS 505 (Miss. 2015).

Jury instruction on the sentence of life imprisonment without parole for capital murder did not violate the prohibition against ex post facto laws even though the statute authorizing the punishment, Miss. Code Ann. § 97-3-21, was not in

effect at the time of the crime. *Swann v. State*, 806 So. 2d 1111, 2002 Miss. LEXIS 27 (Miss. 2002).

Instruction at penalty phase of capital murder prosecution that mitigating circumstances must outweigh aggravating circumstances does not shift state's burden of proving the aggravating circumstances. *Blue v. State*, 674 So. 2d 1184, 1996 Miss. LEXIS 304 (Miss.), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517, 1996 U.S. LEXIS 7523 (U.S. 1996).

It was proper to instruct jurors at penalty phase of capital murder prosecution that they should disregard sympathy in reaching their sentencing decision. *Blue v. State*, 674 So. 2d 1184, 1996 Miss. LEXIS 304 (Miss.), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517, 1996 U.S. LEXIS 7523 (U.S. 1996).

Instruction which prohibits, expressly or impliedly, consideration of mitigating circumstances not found unanimously is flawed and requires reversal. *Blue v. State*, 674 So. 2d 1184, 1996 Miss. LEXIS 304 (Miss.), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517, 1996 U.S. LEXIS 7523 (U.S. 1996).

Court was not required to specifically instruct the jury considering death penalty that they did not have to find mitigating circumstances unanimously in order for particular juror to consider them. *Blue v. State*, 674 So. 2d 1184, 1996 Miss. LEXIS 304 (Miss.), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517, 1996 U.S. LEXIS 7523 (U.S. 1996).

Jury considering death penalty can impliedly be charged with knowledge that unanimous finding of mitigating circumstances is not required where jury has been instructed that no degree of consensus on mitigating circumstances is required. *Blue v. State*, 674 So. 2d 1184, 1996 Miss. LEXIS 304 (Miss.), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517, 1996 U.S. LEXIS 7523 (U.S. 1996).

Courts are encouraged to instruct jurors considering death penalty that, even if all 11 other jurors find that a certain mitigating circumstance does not exist, juror who believes that it does exist must find that mitigating circumstance and weigh it in

further deliberations. *Blue v. State*, 674 So. 2d 1184, 1996 Miss. LEXIS 304 (Miss.), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517, 1996 U.S. LEXIS 7523 (U.S. 1996).

Instruction at penalty phase of capital murder prosecution did not provide for unanimous decision for death and unanimous decision for life but, rather, for unanimous decision for death and decision for life; instruction did not require that jury unanimously find for life sentence. *Blue v. State*, 674 So. 2d 1184, 1996 Miss. LEXIS 304 (Miss.), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517, 1996 U.S. LEXIS 7523 (U.S. 1996).

Trial judge's instruction that jurors should return to jury room to clarify ambiguity in jury's findings that supported sentence of death did not taint verdict; jury had death penalty instruction with it, and court directed jury to re-form verdict "if it is the decision of the jury." 74 A.L.R.5th 1.

Whimsical or residual doubt instructions are not required as a mitigating circumstance in death penalty cases. *Taylor v. State*, 672 So. 2d 1246, 1996 Miss. LEXIS 193 (Miss.), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379, 1996 U.S. LEXIS 7020 (U.S. 1996).

State has no burden to rebut mitigating evidence and, thus, capital murder defendant was not entitled to requested sentencing instruction directing jury that credible evidence of mitigating factors may be considered when weighing mitigating against aggravating circumstances unless state rebuts evidence beyond reasonable doubt. *Jackson v. State*, 672 So. 2d 468, 1996 Miss. LEXIS 718 (Miss. 1996).

"Catch-all" mitigating factors in capital murder sentencing proceeding encompasses all nonstatutory mitigating circumstances, including defendant's remorse, and, thus, defendant was not entitled to separate mitigating instruction that he had demonstrated extreme remorse for crimes committed. *Jackson v. State*, 672 So. 2d 468, 1996 Miss. LEXIS 718 (Miss. 1996).

Method of execution was of no concern to jury and, thus, capital murder defendant was not entitled to sentencing phase instruction informing jurors that defen-

dant would be executed by lethal injection if sentenced to death. *Jackson v. State*, 672 So. 2d 468, 1996 Miss. LEXIS 718 (Miss. 1996).

Capital murder defendant was not entitled to requested sentencing phase jury instructions on use of mercy, pity or sympathy; trial court has discretion to give mercy instructions. *Jackson v. State*, 672 So. 2d 468, 1996 Miss. LEXIS 718 (Miss. 1996).

Capital murder defendant was not entitled to requested sentencing phase instructions directing jury that death sentence should not be selected if any juror has doubt about proper punishment and that jury was not required to sentence him to death; requests were for mercy instructions, which trial court has discretion to give. *Jackson v. State*, 672 So. 2d 468, 1996 Miss. LEXIS 718 (Miss. 1996).

Court could strike for cause prospective juror in capital murder case who repeatedly stated that she was disposed to return life sentence, rather than death sentence, and did not know if she could base her decision on evidence and law. *Walker v. State*, 671 So. 2d 581, 1995 Miss. LEXIS 494 (Miss. 1995), cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406, 1996 U.S. LEXIS 7236 (U.S. 1996).

Instruction that in deciding whether to impose death penalty, jury was "not to be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling," was proper. *Ballenger v. State*, 667 So. 2d 1242, 1995 Miss. LEXIS 451 (Miss. 1995), cert. denied, 518 U.S. 1025, 116 S. Ct. 2565, 135 L. Ed. 2d 1082, 1996 U.S. LEXIS 4177 (U.S. 1996).

Defendant was not entitled to instruction at death penalty phase of trial that jury had to consider sympathy and mercy on her behalf; several instructions had directed jury that it was required to consider mitigating circumstances. *Ballenger v. State*, 667 So. 2d 1242, 1995 Miss. LEXIS 451 (Miss. 1995), cert. denied, 518 U.S. 1025, 116 S. Ct. 2565, 135 L. Ed. 2d 1082, 1996 U.S. LEXIS 4177 (U.S. 1996).

Defendant is not entitled to mercy instruction at death penalty phase of trial. *Ballenger v. State*, 667 So. 2d 1242, 1995 Miss. LEXIS 451 (Miss. 1995), cert. de-

nied, 518 U.S. 1025, 116 S. Ct. 2565, 135 L. Ed. 2d 1082, 1996 U.S. LEXIS 4177 (U.S. 1996).

Defendant was not entitled to instruction that life sentence rather than death penalty was presumed to be appropriate sentence unless presumption was overcome. *Ballenger v. State*, 667 So. 2d 1242, 1995 Miss. LEXIS 451 (Miss. 1995), cert. denied, 518 U.S. 1025, 116 S. Ct. 2565, 135 L. Ed. 2d 1082, 1996 U.S. LEXIS 4177 (U.S. 1996).

Instruction that for jury to impose death penalty, it had to find that mitigating circumstances did not outweigh aggravating circumstances, did not improperly allow jury to impose death penalty based solely on presence of aggravating circumstances. *Ballenger v. State*, 667 So. 2d 1242, 1995 Miss. LEXIS 451 (Miss. 1995), cert. denied, 518 U.S. 1025, 116 S. Ct. 2565, 135 L. Ed. 2d 1082, 1996 U.S. LEXIS 4177 (U.S. 1996).

Failure to include a jury foreman signature line under the life imprisonment option in a sentencing verdict instruction in a death penalty case will no longer be tolerated by the Supreme Court; this facial defect may be cured simply by reversing the order of the options in the sentencing instruction so that the life option is listed first. *Colosimo v. Senatobia Motor Inn*, 662 So. 2d 552, 1995 Miss. LEXIS 479 (Miss. 1995).

In the sentencing phase of a capital murder prosecution, the defendant was not entitled to an instruction permitting imposition of the death penalty only if the aggravating circumstances outweighed the mitigating circumstances. *Davis v. State*, 660 So. 2d 1228, 1995 Miss. LEXIS 287 (Miss. 1995), cert. denied, 517 U.S. 1192, 116 S. Ct. 1684, 134 L. Ed. 2d 785, 1996 U.S. LEXIS 3101 (U.S. 1996).

In the sentencing phase of a capital murder prosecution, a limiting instruction for the "especially heinous, atrocious or cruel" aggravating circumstance was proper where it comported with the requisite narrowing language found in *Coleman v. State* (Miss. 1979) 378 so2d 640. *Carr v. State*, 655 So. 2d 824, 1995 Miss. LEXIS 56 (Miss. 1995), cert. denied, 516 U.S. 1077, 116 S. Ct. 783, 133 L. Ed. 2d 734, 1996 U.S. LEXIS 547 (U.S. 1996).

In the sentencing phase of a capital murder prosecution, the trial court did not unconstitutionally limit consideration of emotional disturbance mitigation evidence to "extreme" emotional disturbance by submitting an instruction on "extreme mental or emotional disturbance" where the instructions on mitigating factors, when read as a whole, provided ample opportunity for the jury to give consideration to any emotional disturbance the defendant may have suffered. *Carr v. State*, 655 So. 2d 824, 1995 Miss. LEXIS 56 (Miss. 1995), cert. denied, 516 U.S. 1077, 116 S. Ct. 783, 133 L. Ed. 2d 734, 1996 U.S. LEXIS 547 (U.S. 1996).

In the sentencing phase of a capital murder prosecution, the trial court did not err in refusing to give peremptory instructions requiring the jury to find 5 mitigating factors which the defendant claimed were undisputed, since the existence of mitigating factors should be left to the jury's consideration; while it is constitutionally required that a jury not be precluded from considering any mitigating factor, a jury is not required to find such factors. *Carr v. State*, 655 So. 2d 824, 1995 Miss. LEXIS 56 (Miss. 1995), cert. denied, 516 U.S. 1077, 116 S. Ct. 783, 133 L. Ed. 2d 734, 1996 U.S. LEXIS 547 (U.S. 1996).

In the sentencing phase of a capital murder prosecution, the trial court did not err in instructing the jurors that they should consider the detailed circumstances of the offense when making their decision where the instructions as a whole properly instructed the jury as to the framework within which it was to consider mitigating and aggravating circumstances. *Carr v. State*, 655 So. 2d 824, 1995 Miss. LEXIS 56 (Miss. 1995), cert. denied, 516 U.S. 1077, 116 S. Ct. 783, 133 L. Ed. 2d 734, 1996 U.S. LEXIS 547 (U.S. 1996).

A sentencing instruction in a capital murder prosecution properly defined the "especially heinous, atrocious, or cruel" aggravating factor, and thus there was no violation of the Eighth Amendment to the United States Constitution, where the instruction defined the term "heinous, atrocious, or cruel" as "those situations where the actual commission of the capital felony was accomplished by such addi-

tional acts to set the crime apart from the norm of capital felonies by the consciencelessness or pitilessness of the crime which is unnecessarily tortuous to the victim." *Hansen v. State*, 649 So. 2d 1256, 1994 Miss. LEXIS 496 (Miss. 1994), cert. denied, 516 U.S. 986, 116 S. Ct. 513, 133 L. Ed. 2d 422, 1995 U.S. LEXIS 7828 (U.S. 1995).

A capital murder defendant is not entitled to a "mercy" instruction. *Foster v. State*, 639 So. 2d 1263, 1994 Miss. LEXIS 670 (Miss. 1994), cert. denied, 514 U.S. 1019, 115 S. Ct. 1365, 131 L. Ed. 2d 221, 1995 U.S. LEXIS 2061 (U.S. 1995).

In the sentencing phase of a capital murder prosecution, the trial court did not err in stating that "robbery is a crime of violence" when instructing the jury regarding the aggravating circumstance of a previous conviction for an offense involving the use or threat of violence, even though the robbery previously committed by the defendant involved an attempt to snatch cash from a cash register in a store and the record did not indicate that the defendant had a weapon on that occasion, since the very act of reaching across a store counter in the presence of a clerk and seizing money from a cash register intimates a willingness to resort to violence, and § 97-3-73 the statute under which the defendant pled guilty-defines the crime of robbery as the act of taking another's personal property "by violence to his person or by putting such person in fear of some immediate injury to his person." *Conner v. State*, 632 So. 2d 1239, 1993 Miss. LEXIS 541 (Miss. 1993), cert. denied, 513 U.S. 927, 115 S. Ct. 314, 130 L. Ed. 2d 276, 1994 U.S. LEXIS 7088 (U.S. 1994), overruled, *Weatherspoon v. State*, 732 So. 2d 158, 1999 Miss. LEXIS 4 (Miss. 1999).

In the sentencing phase of a capital murder prosecution, the definition of the "especially heinous, atrocious, or cruel" aggravating factor contained in the limiting instruction was constitutionally adequate where the instruction described an especially heinous, atrocious or cruel capital offense as a "conscienceless or pitiless crime which is unnecessarily torturous to the victim" and which can be shown by the fact that the defendant "utilized a method

of killing which caused serious mutilation where there is a dismemberment of the corpse, where the defendant inflicted physical or mental pain before death, where there was mental torture and aggravation before death or where a lingering or torturous death was suffered by the victim." *Conner v. State*, 632 So. 2d 1239, 1993 Miss. LEXIS 541 (Miss. 1993), cert. denied, 513 U.S. 927, 115 S. Ct. 314, 130 L. Ed. 2d 276, 1994 U.S. LEXIS 7088 (U.S. 1994), overruled, *Weatherspoon v. State*, 732 So. 2d 158, 1999 Miss. LEXIS 4 (Miss. 1999).

In the sentencing phase of a capital murder prosecution, a jury instruction which provided a step-by-step guide in arriving at a verdict did not impermissibly limit the consideration of mitigating evidence, in spite of the defendant's argument that the language of the instruction could have misled the jury to believe that a finding of mitigating circumstances must be unanimous because "everything else" required a unanimous finding, where the mitigating circumstances portion of the instruction did not contain the word "unanimous" or "unanimously," and the instruction would not have implied to any reasonably literate juror that he or she should await unanimity before considering a mitigating circumstance. *Conner v. State*, 632 So. 2d 1239, 1993 Miss. LEXIS 541 (Miss. 1993), cert. denied, 513 U.S. 927, 115 S. Ct. 314, 130 L. Ed. 2d 276, 1994 U.S. LEXIS 7088 (U.S. 1994), overruled, *Weatherspoon v. State*, 732 So. 2d 158, 1999 Miss. LEXIS 4 (Miss. 1999).

A trial court in a capital murder prosecution did not err in excusing a juror for cause where the juror stated that she opposed the death penalty and would not impose the death penalty under any circumstances. *Russell v. State*, 607 So. 2d 1107, 1992 Miss. LEXIS 474 (Miss. 1992).

A murder defendant was not denied a fair trial on the ground that the trial court refused to accept his challenges for cause to 3 potential jurors where the defendant used peremptory challenges to remove those jurors, since the loss of a peremptory challenge does not constitute a violation of the constitutional right to an impartial jury; so long as the jury that sits is impartial, the fact that the defendant had

to use peremptory challenges to achieve that result does not mean that the defendant was denied his or her constitutional rights. *Mettetal v. State*, 602 So. 2d 864, 1992 Miss. LEXIS 413 (Miss. 1992).

Personal opposition to capital punishment is not a constitutional impediment to juror service so long as the juror is able to set aside his or her personal belief and fairly consider all sentencing options under the law; it was therefore error for a trial court to refuse defense counsel an opportunity to further voir dire potential jurors who had expressed reluctance to vote for the death penalty. *Balfour v. State*, 598 So. 2d 731, 1992 Miss. LEXIS 131 (Miss. 1992).

Prospective jurors in a capital murder prosecution who had stated their opposition to the death penalty were improperly excluded without allowing the defense counsel the opportunity to question them. However, this error was harmless beyond a reasonable doubt where the answers the jurors gave were substantially clear, it was reasonably certain that the jurors were "Witherspoon-excludable," and it was unlikely that voir dire examination by the defense counsel would have rehabilitated the jurors sufficient to take them out of *Witherspoon*. *Hansen v. State*, 592 So. 2d 114, 1991 Miss. LEXIS 876 (Miss. 1991), cert. denied, 504 U.S. 921, 112 S. Ct. 1970, 118 L. Ed. 2d 570, 1992 U.S. LEXIS 2882 (U.S. 1992).

A defendant was denied his constitutional right to a fair trial by an impartial jury in the sentencing phase of a capital murder prosecution where, upon conclusion of the guilt phase but before the sentencing phase began, the jury prematurely deliberated and sent a note to the judge indicating their decision that the defendant should be sentenced to death. Rather than questioning the jurors in order to determine whether each of them could remain impartial during the sentencing phase, the judge merely instructed the jurors to "refrain from further deliberations," which was insufficient to insure that the defendant's right to a fair hearing was not prejudiced. *Holland v. State*, 587 So. 2d 848, 1991 Miss. LEXIS 648 (Miss. 1991).

That murder was committed (1) while engaged in crime of robbery and (2) for

pecuniary gain may not be given as two separate and independent aggravating circumstances, as they essentially comprise one. When life is at stake, a jury cannot be allowed to doubly weigh the commission of the underlying felony and the motive behind it as separate aggravators. *Willie v. State*, 585 So. 2d 660, 1991 Miss. LEXIS 454 (Miss. 1991).

A prospective juror may not be struck from the jury venire for cause simply because the juror voiced general objections to the death penalty or expressed conscientious or religious scruples against infliction of the death penalty. If a juror indicates that if he or she was convinced of the guilt of the defendant and the circumstances warranted a verdict of guilty, he or she could return a verdict of guilty although that verdict could result in the death penalty, then the juror may not be struck from the jury venire for cause, despite his or her objections and concerns. A prospective juror may be struck if the juror indicates that he or she cannot consider and decide the facts impartially or cannot conscientiously apply the law or the court's instructions. The juror need not expressly state that he or she absolutely refuses to consider the death penalty; an equivalent response made in any reasonable manner which indicates that the juror's position is firm will suffice. *Willie v. State*, 585 So. 2d 660, 1991 Miss. LEXIS 454 (Miss. 1991).

The denial of a challenge for cause is not error where it is not shown that the defense has exhausted peremptory challenges and is thus forced to accept the juror. Thus, a trial court's refusal to remove 6 jurors for cause did not deprive the defendant of a fair trial where only one of the 6 actually served on the jury and she was not challenged at a time when the defense had 12 peremptory challenges, the defense still had one challenge left as well as an alternate challenge at the completion of the selection process, and the defense counsel never raised any objection to the other 5 jurors. *Berry v. State*, 575 So. 2d 1, 1990 Miss. LEXIS 849 (Miss. 1990), cert. denied, 500 U.S. 928, 111 S. Ct. 2042, 114 L. Ed. 2d 126, 1991 U.S. LEXIS 2673 (U.S. 1991).

In a capital murder prosecution, the court's failure to excuse for cause a poten-

tial juror who stated during voir dire that in order for him not to impose the death penalty the defendant would have to prove beyond a reasonable doubt that he should not be executed, was not reversible error where defense counsel used his twelfth peremptory challenge to remove the juror, defense counsel had not exhausted his peremptory challenges and did not challenge anyone else for cause or ask for more peremptory challenges. *Minnick v. State*, 551 So. 2d 77, 1988 Miss. LEXIS 612 (Miss. 1988), rev'd, 498 U.S. 146, 111 S. Ct. 486, 112 L. Ed. 2d 489, 1990 U.S. LEXIS 6118 (U.S. 1990), overruled, *Willie v. State*, 585 So. 2d 660, 1991 Miss. LEXIS 454 (Miss. 1991).

"Death qualification" of jurors prior to the guilt phase in a capital murder prosecution did not deprive the defendant of a jury composed of a fair cross section of the community. *Minnick v. State*, 551 So. 2d 77, 1988 Miss. LEXIS 612 (Miss. 1988), rev'd, 498 U.S. 146, 111 S. Ct. 486, 112 L. Ed. 2d 489, 1990 U.S. LEXIS 6118 (U.S. 1990), overruled, *Willie v. State*, 585 So. 2d 660, 1991 Miss. LEXIS 454 (Miss. 1991).

A capital murder defendant's motion to reduce his sentence of death to a life sentence would be denied, and his alternative motion to vacate and set aside his death sentence and remand the cause for a new sentencing hearing would be granted, where the defendant sought relief based on the jury's consideration of the "especially heinous, atrocious or cruel" aggravating circumstance without further guidance concerning the meaning of this aggravating circumstance, and he contended that *Maynard v. Cartwright* (1988, US) 100 L. Ed. 2d 372, 108 S. Ct. 1853 and *Clemons v. Mississippi* (1990, US) 108 L. Ed. 2d 725, 110 S. Ct. 1441 were intervening decisions within the meaning of § 99-39-27(9). *Smith v. State*, 648 So. 2d 63, 1994 Miss. LEXIS 666 (Miss. 1994).

In a homicide prosecution, where the state was permitted to challenge for cause three jurors who expressed conscientious scruples against imposing the death penalty, an order sentencing the defendant to death must be reversed; upon reversal of the order, the trial judge must remand for a new trial as to punishment, or if the

district attorney and the trial judge should so agree, might sentence the defendant to life imprisonment without the intervention of the jury. *Rouse v. State*, 222 So. 2d 145, 1969 Miss. LEXIS 1523 (Miss. 1969).

Jurors in murder prosecution who have conscientious convictions against inflicting death penalty are not qualified. *Shimniok v. State*, 197 Miss. 179, 19 So. 2d 760, 1944 Miss. LEXIS 289 (Miss. 1944).

In qualifying the jurors in murder prosecution, it is the duty of the judge to inquire of the jurors, and the duty of the jurors to answer under oath, whether they have conscientious convictions against inflicting the death penalty. *Shimniok v. State*, 197 Miss. 179, 19 So. 2d 760, 1944 Miss. LEXIS 289 (Miss. 1944).

No set words or phrases are required or prescribed in propounding question to prospective jurors in murder prosecution whether they have conscientious convictions against inflicting death penalty. *Shimniok v. State*, 197 Miss. 179, 19 So. 2d 760, 1944 Miss. LEXIS 289 (Miss. 1944).

Use of word “hesitate,” by court in asking prospective jurors in course of voir dire examination in murder prosecution if any would hesitate to inflict capital punishment if the law authorized it and the evidence justified it, was improper, but did not constitute reversible error where court reworded the question upon defendants’ objection. *Shimniok v. State*, 197 Miss. 179, 19 So. 2d 760, 1944 Miss. LEXIS 289 (Miss. 1944).

In a prosecution for murder, the court properly excluded from the jury persons who stated that they had conscientious scruples against the infliction of capital punishment. *Borowitz v. State*, 115 Miss. 47, 75 So. 761, 1917 Miss. LEXIS 183 (Miss. 1917).

7. Jury.

Because this section explicitly vested sentencing authority with the trial court, defendant possessed no statutory right to a jury sentencing. *Bass v. State*, 273 So. 3d 768, 2018 Miss. App. LEXIS 631 (Miss. Ct. App. 2018), cert. denied, 272 So. 3d 130, 2019 Miss. LEXIS 238 (Miss. 2019).

8. —Qualifications.

Prosecutor’s question to potential jurors

asking whether they could conceive of imposing death penalty in murder case with no eyewitness was proper means of probing into their prejudices to get insight into their thoughts. *Taylor v. State*, 672 So. 2d 1246, 1996 Miss. LEXIS 193 (Miss.), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379, 1996 U.S. LEXIS 7020 (U.S. 1996).

Trial court acted within its discretion in excusing 4 potential jurors who stated that they probably could not impose death penalty when there were no eyewitnesses or fingerprints linking defendant to crime, and stated that they would need “a lot stronger proof” to change their position. *Taylor v. State*, 672 So. 2d 1246, 1996 Miss. LEXIS 193 (Miss.), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379, 1996 U.S. LEXIS 7020 (U.S. 1996).

Decision of whether or not to excuse potential juror based on bias against death penalty is left to trial judge’s discretion. *Taylor v. State*, 672 So. 2d 1246, 1996 Miss. LEXIS 193 (Miss.), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379, 1996 U.S. LEXIS 7020 (U.S. 1996).

For trial court to excuse potential juror for bias against death penalty, juror need not expressly state that he or she absolutely refuses to consider death penalty; equivalent response made in any reasonable manner indicating juror’s firm position will suffice. *Taylor v. State*, 672 So. 2d 1246, 1996 Miss. LEXIS 193 (Miss.), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379, 1996 U.S. LEXIS 7020 (U.S. 1996).

Prospective jurors in capital cases may only be excluded for cause based upon their views on capital punishment when those views would prevent or substantially impair performance of their duties as jurors in accordance with their instructions and oath. *Taylor v. State*, 672 So. 2d 1246, 1996 Miss. LEXIS 193 (Miss.), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379, 1996 U.S. LEXIS 7020 (U.S. 1996).

If prospective juror who is opposed to death penalty indicates that, if convinced of defendant’s guilt, he or she could return verdict of guilty which might result in death penalty, juror cannot be struck from jury. *Taylor v. State*, 672 So. 2d 1246, 1996

Miss. LEXIS 193 (Miss.), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379, 1996 U.S. LEXIS 7020 (U.S. 1996).

If prospective juror is irrevocably committed to vote against death penalty regardless of facts and circumstances, juror can be struck from jury. *Taylor v. State*, 672 So. 2d 1246, 1996 Miss. LEXIS 193 (Miss.), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379, 1996 U.S. LEXIS 7020 (U.S. 1996).

Four prospective jurors in capital murder case were properly excused after stating their inability to impose death penalty. *Taylor v. State*, 672 So. 2d 1246, 1996 Miss. LEXIS 193 (Miss.), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379, 1996 U.S. LEXIS 7020 (U.S. 1996).

Defense counsel's extensive voir dire of venire members regarding attitudes toward death penalty precluded claim on appeal that trial court's inadequate voir dire questioning permitted seating of jurors with bias in favor of death penalty. *Jackson v. State*, 672 So. 2d 468, 1996 Miss. LEXIS 718 (Miss. 1996).

Any juror who would impose death sentence regardless of facts and circumstances of capital murder conviction cannot follow dictates of law and is subject to be removed through use of complementary challenge for cause. *Walker v. State*, 671 So. 2d 581, 1995 Miss. LEXIS 494 (Miss. 1995), cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406, 1996 U.S. LEXIS 7236 (U.S. 1996).

Police officer was not required to be removed from capital murder jury panel, even though during general voir dire of venire he had stated that due to seriousness of charge of capital murder guilty verdict should be followed by death penalty, and officer admitted to knowing some details of case; officer had further stated that he believed his decision whether to impose death penalty would be based on circumstances and that he could be fair and impartial, and there was no automatic rule that law enforcement officers or their relatives could be challenged for cause. *Walker v. State*, 671 So. 2d 581, 1995 Miss. LEXIS 494 (Miss. 1995), cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406, 1996 U.S. LEXIS 7236 (U.S. 1996).

Prospective juror was not required to be removed from capital murder panel, even though during initial voir dire he had raised his hand and commented, regarding death penalty, that "if the jury reached a decision of guilty, I would automatically vote" for death; when questioned individually, prospect stated that he would weigh evidence and that he could put aside his views and listen to evidence and instructions. *Walker v. State*, 671 So. 2d 581, 1995 Miss. LEXIS 494 (Miss. 1995), cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406, 1996 U.S. LEXIS 7236 (U.S. 1996).

Prospective juror was not required to be removed from capital murder jury panel, even though he nodded his head affirmatively during group voir dire when asked whether he would automatically vote for death penalty, whether he believed in death penalty, and whether he would vote with majority of other jurors as to sentence; under further questioning he stated that he would evaluate the evidence and impose penalty which seemed most logical, and when informed that his vote was an individual choice prospect replied that he would vote whichever way evidence pointed, would be fair and impartial and would follow law. *Walker v. State*, 671 So. 2d 581, 1995 Miss. LEXIS 494 (Miss. 1995), cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406, 1996 U.S. LEXIS 7236 (U.S. 1996).

Prospective juror was not required to be removed for cause from jury panel in capital murder case, even though he initially stated he would vote for death penalty upon capital conviction, and later that he would be predisposed to vote for death all things being equal; prospect also stated that he would follow instructions given by court and review facts before reaching decision, and that his decision would be based upon how evidence "came about" in penalty phase of trial. *Walker v. State*, 671 So. 2d 581, 1995 Miss. LEXIS 494 (Miss. 1995), cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406, 1996 U.S. LEXIS 7236 (U.S. 1996).

Even if trial court erred in capital murder case by failing to strike for cause prospective juror who allegedly stated he would always vote for death penalty, de-

defendant's right to impartial jury was not violated, where prospective juror did not serve on defendant's jury panel, and defendant was not forced to use peremptory strike to keep him off panel. *Russell v. State*, 670 So. 2d 816, 1995 Miss. LEXIS 617 (Miss. 1995), cert. denied, 519 U.S. 982, 117 S. Ct. 436, 136 L. Ed. 2d 333, 1996 U.S. LEXIS 6884 (U.S. 1996), cert. dismissed, 520 U.S. 1249, 117 S. Ct. 2406, 137 L. Ed. 2d 1064, 1997 U.S. LEXIS 3537 (U.S. 1997).

Circuit court should take substantial role in conducting voir dire to determine whether prospective jurors would vote automatically for death penalty regardless of aggravating and mitigating circumstances. *Ballenger v. State*, 667 So. 2d 1242, 1995 Miss. LEXIS 451 (Miss. 1995), cert. denied, 518 U.S. 1025, 116 S. Ct. 2565, 135 L. Ed. 2d 1082, 1996 U.S. LEXIS 4177 (U.S. 1996).

A trial judge in a capital murder prosecution did not abuse his discretion by excusing a potential juror who initially indicated that she could not impose the death penalty, even though she subsequently indicated that there were some circumstances under which she could impose the death penalty, where she failed to clearly indicate that she was willing to set aside her own beliefs and follow the instructions and law as to the death penalty. *Davis v. State*, 660 So. 2d 1228, 1995 Miss. LEXIS 287 (Miss. 1995), cert. denied, 517 U.S. 1192, 116 S. Ct. 1684, 134 L. Ed. 2d 785, 1996 U.S. LEXIS 3101 (U.S. 1996).

A prosecutor's request of jurors during individual voir dire to give the particular circumstances that each would require in order to return a death sentence were not improperly designed to extract a promise from the jurors that they would certainly vote in favor of the death penalty given a specific set of circumstances, and therefore did not violate the defendant's constitutional rights. *Foster v. State*, 639 So. 2d 1263, 1994 Miss. LEXIS 670 (Miss. 1994), cert. denied, 514 U.S. 1019, 115 S. Ct. 1365, 131 L. Ed. 2d 221, 1995 U.S. LEXIS 2061 (U.S. 1995).

The 1968 decision of the United States Supreme Court in *United States v. Jackson*, 390 U.S. 570, 20 L. Ed. 2d 138, 88 S. Ct. 1209, is not retroactive and was not

applicable to a guilty plea entered in 1960 by a defendant charged with murder who, at the time of the decision of *Jackson*, was serving a life sentence in the penitentiary as a consequence. *King v. Cook*, 211 So. 2d 517, 1968 Miss. LEXIS 1267 (Miss. 1968).

A defendant who in 1960 entered a plea of guilty to an indictment for murder and received a life sentence which he was currently serving, following the decision in 1968 of the United States Supreme Court in *United States v. Jackson*, 390 U.S. 570, 20 L. Ed. 2d 138, 88 S. Ct. 1209, filed a petition for a writ of habeas corpus alleging that the death penalty provision of Code 1942, § 2217 of the Mississippi Code violated the Fifth and Sixth Amendments of the United States Constitution and § 14 of the Mississippi Constitution. In affirming the denial of the writ, the court held that the *Jackson* rule was inapplicable to the Mississippi general statute on murder for the reason that an accused entering a plea of guilty to a charge of murder under Code 1942, § 2217 is not assured of not receiving the death penalty; for the trial court cannot be required to accept a guilty plea in a capital case and pronounce a sentence of less than death, but may require a jury trial in which the imposition of the death sentence is within the sole province of the jury. *King v. Cook*, 211 So. 2d 517, 1968 Miss. LEXIS 1267 (Miss. 1968).

The trial judge cannot be compelled to accept a plea of guilty in capital cases. *Dickerson v. State*, 202 Miss. 804, 32 So. 2d 881, 1947 Miss. LEXIS 343 (Miss. 1947).

It is discretionary with the trial judge whether he will accept a plea of guilty in a capital case; if he does so he must see to it, first, that the plea is entirely voluntary and that defendant fully realizes and is competent to know the consequences of such plea, and second, a competent and impartial jury must be empanelled to consider the material circumstances of the crime fully enough to adjudge whether the death sentence should be imposed. *Dickerson v. State*, 202 Miss. 804, 32 So. 2d 881, 1947 Miss. LEXIS 343 (Miss. 1947).

The death penalty is within the sole province of the jury. *Dickerson v. State*, 202 Miss. 804, 32 So. 2d 881, 1947 Miss. LEXIS 343 (Miss. 1947).

On murder conviction, it is within the province of the jury to fix the penalty at death or life imprisonment. *Shimniok v. State*, 197 Miss. 179, 19 So. 2d 760, 1944 Miss. LEXIS 289 (Miss. 1944).

Where defendants had been convicted of murder and sentenced to death, the supreme court had no power to reverse and remand the case on the mere ground that another jury might fix the punishment at life imprisonment because of the youth and indiscretion of the defendants since the exercise of clemency is vested in the executive. *Shimniok v. State*, 197 Miss. 179, 19 So. 2d 760, 1944 Miss. LEXIS 289 (Miss. 1944).

Since the jury is vested with the power to determine whether the death penalty should be inflicted in a murder prosecution, the issue of life or death should be decided by the jury, uninfluenced by extraneous and highly prejudicial issues. *Russell v. State*, 185 Miss. 464, 189 So. 90, 1939 Miss. LEXIS 181 (Miss. 1939).

9. —Powers and duties.

A trial court's failure to give a limiting instruction with respect to the "especially heinous, atrocious or cruel" aggravating circumstance did not constitute harmless error where the jury was instructed as to only 2 aggravating circumstances, the "especially heinous" factor was argued almost exclusively to the jury as a reason to impose the death penalty, and there was no way of knowing beyond a reasonable doubt that a jury would have found, had it been so instructed, that "the actual commission of the felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies—the conscienceless or pitiless crime which is unnecessarily torturous to the victim." *Pinkney v. State*, 602 So. 2d 1177, 1992 Miss. LEXIS 384 (Miss. 1992).

A trial court's failure to give a limiting instruction in conjunction with the "especially heinous, atrocious, or cruel" aggravating circumstance did not constitute harmless error, even though the jury was allowed to consider 2 additional aggravating circumstances, where the "especially heinous" factor was argued almost exclusively to the jury as a reason to impose the death penalty, and it could not be said

beyond a reasonable doubt that under the facts of the case the result would have been the same had the "especially heinous" aggravating circumstance been properly defined in the jury instructions. *Jones v. State*, 602 So. 2d 1170, 1992 Miss. LEXIS 345 (Miss. 1992).

In the penalty phase of a capital murder prosecution, the trial court's instruction on the "especially heinous, atrocious or cruel" statutory aggravating circumstance was proper where the court instructed the jury that the term "heinous, atrocious, or cruel" meant "those situations where the actual commission of the capital felony was accomplished by such additional acts to set the crime apart from the norm of capital felonies by the consciousness or pitilessness of the crime which is unnecessarily torturous to the victim." *Hansen v. State*, 592 So. 2d 114, 1991 Miss. LEXIS 876 (Miss. 1991), cert. denied, 504 U.S. 921, 112 S. Ct. 1970, 118 L. Ed. 2d 570, 1992 U.S. LEXIS 2882 (U.S. 1992).

A defendant enjoys no right to be spared the death penalty because the jury entertains a whimsical or residual doubt of his or her guilt, though counsel remains free to argue to the jury any such doubt. Thus, a trial court did not err in refusing a defendant's requested "whimsical doubt" instruction where the record did not reflect that the defendant's counsel was forbidden to argue whimsical or residual doubt to the jury. *Hansen v. State*, 592 So. 2d 114, 1991 Miss. LEXIS 876 (Miss. 1991), cert. denied, 504 U.S. 921, 112 S. Ct. 1970, 118 L. Ed. 2d 570, 1992 U.S. LEXIS 2882 (U.S. 1992).

In the sentencing phase of a capital murder prosecution, the defendant was not entitled to an instruction affirmatively instructing the jurors that they should individually consider the evidence in mitigation; the instructions given were sufficient where the mitigating circumstances portion of the instruction did not contain "unanimous" or "unanimously," only the aggravating circumstances part of the instruction contained those words, and there was no instruction implying or intimating that a juror should await unanimity before considering a mitigating circumstance. *Hansen v. State*, 592 So. 2d 114, 1991 Miss. LEXIS 876 (Miss. 1991),

cert. denied, 504 U.S. 921, 112 S. Ct. 1970, 118 L. Ed. 2d 570, 1992 U.S. LEXIS 2882 (U.S. 1992).

In the sentencing phase of capital murder prosecution, an instruction cautioning the jury “not to be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling” was a proper statement of the law because it did not inform the jury that it was required to disregard in toto sympathy and left the jury the option to vote for or against the death penalty. *Willie v. State*, 585 So. 2d 660, 1991 Miss. LEXIS 454 (Miss. 1991).

In the penalty phase of a capital murder prosecution, a jury instruction stating that the jury “may objectively consider the detailed circumstances of the offense for which the defendant was convicted, and the character and record of the defendant,” was not defective, notwithstanding the defendant’s claim that the use of the word “may” allowed the jury to permissively consider mitigating circumstances instead of requiring them to do so, since the instruction did not place limitations on what mitigating circumstances the jury could consider. *Shell v. State*, 554 So. 2d 887, 1989 Miss. LEXIS 492 (Miss. 1989), rev’d, in part, 498 U.S. 1, 111 S. Ct. 313, 112 L. Ed. 2d 1, 1990 U.S. LEXIS 5501 (U.S. 1990).

In the sentencing phase of a capital case, an instruction stating that in order to return the death penalty the jury was required to find that the mitigating circumstances did not outweigh the aggravating circumstances, did not improperly shift the burden of proof from the prosecution to the defense. *Shell v. State*, 554 So. 2d 887, 1989 Miss. LEXIS 492 (Miss. 1989), rev’d, in part, 498 U.S. 1, 111 S. Ct. 313, 112 L. Ed. 2d 1, 1990 U.S. LEXIS 5501 (U.S. 1990).

A limiting instruction during the penalty phase of a capital murder prosecution concerning the “heinous, atrocious, or cruel” aggravating factor was adequate where the court instructed the jury that the word “heinous means extremely wicked or shockingly evil; atrocious means outrageously wicked and vile; and cruel means designed to inflict a high degree of pain with indifference to, or even

enjoyment of the suffering of others.” These instructions adequately defined each of the 3 potential aggravating factors in terms the average lay person (juror) could understand and the language used was neither vague nor unclear. *Shell v. State*, 554 So. 2d 887, 1989 Miss. LEXIS 492 (Miss. 1989), rev’d, in part, 498 U.S. 1, 111 S. Ct. 313, 112 L. Ed. 2d 1, 1990 U.S. LEXIS 5501 (U.S. 1990).

In the penalty phase of a capital case, the jury’s consideration of whimsical doubt as a mitigating factor was not impaired by the trial court’s denial of a jury instruction on whimsical doubt where defense counsel was permitted to argue whimsical doubt to the jury. *Minnick v. State*, 551 So. 2d 77, 1988 Miss. LEXIS 612 (Miss. 1988), rev’d, 498 U.S. 146, 111 S. Ct. 486, 112 L. Ed. 2d 489, 1990 U.S. LEXIS 6118 (U.S. 1990), overruled, *Willie v. State*, 585 So. 2d 660, 1991 Miss. LEXIS 454 (Miss. 1991).

The judgment as to the sentence of one convicted of murder would be reversed to permit the jury to fix punishment, where although the judge instructed the jury to fix punishment at life imprisonment if it should find the defendant guilty, the jury returned a verdict merely finding the defendant guilty as charged, whereupon the court sentenced the defendant to serve a life term in the state penitentiary. *Ray v. R. G. Le Tourneau, Inc.*, 220 So. 2d 837, 1969 Miss. LEXIS 1481 (Miss. 1969).

10. Deferral of sentence.

Trial court exceeded its authority by suspending all but twenty years of defendant’s life sentence for first-degree murder because life imprisonment was the applicable sentence for first-degree murder; therefore, the trial court had no authority to suspend any part of defendant’s life sentence. *Shaheed v. State*, 205 So. 3d 1105, 2016 Miss. App. LEXIS 806 (Miss. Ct. App. 2016).

It was improper for the trial court to indefinitely defer the defendant’s sentencing because the statute requires that every person convicted of murder “shall” be sentenced to imprisonment for life in the state penitentiary. *House v. State*, 754 So. 2d 1147, 1999 Miss. LEXIS 353 (Miss. 1999).

11. Sentencing hearings.

As a result of defendant juvenile's guilty plea, the circuit court was the proper sentencing authority for his resentencing. *Ealy v. State*, — So. 3d —, 2019 Miss. App. LEXIS 542 (Miss. Ct. App. Nov. 5, 2019).

Death sentence was properly imposed pursuant to Miss. Code Ann. § 97-3-21 because petitioner inmate did not have the right to present evidence at sentencing—specifically evidence that he did not commit rape—that was inconsistent with the verdict of the guilt-phase jury. *Holland v. Anderson*, 583 F.3d 267, 2009 U.S. App. LEXIS 20769 (5th Cir. Miss. 2009), cert. denied, 559 U.S. 1073, 130 S. Ct. 2100,

176 L. Ed. 2d 731, 2010 U.S. LEXIS 3429 (U.S. 2010).

Defendant's capital murder conviction was proper pursuant to Miss. Code Ann. § 97-3-21 because he did not need to receive a sentencing hearing since, even absent a procedural bar, if the State was not seeking the death penalty, the only possible sentence for conviction of capital murder was life without parole. *Davis v. State*, 914 So. 2d 200, 2005 Miss. App. LEXIS 269 (Miss. Ct. App.), cert. denied, 921 So. 2d 344, 2005 Miss. LEXIS 746 (Miss. 2005), cert. denied, 549 U.S. 856, 127 S. Ct. 133, 166 L. Ed. 2d 98, 2006 U.S. LEXIS 6743 (U.S. 2006).

RESEARCH REFERENCES

A.L.R.

Acquittal on homicide as bar to subsequent prosecution for assault and battery or vice versa. 37 A.L.R.2d 1068.

Homicide by fright or shock. 47 A.L.R.2d 1072.

Homicide: Liability where death immediately results from treatment or mistreatment of injury inflicted by defendant. 50 A.L.R.5th 467.

C.J.S.

41 C.J.S., Homicide §§ 517 et seq.

Practice References.

Ronald L. Schoenberg, *Criminal Law Deskbook* (Matthew Bender).

§ 97-3-23. Homicide; death following duels fought out of state.

Every person who shall, by previous appointment, agreement, or understanding made in this state, fight a duel without the jurisdiction of this state, and, in so doing, shall inflict a wound upon his antagonist or any other person, whereof the person thus injured die within this state, and every second engaged in such duel, shall be guilty of murder in this state, and may be indicted, tried, and convicted in the county where such death shall happen.

HISTORY: Codes, *Hutchinson's* 1848, ch. 64, art. 12, Title 2 (5); 1857, ch. 64, art. 166; 1871, § 2629; 1880, § 2876; 1892, § 1150; 1906, § 1228; *Hemingway's* 1917, § 958; 1930, § 986; 1942, § 2216.

Cross References — Murder, as provided in this section, defined as crime of violence, see § 97-3-2.

Penalty for murder, see § 97-3-21.

Crime of dueling, see §§ 97-39-1 et seq.

Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see § 97-43-1 et seq.

JUDICIAL DECISIONS

1. In general.

It was not improper for prosecution, during closing argument, to project on wall words referring to well-known bombing incident, despite claim that specter of incident was raised for sole purpose of exciting passion of jury in prosecution for possession of explosives; defendant had strenuously asserted throughout trial

that materials confiscated were not peculiarly adapted to aid in commission of crime, and prosecutor was trying to graphically demonstrate for jury that materials were indeed so adapted, using example jury would be able to understand. *Brewer v. State*, 704 So. 2d 70, 1997 Miss. LEXIS 449 (Miss. 1997).

§ 97-3-25. Homicide; killing of child under 18 years of age by perpetrator over 21 years of age; penalties for manslaughter and child homicide.

(1) Except as otherwise provided in this section, any person convicted of manslaughter shall be fined in a sum not less than Five Hundred Dollars (\$500.00), or imprisoned in the county jail not more than one (1) year, or both, or in the custody of the Department of Corrections not less than two (2) years, nor more than twenty (20) years.

(2)(a) A person is guilty of child homicide if:

(i) The person is found guilty of manslaughter in circumstances where the killing, although without malice, was intentional and not accidental; and

(ii) The perpetrator was over the age of twenty-one (21) years and the victim was a child under the age of eighteen (18) years.

(b) A person found guilty of child homicide shall be imprisoned in the custody of the Department of Corrections for a term not to exceed thirty (30) years.

HISTORY: Codes, Hutchinson's 1848, ch. 64, art. 12, Title 3 (20, 21); 1857, ch. 64, art. 183; 1871, § 2646; 1880, § 2894; 1892, § 1167; 1906, § 1245; Hemingway's 1917, § 975; 1930, § 1003; 1942, § 2233; Laws, 2013, ch. 379, § 1, eff from and after July 1, 2013.

Cross References — Murder, as provided in this section, defined as crime of violence, see § 97-3-2.

Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see § 97-43-1 et seq.

Requisites of indictment for manslaughter, see § 99-7-37.

Conviction of constituent offense, see § 99-19-5.

Enhancement of offenses listed in 99-19-401(2) if the instrumentality used in the commission of the 99-19-401(2) offense was initially obtained in the course of the commission of the crime(s) provided for in this section, see § 99-19-401.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Penitentiary sentences.
3. Fines and assessments.
4. Not cruel and unusual.
5. Enhancement.
6. Ex post facto violation.
7. Illustrative cases.

1. In general.

Defendant claimed that counsel's introduction of and failure to object to a jury instruction based on the statute constituted ineffective assistance of counsel, yet the things of which defendant complained constituted strategic decisions; counsel had clearly studied the case and effectively prepared for both pretrial and trial matters, and thus defendant failed to prove that counsel's performance was deficient. *Cozart v. State*, 226 So. 3d 639, 2016 Miss. App. LEXIS 270 (Miss. Ct. App. 2016).

Defendant was aware that the manslaughter jury instruction introducing the elements of child homicide would be given to the jury because he offered the instruction himself, and thus he waived his right to assert an ex post facto violation. *Cozart v. State*, 226 So. 3d 639, 2016 Miss. App. LEXIS 270 (Miss. Ct. App. 2016).

Had defendant not pled guilty to manslaughter and demanded to go to trial for murder, he still possessed no right for a jury to decide his sentence, as the sentence was mandatory; defendant forfeited no right to have a jury decide his sentence by pleading guilty to the lesser crime of manslaughter. *Smith v. State*, 922 So. 2d 43, 2006 Miss. App. LEXIS 126 (Miss. Ct. App. 2006).

Evidence was sufficient to convict defendant of manslaughter where testimony was presented that he was seen with a gun during the altercation, a muzzle flash from his gun, and that bullet casings from a weapon matching defendant's gun were recovered; while there was testimony that at least one other person drew a gun inside the club that night, the jury decided to give that testimony less weight than the testimony supporting defendant's

guilt. *Anderson v. State*, 856 So. 2d 650, 2003 Miss. App. LEXIS 585 (Miss. Ct. App. 2003).

Defendant's sentence of eight years for manslaughter was not cruel and unusual when defendant could have received up to 20 years. *Wade v. State*, 802 So. 2d 1023, 2001 Miss. LEXIS 240 (Miss. 2001).

A sentence of 20 years for a conviction of manslaughter was not cruel and unusual punishment, notwithstanding that the defendant was 40 years old and in poor health when sentenced. *Harried v. State*, 773 So. 2d 966, 2000 Miss. App. LEXIS 455 (Miss. Ct. App. 2000).

In a homicide prosecution resulting in a conviction for manslaughter, an order of restitution in the amount of \$12,828.50 was error where there was no evidence that the trial judge considered the factors set forth in § 99-37-3(2), the trial judge did not specify a time for payment or a method of payment, and there was no express finding that the defendant had assets to pay any part of the amount ordered, though the judge implicitly found that the defendant had assets to pay part of the restitution amount by directing that a lien be placed against the defendant's workers' compensation benefits. *Green v. State*, 631 So. 2d 167, 1994 Miss. LEXIS 13 (Miss. 1994).

Exclusion of evidence as to victim's character was not abuse of discretion where defendant was not claiming self-defense. *Weeks v. State*, 493 So. 2d 1280, 1986 Miss. LEXIS 2614 (Miss. 1986).

The inclusion in manslaughter instruction of parenthetical statement to the effect that in the event defendant is convicted it will be the duty of the court to sentence him to a term of years in the state penitentiary was error in view of the fact that the penalty for manslaughter as provided by statute may be either a fine or imprisonment. *Smith v. State*, 288 So. 2d 720, 1974 Miss. LEXIS 1860 (Miss. 1974).

A 15 year sentence for the shooting death of an innocent bystander was within the limits set by Code 1942 § 2233 and was neither cruel nor unusual punishment. *Pace v. State*, 285 So. 2d 906, 1973 Miss. LEXIS 1314 (Miss. 1973).

One again convicted of manslaughter, on a retrial ordered on the court's own motion, may be given by the same judge a heavier sentence than that imposed on the former trial. *Sanders v. State*, 239 Miss. 874, 125 So. 2d 923, 1961 Miss. LEXIS 307 (Miss. 1961).

Imposing twenty-year sentence on defendant convicted of manslaughter for driving truck while drunk and colliding with another car causing death of passenger in other car was not cruel and unusual punishment. *Lester v. State*, 209 Miss. 171, 46 So. 2d 109, 1950 Miss. LEXIS 376 (Miss. 1950).

Where evidence was sufficient to sustain verdict of manslaughter and sentence was within the limits prescribed by the statutes, supreme court had no authority to reduce it or to reverse on account of excessiveness of sentence imposed. *Griffin v. State*, 195 So. 472 (Miss. 1940).

In assessing the punishment under this section [Code 1942, § 2233], an exceedingly wide discretion is vested in the court, and the imposition or sentence should be controlled by the facts of the case, the jury's recommendation having weighty force, but not controlling. *McCaffrey v. State*, 185 Miss. 659, 187 So. 740, 1939 Miss. LEXIS 146 (Miss. 1939).

While the imposition of a sentence of seventeen years for manslaughter, notwithstanding the recommendation of the jury for mercy, appeared to be excessive, such sentence would not be reversed on appeal, since the trial court was vested with a wide discretion in such matters, but would be left for correction by the governor. *McCaffrey v. State*, 185 Miss. 659, 187 So. 740, 1939 Miss. LEXIS 146 (Miss. 1939).

2. Penitentiary sentences.

Because the trial court did not sentence defendant for vehicular manslaughter while intoxicated under Miss. Code Ann. § 63-11-30(5), but, instead, defendant received a 20-year sentence for manslaughter under Miss. Code Ann. § 97-3-47, the trial court's sentence of 20 years under Miss. Code Ann. § 97-3-25(1) was proper. *England v. State*, 195 So. 3d 830, 2016 Miss. App. LEXIS 14 (Miss. Ct. App. 2016), cert. dismissed, — So. 3d —, 2017 Miss. LEXIS 112 (Miss. 2017).

Manslaughter statute, Miss. Code Ann. § 97-3-25, allowed sentences of up to twenty years; defendant was sentenced to 20 years, and therefore because his claim that the trial court failed to address the issue of whether his sentence was excessive for a first-time offender was so completely meritless upon its face, there was no clear error in the trial court's failure to address it directly. *Brown v. State*, 944 So. 2d 103, 2006 Miss. App. LEXIS 420 (Miss. Ct. App.), cert. denied, 946 So. 2d 368, 2006 Miss. LEXIS 732 (Miss. 2006).

Appellate court affirmed defendant's sentence for 15 years after pleading guilty to manslaughter under Miss. Code Ann. § 97-3-47 because Miss. Code Ann. § 97-3-25 provided that the sentencing range was two to 20 years. *Henderson v. State*, 929 So. 2d 391, 2006 Miss. App. LEXIS 384 (Miss. Ct. App. 2006).

Inmate was not entitled to post-conviction relief simply because he was sentenced to 10 years for the shooting into a dwelling house, which was the maximum sentence, even though he was a first time offender, because sentences were generally upheld on appeal if they were within the statutory range. *Johnson v. State*, 908 So. 2d 900, 2005 Miss. App. LEXIS 566 (Miss. Ct. App. 2005).

Petitioner's argument that the sentence imposed was disproportionate to the sentences imposed on similarly situated defendants within the same circuit court district was rejected where petitioner's sentence for manslaughter (20 years with 2 years suspended), was within the applicable statutory guidelines; the fact that other criminal defendants in the same county circuit court who pled guilty to manslaughter received shorter sentences than petitioner had no decisive bearing on whether or not petitioner's sentence was disproportionate. *Jones v. State*, 885 So. 2d 83, 2004 Miss. App. LEXIS 487 (Miss. Ct. App.), cert. denied, 883 So. 2d 1180, 2004 Miss. LEXIS 1334 (Miss. 2004).

Trial court did not abuse its discretion in sentencing defendant to 18 years despite the fact that this was his first felony conviction and that he was in a drunken state at the time the crime was committed. *Wash v. State*, 880 So. 2d 1054, 2004 Miss. App. LEXIS 226 (Miss. Ct. App. 2004).

Defendant's sentence of nineteen and one-half years incarceration and six months suspended plus five years of probation does not equate to twenty-five years of time-served, and the sentence is thus not in violation of this section or § 47-7-37. *Carter v. State*, 754 So. 2d 1207, 2000 Miss. LEXIS 7 (Miss. 2000).

Defendant's maximum sentence of 20 years' imprisonment, pursuant to this section, following her conviction for manslaughter, was not excessive; however, the trial court erred in founding the sentence on the unverified statement of a juror which defendant was not allowed to refute. *Ford v. State*, 437 So. 2d 13, 1983 Miss. LEXIS 2813 (Miss. 1983).

Where upon conviction of manslaughter defendant was sentenced to a term of a year and a half at a state penitentiary the sentence was improper and case would be remanded for proper sentence. *Lampkin v. State*, 214 Miss. 735, 59 So. 2d 335, 1952 Miss. LEXIS 513 (Miss. 1952).

A one-year sentence in the state penitentiary for manslaughter was improper under this section [Code 1942, § 2233]. *Anderson v. State*, 213 Miss. 439, 57 So. 2d 169, 1952 Miss. LEXIS 382 (Miss. 1952).

3. Fines and assessments.

Defendant's conviction for manslaughter was affirmed as the evidence indicated that defendant went to his estranged wife's boyfriend's apartment and shot and killed the boyfriend; the trial court did not err in admitting photographs of the crime scene and the autopsy, as the evidence was relevant to the circumstances surrounding the crime, and the two twenty-year consecutive sentences that were imposed for defendant's convictions for manslaughter and aggravated assault did not constitute cruel and unusual punishment. *Lewis v. State*, 905 So. 2d 729, 2004 Miss. App. LEXIS 1188 (Miss. Ct. App. 2004).

Where a defendant is convicted of manslaughter under Miss. Code Ann. § 97-3-25 and Miss. Code Ann. § 99-19-32(1), and the sentence imposed is a term of imprisonment in the penitentiary, the fine provision of Miss. Code Ann. § 97-3-25 is not applicable. However, where the of-

fense is punishable by imprisonment in the penitentiary for more than one year and the imposition of a fine is not provided elsewhere, Miss. Code Ann. § 99-19-32(1) is applicable and allows for imposition of a fine not in excess of \$ 10,000. *Felder v. State*, 876 So. 2d 372, 2004 Miss. LEXIS 776 (Miss. 2004).

4. Not cruel and unusual.

In a case in which defendant, who was 15 years old when he shot and killed the victim, was indicted for deliberate design murder, but pled guilty to manslaughter and kidnapping, his second petition for post-conviction relief was properly denied because, although defendant's total sentence of 50 years for manslaughter and kidnapping was lengthy, it was not a life sentence or de facto life sentence that violated the Eighth Amendment, which forbade a sentencing scheme that mandated life in prison without possibility of parole for juvenile offenders. *Mason v. State*, 235 So. 3d 129, 2017 Miss. App. LEXIS 322 (Miss. Ct. App. 2017), cert. denied, — So. 3d —, 2018 Miss. LEXIS 48 (Miss. 2018).

Even though an appellate court was precluded from addressing a claim of cruel and unusual punishment under the Eighth Amendment because it was not raised to a trial court in a manslaughter case, the issue was without merit in any event because a sentence of twenty years with four years suspended was within the range set forth in Miss. Code Ann. § 97-3-25. *Brown v. State*, 970 So. 2d 1300, 2007 Miss. App. LEXIS 826 (Miss. Ct. App. 2007).

5. Enhancement.

Trial court erred in enhancing defendant's sentence for using a firearm during the commission of a felony because the jury did not specifically find defendant guilty of using a firearm in the commission of the crime of manslaughter; because the fact that defendant used a firearm during the commission of the felony crime of manslaughter could be inferred only from the evidence, not the jury's findings, the trial court was not permitted to enhance defendant's sentence. *Waits v. State*, 119 So. 3d 1024, 2013 Miss. LEXIS 414 (Miss. 2013).

Where a defendant is convicted of manslaughter under Miss. Code Ann. § 97-3-25 and Miss. Code Ann. § 99-19-32(1), and the sentence imposed is a term of imprisonment in the penitentiary, the fine provision of Miss. Code Ann. § 97-3-25 is not applicable. However, where the offense is punishable by imprisonment in the penitentiary for more than one year and the imposition of a fine is not provided elsewhere, Miss. Code Ann. § 99-19-32(1) is applicable and allows for imposition of a fine not in excess of \$ 10,000. *Felder v. State*, 876 So. 2d 372, 2004 Miss. LEXIS 776 (Miss. 2004).

6. Ex post facto violation.

Defendant's manslaughter sentence was an ex post facto violation because (1) the maximum sentence was 20 years when the crime was committed, but a statutory revision providing a maximum 30-year sentence was applied, and (2) the longer sentence was not ameliorative. *Cozart v. State*, 226 So. 3d 574, 2017 Miss. LEXIS 210 (Miss. 2017).

7. Illustrative cases.

In a case in which defendant, who was 15 years old when he shot and killed the victim, was indicted for deliberate design murder, but pled guilty to manslaughter and kidnapping, his second petition for post-conviction relief was properly denied because his derivative double jeopardy claim that the sentence he received for kidnapping was, in reality, a multiple punishment for the offense of manslaughter was without merit as defendant was not actually or factually innocent of kidnapping, and there was a sufficient basis for his plea to that charge. *Mason v. State*, 235 So. 3d 129, 2017 Miss. App. LEXIS 322 (Miss. Ct. App. 2017), cert. denied, — So. 3d —, 2018 Miss. LEXIS 48 (Miss. 2018).

Defendant's manslaughter sentence was plain error, despite defendant submitting an instruction providing the harsher sentence, because (1) the sentence impacted a fundamental right, as the revised statute under which defendant was sen-

tenced was not effective when the crime was committed, (2) the error was obvious, as it was not clear defendant relied on the greater sentence to escape a harsher penalty, and (3) the error affected the integrity of judicial proceedings, as defendant conceivably presumed a 20-year sentence would be applied and did not know a 30-year sentence was possible until after sentence was pronounced. *Cozart v. State*, 226 So. 3d 574, 2017 Miss. LEXIS 210 (Miss. 2017).

Verdicts finding defendant guilty of manslaughter and armed robbery were not contrary to the weight of the evidence because defendant's alleged former common-law wife testified that he told her of the robbery and murder that he and his former girlfriend committed together; the former girlfriend testified that she was with defendant on the day of the crime, helped him scout out the location of the crime, helped obtain a stolen car, placed the car in position for defendant to flee after executing the robbery, and returned the stolen car after defendant wiped it down with a grey or purple fabric, which was similar to one of the items recovered at the scene of a fire, which also included a metal cash box from the victim's convenience store. *Lyons v. State*, 237 So. 3d 763, 2017 Miss. App. LEXIS 218 (Miss. Ct. App. 2017), cert. denied, 236 So. 3d 817, 2018 Miss. LEXIS 99 (Miss. 2018).

In viewing Miss. Code Ann. §§ 97-3-25, 99-19-32(1), and § 47-7-49 in *pari materia*, the trial court was within its discretion to order defendant, convicted of manslaughter and sentenced to a term of imprisonment, to pay not only a \$10,000 fine, but also a \$ 10,000 assessment to the Mississippi Crime Victims' Compensation Fund. *Felder v. State*, 876 So. 2d 372, 2004 Miss. LEXIS 776 (Miss. 2004).

Cited in *Barnes v. State*, 920 So. 2d 1019, 2005 Miss. App. LEXIS 527 (Miss. Ct. App.), cert. dismissed, 920 So. 2d 1008, 2005 Miss. LEXIS 602 (Miss. 2005), cert. dismissed, 921 So. 2d 344, 2005 Miss. LEXIS 761 (Miss. 2005), cert. denied, 926 So. 2d 922, 2006 Miss. LEXIS 79 (Miss. 2006).

RESEARCH REFERENCES

ALR.

Corporation's criminal liability for homicide. 83 A.L.R.2d 1117.

Homicide: identification of victim as person named in indictment or information. 86 A.L.R.2d 722.

Admissibility, in homicide prosecution, of evidence as to tests made to ascertain distance from gun to victim when gun was fired. 11 A.L.R.5th 497.

Homicide: Liability where death imme-

diately results from treatment or mistreatment of injury inflicted by defendant. 50 A.L.R.5th 467.

CJS.

41 C.J.S., Homicide §§ 517 et seq.

Practice References.

Ronald L. Schoenberg, *Criminal Law Deskbook* (Matthew Bender).

§ 97-3-27. Homicide; killing while committing felony.

The killing of a human being without malice, by the act, procurement, or culpable negligence of another, while such other is engaged in the perpetration of any felony, except those felonies enumerated in Section 97-3-19(2)(e) and (f), or while such other is attempting to commit any felony besides such as are above enumerated and excepted, shall be manslaughter.

HISTORY: Codes, *Hutchinson's* 1848, ch. 64, art. 12, Title 3 (6); 1857, ch. 64, art. 170; 1871, § 2633; 1880, § 2880; 1892, § 1154; 1906, § 1232; *Hemingway's* 1917, § 962; 1930, § 990; 1942, § 2220; *Laws*, 1994 Ex Sess, ch. 27, § 1, eff from and after passage (approved August 23, 1994).

Cross References — Manslaughter, as provided in this section, defined as crime of violence, see § 97-3-2.

Penalty for manslaughter, see § 97-3-25.

Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see § 97-43-1 et seq.

Enhancement of offenses listed in 99-19-401(2) if the instrumentality used in the commission of the 99-19-401(2) offense was initially obtained in the course of the commission of the crime(s) provided for in this section, see § 99-19-401.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Self-defense.
3. Indictment.
4. Evidence; generally.
5. —Threats.
6. Instructions.

1. In general.

Even though an inmate did not admit to killing a victim, there was still a sufficient factual basis for a plea where he entered a plea of guilty to manslaughter and stated the plea was in his best interest. *Hull v.*

State, 933 So. 2d 315, 2006 Miss. App. LEXIS 499 (Miss. Ct. App. 2006).

Existence of two separate statutes under which defendant could be prosecuted for killing during course of committing felonious child abuse, only one of which could result in capital murder conviction, did not give prosecutor impermissible discretion to impose death penalty, in violation of Eighth Amendment, where jury was instructed that it could impose life sentence. *Jackson v. State*, 684 So. 2d 1213, 1996 Miss. LEXIS 7 (Miss. 1996), cert. denied, 520 U.S. 1215, 117 S. Ct. 1703, 137 L. Ed. 2d 828, 1997 U.S. LEXIS 2937 (U.S. 1997).

Defendant charged with capital offense of killing while engaged in commission of child abuse or battery was not entitled to lesser included offense instruction on manslaughter based on killing while committing a felony. *Jackson v. State*, 684 So. 2d 1213, 1996 Miss. LEXIS 7 (Miss. 1996), cert. denied, 520 U.S. 1215, 117 S. Ct. 1703, 137 L. Ed. 2d 828, 1997 U.S. LEXIS 2937 (U.S. 1997).

Defendant could be prosecuted for capital murder based on felony murder, even though he could also have been charged with manslaughter. *Blue v. State*, 674 So. 2d 1184, 1996 Miss. LEXIS 304 (Miss.), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517, 1996 U.S. LEXIS 7523 (U.S. 1996).

Instructing jury that defendant could be sentenced to life in prison precluded claim that overlapping statutes for felonious child abuse and manslaughter, one which permitted death penalty and another that did not, gave prosecutors and juries unfettered discretion to impose the death penalty, in violation of Eighth Amendment rights. *Jackson v. State*, 672 So. 2d 468, 1996 Miss. LEXIS 718 (Miss. 1996).

Under this section and § 97-3-35, manslaughter is killing without malice, either in the course of a felony other than rape, burglary, arson or robbery or in the heat of passion. Accordingly, since there was no evidence of "heat of passion," and the robbery element was uncontested, the evidence could not support a verdict of manslaughter without capital murder. *Bell v. Watkins*, 692 F.2d 999, 1982 U.S. App. LEXIS 23546 (5th Cir. Miss. 1982), cert. denied, 464 U.S. 843, 104 S. Ct. 142, 78 L. Ed. 2d 134, 1983 U.S. LEXIS 1426 (U.S. 1983).

Where the evidence showed that defendant and his brothers kidnapped the deceased, and during the commission of this crime, she was killed by one of defendant's brothers alone without any participation by the defendant, defendant could be guilty of no greater crime than manslaughter. *Griffin v. State*, 293 So. 2d 810, 1974 Miss. LEXIS 1811 (Miss. 1974).

In the absence of a showing of malice on the part of the defendant and of a lawful arrest on the part of the deceased officer, slaying of the officer by the defendant

enroute to the jail was manslaughter. *Shedd v. State*, 203 Miss. 544, 33 So. 2d 816, 1948 Miss. LEXIS 305 (Miss. 1948).

One who kills another, not in malice, but to prevent an unlawful arrest of himself by such other, is guilty not of murder, but of manslaughter. *Fletcher v. State*, 129 Miss. 207, 91 So. 338, 1922 Miss. LEXIS 2 (Miss.), modified, 129 Miss. 578, 92 So. 556, 1922 Miss. LEXIS 56 (Miss. 1922).

A husband is not guilty of murder, but of manslaughter only, who instantly shoots and kills his wife or her paramour on discovering them in the very act of adultery. *Rowland v. State*, 83 Miss. 483, 35 So. 826, 1903 Miss. LEXIS 68 (Miss. 1903).

2. Self-defense.

Where the accused's uncontradicted testimony that after he was awakened in the early morning hours by the noise of someone breaking into his home, he seized his gun and went to the back of the house where he saw the form of a man coming toward him, and upon inquiring who it was, the man cursed him and continued to advance, so that he, apprehending that the man was about to do him some great bodily harm or kill him, then fired in defense of his own life, was, under the circumstances, reasonable, and, therefore, must be accepted as true, and the accused was entitled to a peremptory instruction. *Lee v. State*, 232 Miss. 717, 100 So. 2d 358, 1958 Miss. LEXIS 320 (Miss. 1958).

Persons committing felony, armed to resist arrest, and not surrendering when called on by officers attempting to arrest them, cannot shoot even to defend their lives without first offering to surrender, regardless of whether officers fired first shot. *Wilkinson v. State*, 143 Miss. 324, 108 So. 711, 1926 Miss. LEXIS 270 (Miss. 1926).

Aggressor resisting eviction by owner of premises not entitled to plead self-defense. *Cotton v. State*, 135 Miss. 792, 100 So. 383, 1924 Miss. LEXIS 74 (Miss. 1924).

3. Indictment.

Where an indictment charged that the defendant unlawfully, feloniously and by culpable negligence, did kill a person con-

trary to this section [Code 1942, § 2220] and against the peace and dignity of the State of Mississippi, the indictment adequately charged the defendant with the offense of manslaughter by culpable negligence in operation of an automobile, despite the mistake in citation of the statute, inasmuch as reference to the code section in the indictment was surplusage and unnecessary to the charge of the crime for which the defendant was tried. *Dendy v. State*, 224 Miss. 208, 79 So. 2d 827, 1955 Miss. LEXIS 481 (Miss. 1955).

4. Evidence; generally.

Weight of the evidence did not support a manslaughter conviction rather than a murder conviction because defendant failed to detail what he considered “sufficient provocation,” and his sister testified that the victim had gotten up and had began walking into the kitchen when defendant ran and grabbed the victim from behind. There was no testimony that the victim had a weapon and there was no testimony that defendant had to use deadly force under the circumstances. *Ravencraft v. State*, 989 So. 2d 437, 2008 Miss. App. LEXIS 480 (Miss. Ct. App. 2008).

Evidence was sufficient to support defendant’s manslaughter conviction because: (1) a witness testified that after the argument and defendant and the vehicle left in their vehicles, when the victim attempted to pass defendant’s truck, defendant “cut over” on him, looking back through the window before doing so; (2) other witnesses testified as to the argument and the accident; (3) and an officer testified that defendant admitted that he and the victim had an argument, that he drove down the middle of the road to prevent the victim from passing him, that he would get over when the victim tried to pass, until the last time when he turned the wheel too far and lost control of his truck. *Bell v. State*, 963 So. 2d 1124, 2007 Miss. LEXIS 400 (Miss. 2007).

Even by his own argument, defendant was responsible for aggravated assault and a reduced charge of manslaughter, to which he had plead guilty because he had heard the factual basis which the district attorney’s office stated was proof should

defendant’s case go to trial and defendant had previously told the court that he had no disagreement with those statements. *Graham v. State*, 914 So. 2d 1256, 2005 Miss. App. LEXIS 915 (Miss. Ct. App. 2005).

Where a number of extenuating circumstances in favor of the accused were disclosed by the record, the ends of justice would be better served by reversing and remanding the case and permitting another jury to pass on the issue as to whether or not the accused had good cause to believe, and did believe, in view of the disparity in size of the two men, that he was in either real or apparent danger of great bodily harm at the hands of the deceased at the time he shot him. *Folks v. State*, 230 Miss. 217, 92 So. 2d 461, 1957 Miss. LEXIS 361 (Miss. 1957).

In prosecution for causing death by unlawful operation for abortion where a properly qualified pathologist testified as to cause of death, drawings showing relative location of the several organs were admissible in evidence even though they were abstract. *Lackey v. State*, 215 Miss. 57, 60 So. 2d 503, 1952 Miss. LEXIS 537 (Miss. 1952).

Evidence obtained at the time and place of killing showing existence of moonshine still, which was being operated, may be offered in evidence. *Pickett v. State*, 139 Miss. 529, 104 So. 358, 1925 Miss. LEXIS 174 (Miss. 1925).

Evidence of commission of felony by accused prosecuted for murder of officer attempting to arrest parties committing it, admissible. *Lee v. State*, 137 Miss. 329, 102 So. 296, 1924 Miss. LEXIS 231 (Miss. 1924); *Hurd v. State*, 137 Miss. 178, 102 So. 293, 1924 Miss. LEXIS 230 (Miss. 1924).

Where killing occurred in quarrel over improper relations with defendant’s wife, and self-defense claimed, it was prejudicial error to exclude wife’s testimony that she wrote letter found by accused on decedent. *Leverett v. State*, 112 Miss. 394, 73 So. 273, 1916 Miss. LEXIS 123 (Miss. 1916).

In murder prosecution, held error to exclude evidence that defendant went to place of killing for purpose of repossessing his child from his divorced wife, child

having been awarded him and stolen by wife, and not with intent of killing deceased. *Mathison v. State*, 87 Miss. 739, 40 So. 801 (Miss. 1905).

5. —Threats.

Uncommunicated threats of deceased against defendant in manslaughter prosecution, admissible to throw light on who was aggressor. *Hambrick v. State*, 138 Miss. 729, 103 So. 364, 1925 Miss. LEXIS 79 (Miss. 1925); *Beauchamp v. State*, 128 Miss. 523, 91 So. 202, 1922 Miss. LEXIS 140 (Miss. 1922); *Mott v. State*, 123 Miss. 729, 86 So. 514, 1920 Miss. LEXIS 75 (Miss. 1920); *Sinclair v. State*, 87 Miss. 330, 39 So. 522, 1905 Miss. LEXIS 124 (Miss. 1905).

In prosecution for murder of constable, testimony that defendant, several weeks prior, uttered threats against any officer undertaking to arrest him, was admissible. *Boatwright v. State*, 120 Miss. 883, 83 So. 311, 1919 Miss. LEXIS 141 (Miss. 1919).

6. Instructions.

Trial counsel was not ineffective for failing to request a felony manslaughter instruction because under the general rule the Mississippi Supreme Court reaffirmed in *Butler* defendant was not entitled to such an instruction, as she was not indicted for capital murder and was not facing the death penalty. Based on the evidence presented, no rational jury could have convicted defendant of one crime but not the other as they were identical. *Cruz v. State*, — So. 3d —, 2020 Miss. App. LEXIS 124 (Miss. Ct. App. Apr. 14, 2020).

Trial court did not err in refusing to give a lesser-included offense instruction on manslaughter; Miss. Code Ann. § 97-3-27 precluded a manslaughter instruction for those felonies specifically enumerated in Miss. Code Ann. § 97-3-19(2)(e), one of which was robbery. Defendant was charged with capital murder during the commission of a robbery, a violation of Miss. Code Ann. § 97-3-19; whether defendant intended to kill the victim was irrelevant. *Banyard v. State*, 47 So. 3d 708, 2009 Miss. App. LEXIS 135 (Miss. Ct. App. 2009), rev'd, 47 So. 3d 676, 2010 Miss. LEXIS 475 (Miss. 2010).

Where defendant was tried for one count of negligent operation of a motor vehicle while under the influence of intoxicating liquors, aggravated assault for his injury of the driver, and five counts of manslaughter by culpable negligence for the deaths of five passengers, he was not entitled to an instruction that aggravated operation of a vehicle while under the influence (DUI), set out in Miss. Code Ann. § 63-11-30, was a lesser-included offense of manslaughter by culpable negligence. *Lawrence v. State*, 931 So. 2d 600, 2005 Miss. App. LEXIS 552 (Miss. Ct. App. 2005), cert. denied, 933 So. 2d 303, 2006 Miss. LEXIS 345 (Miss. 2006).

When defendant's victim was killed in the course of the commission of a burglary, he was not entitled to an instruction on manslaughter, because manslaughter was excepted from the provisions of Miss. Code Ann. § 97-3-27 by Miss. Code Ann. § 97-3-19(2)(e). *Coleman v. State*, 804 So. 2d 1032, 2002 Miss. LEXIS 15 (Miss. 2002).

Where most, if not all, of the evidence in a murder prosecution pointed to the codefendant as the shooter, the defendant was entitled to a manslaughter instruction. *Dabney v. State*, 717 So. 2d 733, 1998 Miss. LEXIS 344 (Miss. 1998).

Defendant who killed victim during commission of rape and armed robbery was not entitled to manslaughter instruction. *Blue v. State*, 674 So. 2d 1184, 1996 Miss. LEXIS 304 (Miss.), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517, 1996 U.S. LEXIS 7523 (U.S. 1996).

Defendant was not entitled to manslaughter instruction in capital murder prosecution where there was no evidence that he did not intend to kill the victim or that the murder was committed in the heat of passion and evidence was presented as to brutal and intentional nature of the crime. *Blue v. State*, 674 So. 2d 1184, 1996 Miss. LEXIS 304 (Miss.), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517, 1996 U.S. LEXIS 7523 (U.S. 1996).

Capital murder defendant prosecuted for killing while engaged in child abuse was not entitled to jury instruction on manslaughter as lesser included offense given that one act alone may constitute abuse or battery of child. *Jackson v. State*,

672 So. 2d 468, 1996 Miss. LEXIS 718 (Miss. 1996).

Capital murder defendant was not entitled to instruction on lesser included offense of manslaughter; that offense required absence of malice, defined as doing of wrongful act in such manner and under such circumstances that death of human being may result, and victim's manner of death, from breaking of neck bone as part of strangulation or drowning, precluded claim that defendant could have acted without malice. *Walker v. State*, 671 So. 2d 581, 1995 Miss. LEXIS 494 (Miss. 1995), cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406, 1996 U.S. LEXIS 7236 (U.S. 1996).

A trial court did not err in refusing to grant a lesser included offense instruction for manslaughter in a capital murder prosecution arising from the commission of a murder while engaged in the commission of an armed robbery, since the manslaughter statute explicitly excepts robbery from its provisions. *Willie v. State*, 585 So. 2d 660, 1991 Miss. LEXIS 454 (Miss. 1991).

A trial court properly denied a murder defendant's request for a jury instruction on the lesser included offense of manslaughter where the evidence indicated that there had been a struggle in the victim's home, the defendant knocked the victim unconscious by hitting him with a blunt object with tremendous force, the defendant put the victim's unconscious body into the trunk of the victim's car and drove the car to another county, and the defendant poured gasoline on the victim and burned him to death hours later. *Mackbee v. State*, 575 So. 2d 16, 1990 Miss. LEXIS 831 (Miss. 1990).

A defendant who was indicted for murder under § 97-3-19(2)(e) was not entitled to a manslaughter instruction under this section, where the victim was beaten to death and the injuries were consistent with injuries inflicted by hands and feet, and therefore no reasonable hypothetical juror could have found that the killing was without malice. *Berry v. State*, 575 So. 2d 1, 1990 Miss. LEXIS 849 (Miss. 1990), cert. denied, 500 U.S. 928, 111 S. Ct. 2042, 114 L. Ed. 2d 126, 1991 U.S. LEXIS 2673 (U.S. 1991).

A trial court erred in refusing a murder defendant's proffered lesser included offense manslaughter instructions where, taking the evidence in the light most favorable to the defendant, the jury could have found that the defendant lacked the requisite intent of malice aforethought to assist in the murder but that he did participate in kidnapping the victim. *Welch v. State*, 566 So. 2d 680, 1990 Miss. LEXIS 152 (Miss. 1990).

A capital murder defendant was not entitled to a manslaughter instruction based upon his claim that he intended to strike the victim over the head with a shotgun and that in doing so it discharged. Having occurred during the course of a robbery, the homicide was capital murder, regardless of the intent of the defendant; there is nothing in § 97-3-19 which requires any intent to kill when a person is slain during the course of a robbery, and it is no legal defense to claim accident or that it was done without malice. Although this section authorizes a conviction of manslaughter only when a person is slain without malice during the commission of felonies generally, certain felonies, including robbery, are specifically excluded. *Griffin v. State*, 557 So. 2d 542, 1990 Miss. LEXIS 50 (Miss. 1990).

A capital murder defendant was entitled to a manslaughter instruction where the evidence indicated that the defendant was under the heavy influence of drugs at the time of the shooting, the defendant shot the victim while engaged in a felony other than those listed in this section, the defendant's pistol may have discharged as a result of reflective action rather than deliberate design, and the defendant scuffled with the victim, apparently with the defendant's gun in his hand, for a period of time without shooting the victim. *Mease v. State*, 539 So. 2d 1324, 1989 Miss. LEXIS 66 (Miss. 1989).

Capital murder defendant was not entitled to manslaughter instruction, where neither his confession nor his testimony at trial supported a finding that the victim's death was the result of defendant's intent to commit larceny instead of robbery. *Caballo v. State*, 490 So. 2d 852, 1986 Miss. LEXIS 2479 (Miss. 1986).

In a murder prosecution, where it was uncontradicted that at the time of the

shooting, the victim was at the defendant's door, cursing him, making threats upon his life, and attempting to enter his room, the trial court was in error in refusing to instruct the jury that it could not find the defendant guilty of any crime greater than manslaughter. *McElwee v. State*, 255 So. 2d 669, 1971 Miss. LEXIS 1296 (Miss. 1971).

Court did not commit reversible error in refusing the accused's instruction that if he had shot deceased in the lawful defense of his sister-in-law, wife of deceased, the jury should acquit him, in view of insufficient proof that the sister-in-law was in any real or apparent danger of losing her life or sustaining great bodily harm at the hands of the deceased at the time he was

shot. *Folks v. State*, 230 Miss. 217, 92 So. 2d 461, 1957 Miss. LEXIS 361 (Miss. 1957).

In prosecution for causing death by unlawful operation for abortion, where the case was submitted on the theory of manslaughter, the instruction which followed the words of statute in defining crime and the findings necessary to verdict of guilty, was sufficient. *Lackey v. State*, 215 Miss. 57, 60 So. 2d 503, 1952 Miss. LEXIS 537 (Miss. 1952).

Instruction authorizing conviction of manslaughter if killing result of simple negligence held erroneous. *Johnson v. State*, 124 Miss. 429, 86 So. 863, 1920 Miss. LEXIS 526 (Miss. 1920).

RESEARCH REFERENCES

ALR.

Homicide in commission of felony where the killing was the act of one not a participant in the felony. 12 A.L.R.2d 210.

Inference of malice or intent to kill where killing is by blow without weapon. 22 A.L.R.2d 854.

Homicide: causing one, by threats or fright, to leap or fall to his death. 25 A.L.R.2d 1186.

Application of felony-murder doctrine where the felony relied upon is an includible offense with the homicide. 40 A.L.R.3d 1341.

What constitutes attempted murder. 54 A.L.R.3d 612.

Criminal liability where act of killing is done by one resisting felony or other unlawful act committed by defendant. 56 A.L.R.3d 239.

What constitutes termination of felony for purpose of felony-murder rule. 58 A.L.R.3d 851.

Judicial abrogation of felony-murder doctrine. 13 A.L.R.4th 1226.

Homicide: Liability where death immediately results from treatment or mistreatment of injury inflicted by defendant. 50 A.L.R.5th 467.

Am. Jur.

40 Am. Jur. 2d, Homicide §§ 39, 65, 68.

3 Am. Jur. Proof of Facts 2d, Homicide Outside of Common Design, §§ 7 et seq. (proof that lethal act of co-felon was outside of, or foreign to, common design).

2 Am. Jur. Trials, Investigating Particular Crimes §§ 40-57 (homicide).

7 Am. Jur. Trials, Homicide §§ 1 et seq.

CJS.

40 C.J.S., Homicide §§ 35, 98, 99, 125.

Law Reviews.

Murder and Manslaughter in Mississippi: Unintentional Killings, 71 Miss. L.J. 1, Fall, 2001.

Practice References.

Ronald L. Schoenberg, Criminal Law Deskbook (Matthew Bender)

§ 97-3-29. Homicide; killing while committing a misdemeanor.

The killing of a human being without malice, by the act, procurement, or culpable negligence of another, while such other is engaged in the perpetration of any crime or misdemeanor not amounting to felony, or in the attempt to commit any crime or misdemeanor, where such killing would be murder at common law, shall be manslaughter.

HISTORY: Codes, 1880, § 2881; 1892, § 1155; 1906, § 1233; Hemingway's 1917, § 963; 1930, 991; 1942, § 2221.

Cross References — Manslaughter, as provided in this section, defined as crime of violence, see § 97-3-2.

Penalty for manslaughter, see § 97-3-25.

Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see § 97-43-1 et seq.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Instructions.

1. In general.

Evidence supported defendant's conviction for shooting into a dwelling because, although no one saw defendant shoot the victim, witnesses saw defendant carrying a gun to the area where the victim's body was found, heard two shots, and then saw defendant flee the area. Furthermore, one of those witnesses heard a "ding" that the witness thought was a bullet hitting the trailer where the witness and another witness lived, and a bullet was removed from a bullet hole in the side of the trailer. *Hill v. State*, 226 So. 3d 1251, 2017 Miss. App. LEXIS 543 (Miss. Ct. App. 2017).

Because the indictment tracked the language of the manslaughter statute and the maltreatment statute, it was sufficient to put defendant on notice of the charges against her; the indictment's use of the common term "misdemeanor manslaughter" did not render it defective, and the indictment specifically identified not only the underlying misdemeanor (maltreatment) but also the type of maltreatment (failure to provide sufficient medical attention). *Brannan v. State*, — So. 3d —, 2020 Miss. App. LEXIS 593 (Miss. Ct. App. Oct. 20, 2020).

Trial judge did not err or abuse his discretion by denying defendant's motions for judgment notwithstanding the verdict and for a new trial because the evidence was sufficient for the jury to have found she made a deliberate decision not to provide sufficient medical attention to a prisoner, and her decision demonstrated a conscious disregard of a life-threatening risk; defendant knew the prisoner exhib-

ited symptoms of a life-threatening condition and failed to send him to a medical provider. *Brannan v. State*, — So. 3d —, 2020 Miss. App. LEXIS 593 (Miss. Ct. App. Oct. 20, 2020).

Trial court did not abuse its discretion in finding that defendant's voice message was relevant to the State's prosecution for manslaughter and admissible evidence because the message tended to support the State's theory that defendant acted with malice toward the victim since he thought the victim was one of his wife's lovers; the probative value of the evidence was not substantially outweighed by any prejudicial effect it could possess. *Newell v. State*, 175 So. 3d 1260, 2015 Miss. LEXIS 505 (Miss. 2015).

Where the State's evidence showed that defendant threatened that he would kill the victim and a neighbor saw him carrying the same sawed-off shotgun that killed her, the jury verdict finding him guilty of manslaughter was not contrary to the overwhelming evidence. Mississippi Crime Lab did not detect the presence of gunshot residue on the victim's hands after her alleged suicide. *Bergeron v. State*, 913 So. 2d 997, 2005 Miss. App. LEXIS 239 (Miss. Ct. App.), cert. denied, 921 So. 2d 344, 2005 Miss. LEXIS 711 (Miss. 2005).

Defendant's manslaughter conviction was proper where evidence was presented that defendant delivered a non-lethal gunshot would to the victim's head; a witness stated that defendant had several large heavy tools in his possession with which he could cause blunt force trauma, and that the witness heard beating noises that sounded like "kicking a box." *Wilson v. State*, 853 So. 2d 822, 2003 Miss. App. LEXIS 586 (Miss. Ct. App. 2003).

Welfare worker exceeded scope of her knowledge and expertise, in prosecution

for manslaughter of 11-month-old child, by testifying as lay witness that she was certain the child was given cocaine overdose, which was one cause of child's death, from an adult and through a vaporizer; welfare worker was not proffered as expert on methods of cocaine ingestion, and she had no personal knowledge of how cocaine got into child's bloodstream. *Jones v. State*, 678 So. 2d 707, 1996 Miss. LEXIS 411 (Miss. 1996).

"Culpable negligence," as required for manslaughter, is negligence of a degree so gross as to be tantamount to a wanton disregard of, or utter indifference to, safety of human life, and this shall be so clearly evidenced as to place it beyond every reasonable doubt. *Jones v. State*, 678 So. 2d 707, 1996 Miss. LEXIS 411 (Miss. 1996).

"Culpable negligence" required for manslaughter is conscious and wanton or reckless disregard of the probabilities of fatal consequences to others as the result of the willful creation of an unreasonable risk. *Jones v. State*, 678 So. 2d 707, 1996 Miss. LEXIS 411 (Miss. 1996).

Jury could have reasonably found, in prosecution for manslaughter of 11-month-old child, that defendants were culpably negligent in failing to obtain prompt medical attention and in failing to supervise their child with result that child ingested cocaine, regardless of how child ingested cocaine; it was the presence of cocaine in an 11-month-old child and not necessarily the way in which it got there that evidenced culpable negligence. *Jones v. State*, 678 So. 2d 707, 1996 Miss. LEXIS 411 (Miss. 1996).

It was not harmless error, in prosecution for manslaughter of 11-month-old child, to admit welfare worker's testimony that she was certain about method by which child ingested cocaine which caused death by overdose, even though such testimony was not necessary to establish culpable negligence; given welfare worker's certainty and her official capacity, her testimony likely was instrumental in the jury's decision. *Jones v. State*, 678 So. 2d 707, 1996 Miss. LEXIS 411 (Miss. 1996).

Defendants, by failing to object at trial, waived any error in admission of police officer's testimony that he had asked one

defendant, whose child died from cocaine overdose, whether cocaine was used as a tool to quiet the child. *Jones v. State*, 678 So. 2d 707, 1996 Miss. LEXIS 411 (Miss. 1996).

Defendants were not harmed, in prosecution for manslaughter of their 11-month-old child, by admission of police officer's testimony that he had asked one defendant whether cocaine had been used to quiet the child, where officer qualified the statement by testifying that defendant had denied using cocaine in that way or in any other way. *Jones v. State*, 678 So. 2d 707, 1996 Miss. LEXIS 411 (Miss. 1996).

Evidence that defendant was found lying on ground next to pickup truck involved in fatal collision, that just prior to collision, survivor of collision saw only one person in truck, and that defendant gave statement to investigating officer that he was driving truck at time of collision, which statement defendant contradicted by testimony at trial, is sufficient to support finding that defendant was driver of truck at time collision occurred, for purposes of prosecution of defendant for manslaughter through culpable negligence. *McGrew v. State*, 469 So. 2d 95, 1985 Miss. LEXIS 2088 (Miss. 1985).

This section was applicable where the killing occurred in a sudden fight at a time when the uncontradicted testimony showed that the deceased was attacking the defendant, and where there was no evidence of malice on the part of the defendant. *Barnes v. State*, 305 So. 2d 333, 1974 Miss. LEXIS 1475 (Miss. 1974).

Where accused performed an operation on a pregnant woman to procure a miscarriage, and the woman died in consequence thereof, he was guilty of manslaughter. *State v. Proctor*, 102 Miss. 792, 59 So. 890, 1912 Miss. LEXIS 123 (Miss. 1912).

2. Instructions.

Jury instruction that required the jury to find that defendant killed the victim unnecessarily while the victim was committing an unlawful act followed the language of Miss. Code Ann. § 97-3-31 and should have followed the language of Miss. Code Ann. § 97-3-29 more closely in order to avoid any confusion with § 97-3-

29; however, since both statutes applied to the facts, the instructions fairly announced the applicable rules of law. New-

ell v. State, 175 So. 3d 1260, 2015 Miss. LEXIS 505 (Miss. 2015).

RESEARCH REFERENCES

ALR.

Inference of malice or intent to kill where killing is by blow without weapon. 22 A.L.R.2d 854.

Criminal liability where act of killing is done by one resisting felony or other unlawful act committed by defendant. 56 A.L.R.3d 239.

Homicide: Liability where death immediately results from treatment or mistreatment of injury inflicted by defendant. 50 A.L.R.5th 467.

Am. Jur.

40 Am. Jur. 2d, Homicide § 61, 62, 65, 68.

2 Am. Jur. Trials, Investigating Particular Crimes §§ 40-57 (homicide).

7 Am. Jur. Trials, Homicide §§ 1 et seq.

CJS.

40 C.J.S., Homicide §§ 35, 98, 99, 125.

Law Reviews.

Murder and Manslaughter in Mississippi: Unintentional Killings, 71 Miss. L.J. 1, Fall, 2001.

§ 97-3-31. Homicide; killing unnecessarily, while resisting effort of slain to commit felony or do unlawful act.

Every person who shall unnecessarily kill another, either while resisting an attempt by such other person to commit any felony, or to do any unlawful act, or after such attempt shall have failed, shall be guilty of manslaughter.

HISTORY: Codes, Hutchinson's 1848, ch. 64, art. 12, Title 3 (11); 1857, ch. 64, art. 175; 1871, § 2638; 1880, § 2886; 1892, § 1159; 1906, § 1237; Hemingway's 1917, § 967; 1930, § 995; 1942, § 2225.

Cross References — Manslaughter, as provided in this section, defined as crime of violence, see § 97-3-2.

Penalty for manslaughter, see § 97-3-25.

Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see § 97-43-1 et seq.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. What constitutes unlawful act; generally.
3. —Particular acts.
4. Questions for jury.
5. Instructions.

1. In general.

Felony-murder death penalty for persons who do not kill or intend to kill

victims, but who have major personal involvement in felony and show reckless indifference to human life, does not violate Eighth Amendment. *Tison v. Arizona*, 481 U.S. 137, 107 S. Ct. 1676, 95 L. Ed. 2d 127, 1987 U.S. LEXIS 1808 (U.S. 1987).

This section was applicable where the defendant unnecessarily killed the deceased while resisting an attack by the deceased, and where the defendant acted without malice or premeditated design to take the life of the deceased. *Barnes v.*

State, 305 So. 2d 333, 1974 Miss. LEXIS 1475 (Miss. 1974).

In the absence of a showing of malice on the part of the defendant and of a lawful arrest on the part of the deceased officer, slaying of the officer by the defendant enroute to the jail was manslaughter. *Shedd v. State*, 203 Miss. 544, 33 So. 2d 816, 1948 Miss. LEXIS 305 (Miss. 1948).

To constitute murder, the malice must precede the unlawful act which is being attempted or committed by the person killed, where the killing is done in resisting his attempt to do an unlawful act. *Bangren v. State*, 196 Miss. 887, 17 So. 2d 599, 1944 Miss. LEXIS 264 (Miss. 1944), overruled, *Ferrell v. State*, 733 So. 2d 788, 1999 Miss. LEXIS 87 (Miss. 1999).

Unwarranted conviction of manslaughter held harmless error under indictment for murder supported by evidence. *Calicoat v. State*, 131 Miss. 169, 95 So. 318, 1922 Miss. LEXIS 296 (Miss. 1922).

Where indictment for murder was duly returned and accused properly tried thereon, objection founded on this section [Code 1942, § 2225] relates only to proceedings on the trial. *Brown v. State*, 98 Miss. 786, 54 So. 305, 1910 Miss. LEXIS 124 (Miss. 1910), overruled, 200 Miss. 881, 27 So. 2d 838, 1946 Miss. LEXIS 349 (Miss. 1946).

2. What constitutes unlawful act; generally.

Verdict of murder under Miss. Code Ann. § 97-3-19 was not against the overwhelming weight of the evidence as the testimony presented a factual dispute for the jury's resolution and the jury found certain testimony to be credible and defendant's attempts to establish a self-defense theory to be contradictory; although defendant cited to Miss. Code Ann. § 97-3-31, which provided for a manslaughter conviction when one killed another while resisting a felony, there was conflicting testimony as to whether the victim was attempting to commit a felony, and although defendant also cited to Miss. Code Ann. § 97-3-35 and claimed the evidence supported a heat of passion manslaughter conviction, there was no evidence that defendant was acting in a state of violent and uncontrollable rage and he only at-

tempted to show that he was afraid of the victim and acted in self-defense. *Ray v. State*, 27 So. 3d 416, 2009 Miss. App. LEXIS 496 (Miss. Ct. App. 2009), cert. denied, 27 So. 3d 404, 2010 Miss. LEXIS 61 (Miss. 2010).

"Unlawful act" as used in this section [Code 1942, § 2225] refers to act of criminal nature, even though inferior to felony, and for killing to come within terms of this statute [Code 1942, § 2225], the killing must take place either during actual resistance to unlawful act, or immediately following its defeat and abandonment. *Cutrer v. State*, 207 Miss. 806, 43 So. 2d 385, 1949 Miss. LEXIS 390 (Miss. 1949).

Killing in resisting unlawful act not murder, though malicious. *Williams v. State*, 121 Miss. 433, 122 Miss. 151, 84 So. 8 (1919).

3. —Particular acts.

There was substantial evidence to support a manslaughter instruction under this section where the defendant testified that she killed her husband as he was attempting to commit an assault and battery upon her, and where there was evidence that, even though the husband may have already committed an assault and battery on her, or was in the process of trying to do so, the defendant's actions in killing him were "unnecessary". *May v. State*, 460 So. 2d 778, 1984 Miss. LEXIS 1982 (Miss. 1984).

Where the state's evidence showed that the town marshal told the accused to get out of town and that he put his hand on the accused's back and bumped him and at which time the accused turned sidewise and struck deceased with a knife, inflicting a wound from which the marshal died, the marshal in so assaulting the accused was committing an unlawful act. *Coleman v. State*, 218 Miss. 246, 67 So. 2d 304, 1953 Miss. LEXIS 537 (Miss. 1953).

Where killing took place while accused was allegedly ejecting decedent from her home after forbidding him to reenter, the fact that the law was being violated in accused's habitation did not deny her the right to defend or protect it from unwarranted intrusions or trespasses as a home. *Bangren v. State*, 196 Miss. 887, 17 So. 2d 599, 1944 Miss. LEXIS 264 (Miss. 1944),

overruled, *Ferrell v. State*, 733 So. 2d 788, 1999 Miss. LEXIS 87 (Miss. 1999).

Where the evidence showed that the decedent was shot and killed by accused in ejecting him from her home, while decedent was committing an unlawful act, a wilful and forbidden trespass, and accused did not shoot him pursuant to her alleged threat that if he came back to the house she would kill him, but because of what transpired after he reentered the house, the trial court erred in not limiting the issue for the jury to the question of manslaughter or justifiable homicide, and conviction of murder must be reversed and case remanded for new trial. *Bangren v. State*, 196 Miss. 887, 17 So. 2d 599, 1944 Miss. LEXIS 264 (Miss. 1944), overruled, *Ferrell v. State*, 733 So. 2d 788, 1999 Miss. LEXIS 87 (Miss. 1999).

This section [Code 1942, § 2225] was inapplicable to a situation where the defendant did not claim to have killed the deceased while resisting an attempt to commit an alleged trespass, but testified that he committed the killing to prevent deceased from killing him and his son. *Prine v. State*, 188 Miss. 147, 193 So. 446, 1940 Miss. LEXIS 9 (Miss. 1940).

Evidence that the defendant just happened along and did not hear the conversation between his son and the deceased with respect to the title of certain property but that he killed the deceased to prevent him from killing defendant and his son, did not warrant the application of this section [Code 1942, § 2225] on the theory that defendant killed the deceased while resisting an attempt to commit an alleged trespass. *Prine v. State*, 188 Miss. 147, 193 So. 446, 1940 Miss. LEXIS 9 (Miss. 1940).

With respect to the question whether deceased was committing a trespass so as to bring a prosecution for homicide within the purview of this section [Code 1942, § 2225], a person claiming wild and unoccupied land, in good faith, could not be guilty of a criminal trespass thereon. *Prine v. State*, 188 Miss. 147, 193 So. 446, 1940 Miss. LEXIS 9 (Miss. 1940).

Evidence, in killing of constable who armed with void search warrant, after search had been made, forcibly entered defendant's house without permission and

without stating his purpose, held not to authorize conviction of crime higher than manslaughter. *Jones v. State*, 170 Miss. 581, 155 So. 430, 1934 Miss. LEXIS 176 (Miss. 1934).

Person is entitled to defend home with force against unlawful entries and to prevent crimes from being committed therein. *Bowen v. State*, 164 Miss. 225, 144 So. 230, 1932 Miss. LEXIS 235 (Miss. 1932).

Married woman's killing of deceased to prevent his re-entering her home and committing assault upon her held not to constitute murder. *Bowen v. State*, 164 Miss. 225, 144 So. 230, 1932 Miss. LEXIS 235 (Miss. 1932).

Killing committed in resisting unlawful arrest or rescuing prisoner unlawfully arrested amounts to manslaughter only; evidence as to killing of officer, who was attempting illegally to make arrest for misdemeanor without warrant, held to warrant conviction for manslaughter only. *Bergman v. State*, 160 Miss. 65, 133 So. 208, 1931 Miss. LEXIS 144 (Miss. 1931).

Situations under which felonious homicide is "manslaughter" stated. *Williams v. State*, 127 Miss. 851, 90 So. 705, 1921 Miss. LEXIS 288 (Miss. 1921).

Killing of deputy sheriff in resisting unlawful act constituted manslaughter. *Williams v. State*, 121 Miss. 433, 122 Miss. 151, 84 So. 8 (1919).

4. Questions for jury.

Evidence established the elements of murder beyond a reasonable doubt; appellant armed himself with a baseball bat with the intent to cause serious bodily injury or death to the victim and struck an unarmed victim in the head three times with the baseball bat, the first of which would have knocked him unconscious and defenseless. These actions resulted in the victim's death; the victim was not in the process of unlawfully and forcibly entering, or had unlawfully and forcibly entered the business when appellant began attacking the victim. *Westbrook v. State*, 29 So. 3d 828, 2009 Miss. App. LEXIS 648 (Miss. Ct. App. 2009), cert. denied, 29 So. 3d 774, 2010 Miss. LEXIS 124 (Miss. 2010), cert. denied, 562 U.S. 849, 131 S. Ct. 98, 178 L. Ed. 2d 62, 2010 U.S. LEXIS 5934 (U.S. 2010).

In a prosecution for murder arising out of the killing of a man who was allegedly attacking the defendant's wife, the trial court properly refused the defendant's request for a directed verdict of acquittal under § 97-3-15 where the evidence was in conflict as to whether the victim had actually been attacking the defendant's wife; however, where the evidence did not rise to that high degree which would justify a jury in finding the defendant guilty of murder beyond a reasonable doubt, his motion for a directed verdict as to the charge of murder should have been sustained, leaving only the charge of manslaughter under this section to be considered by the jury. *Edge v. State*, 393 So. 2d 1337, 1981 Miss. LEXIS 1926 (Miss. 1981).

The issue as to whether an admitted homicide is murder or manslaughter is ordinarily a question for the jury on conflicting evidence. *Kinthead v. State*, 190 So. 2d 838, 1966 Miss. LEXIS 1397 (Miss. 1966).

The issue as to the truthfulness of the explanation of a defendant as to how an admitted homicide occurred is a question for the determination of the jury where there is substantial, direct or circumstantial evidence which contradicts the version offered by him. *Kinthead v. State*, 190 So. 2d 838, 1966 Miss. LEXIS 1397 (Miss. 1966).

Where owner of a peach orchard who allegedly shot deceased while deceased was trespassing in the orchard, the question whether owner was guilty of murder or manslaughter was for the determination of the jury. *Martin v. State*, 217 Miss. 506, 64 So. 2d 629, 1953 Miss. LEXIS 459 (Miss. 1953).

Submitting to jury question of defendant's guilt of murder is error when defendant cannot be convicted of anything more than manslaughter by reason of fact the immediately prior to defendant's shooting of deceased, deceased, according to state's evidence, had committed unnecessary assault upon defendant's wife by striking her about the face with board and at time of shooting was holding or choking her and continued to hold or choke her until moment of last shot. *Cutrer v. State*, 207 Miss. 806, 43 So. 2d 385, 1949 Miss. LEXIS 390 (Miss. 1949).

Whether accused, killing a visitor at her home in ejecting him therefrom after forbidding him to reenter, used more force than reasonably appeared to be necessary for that purpose, or whether she killed decedent in what reasonably appeared to be in her necessary self-defense, were questions for the jury to determine. *Bangren v. State*, 196 Miss. 887, 17 So. 2d 599, 1944 Miss. LEXIS 264 (Miss. 1944), overruled, *Ferrell v. State*, 733 So. 2d 788, 1999 Miss. LEXIS 87 (Miss. 1999).

In prosecution for murder of divorced husband of defendant's sister, who was living in deceased's home prior to killing and was leaving deceased's home in response to defendant's order when killing occurred, whether defendant was guilty of murder or manslaughter held for jury. *Maddox v. State*, 173 Miss. 799, 163 So. 449, 1935 Miss. LEXIS 258 (Miss. 1935).

Self-defense is a question for jury. *Williams v. State*, 121 Miss. 433, 122 Miss. 151, 84 So. 8 (1919).

5. Instructions.

Where a witness testified that he did not see the victim make any threatening movements before defendant drew his pistol and shot the victim, defendant was convicted of murder. The trial court did not err by denying defendant's proposed instructions on heat-of-passion manslaughter under Miss. Code Ann. § 97-3-31; although the words "heat of passion" were not included in the jury instructions, the jury had the option of finding defendant guilty of manslaughter. *Smith v. State*, 76 So. 3d 170, 2009 Miss. App. LEXIS 174 (Miss. Ct. App.), cert. denied, 19 So. 3d 82, 2009 Miss. LEXIS 520 (Miss. 2009).

Defendant's convictions for two counts of murder were proper because defendant never claimed that he was entitled to a manslaughter instruction because a jury could have found that he killed the victims while resisting their attempt to hold him hostage. Defendant clearly argued that self-defense should have been available for the jury's consideration and that he was entitled to a manslaughter instruction because a jury could have found that he was entitled to use some force but that he used more force than was necessary.

Neese v. State, 993 So. 2d 837, 2008 Miss. App. LEXIS 644 (Miss. Ct. App. 2008).

In a prosecution for capital murder, defendant was entitled to present to the jury a manslaughter instruction on the theory that defendant had “unnecessarily” killed a police officer while the officer was allegedly attempting to commit an unlawful act, if upon remand the record presented the issue, provided that any instructions offered did not exclude from the jury’s consideration whether the officer was making a lawful “stop and frisk.” Caldwell v. State, 381 So. 2d 591, 1980 Miss. LEXIS 1862 (Miss. 1980).

The trial court committed no reversible error in refusing to grant peremptory instruction to find the defendant not guilty of murder when he was not convicted of murder but was convicted of manslaughter, a crime that does not require proof of malice or premeditated design to kill. Kinkead v. State, 190 So. 2d 838, 1966 Miss. LEXIS 1397 (Miss. 1966).

In a case where it was alleged that the defendant “stomped” the decedent to death it was not prejudicial error to grant the state’s instruction that manslaughter is the killing of a human being without malice with a dangerous weapon in the language of Code 1942, § 2226, although more properly the instruction should have been framed under this section [Code 1942, § 2225]. King v. State, 251 Miss. 161, 168 So. 2d 637, 1964 Miss. LEXIS 337 (Miss. 1964).

In prosecution for murder, where defendant testified that he was shooting birds in the orchard and he did not see the deceased and that if he did shoot the deceased he did so unintentionally and accidentally, and the state contended that the shooting was intentional, it was not error for the court to refuse to give instruction that he could not be convicted of

murder. Martin v. State, 217 Miss. 506, 64 So. 2d 629, 1953 Miss. LEXIS 459 (Miss. 1953).

Where defendant’s theft of a watermelon was not committed in the presence of deceased, a private person and owner of such watermelon, and deceased arrested defendant upon information gained from the defendant, the killing of the deceased by the defendant in escaping, without evidence of malice aforethought or premeditation, did not justify a conviction of murder and court below erred in refusing a requested instruction that under the evidence the jury could not find a verdict for a greater offense that manslaughter. Walker v. State, 188 Miss. 177, 189 So. 804, 1939 Miss. LEXIS 2 (Miss. 1939).

Refusal of instructions relating to manslaughter if defendant killed deceased while resisting unlawful search held not erroneous in view of defense. Richardson v. State, 153 Miss. 654, 121 So. 284, 1929 Miss. LEXIS 67 (Miss. 1929).

Manslaughter instruction where facts warranted conviction of murder and no element of manslaughter is shown, is prejudicial error. Parker v. State, 102 Miss. 113, 58 So. 978, 1912 Miss. LEXIS 37 (Miss. 1912), overruled, Houston v. State, 105 Miss. 413, 62 So. 421, 1913 Miss. LEXIS 225 (Miss. 1913); Rester v. State, 110 Miss. 689, 70 So. 881, 1916 Miss. LEXIS 191 (Miss. 1916), overruled, Calicoat v. State, 131 Miss. 169, 95 So. 318, 1922 Miss. LEXIS 296 (Miss. 1922); Moore v. State, 86 Miss. 160, 38 So. 504, 1905 Miss. LEXIS 55 (Miss. 1905); Houston v. State, 105 Miss. 413, 62 So. 421, 1913 Miss. LEXIS 225 (Miss. 1913), overruled, Rester v. State, 110 Miss. 689, 70 So. 881, 1916 Miss. LEXIS 191 (Miss. 1916); Calicoat v. State, 131 Miss. 169, 95 So. 318, 1922 Miss. LEXIS 296 (Miss. 1922).

RESEARCH REFERENCES

ALR.

Criminal liability where act of killing is done by one resisting felony or other unlawful act committed by defendant. 56 A.L.R.3d 239.

Standard for determination of reasonableness of criminal defendant’s belief, for

purposes of self-defense claim, that physical force is necessary – modern cases. 73 A.L.R.4th 993.

Homicide: Liability where death immediately results from treatment or mistreatment of injury inflicted by defendant. 50 A.L.R.5th 467.

Am. Jur.

40 Am. Jur. 2d, Homicide §§ 46, 48 et seq.

33 Am. Jur. Proof of Facts 2d 211, Privileged Use of Force in Self-Defense.

2 Am. Jur. Trials, Investigating Particular Crimes §§ 40-57 (homicide).

7 Am. Jur. Trials, Homicide §§ 1 et seq.

CJS.

40 C.J.S., Homicide §§ 35, 98, 99, 125.

§ 97-3-33. Killing trespasser involuntarily.

The involuntary killing of a human being by the act, procurement, or culpable negligence of another, while such human being is engaged in the commission of a trespass or other injury to private rights or property, or is engaged in an attempt to commit such injury, shall be manslaughter.

HISTORY: Codes, Hutchinson's 1848, ch. 64, art. 12, Title 3 (13); 1857, ch. 64, art. 177; 1871, § 2640; 1880, § 2888; 1892, § 1161; 1906, § 1239; Hemingway's 1917, § 969; 1930, § 997; 1942, § 2227.

Cross References — Manslaughter, as provided in this section, defined as crime of violence, see § 97-3-2.

Penalty for manslaughter, see § 97-3-25.

Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see § 97-43-1 et seq.

JUDICIAL DECISIONS

1. In general.

Where, after conviction of the defendant on an indictment for murder, it was found by the court that in excusing jurors expressing scruples against imposition of death penalty the rules in such cases provided had been violated, a new jury

trial could be granted on the sole issue of punishment, without a new trial on the issue of defendant's guilt. *Irving v. State*, 228 So. 2d 266, 1969 Miss. LEXIS 1382 (Miss. 1969), vacated, 408 U.S. 935, 92 S. Ct. 2857, 33 L. Ed. 2d 751, 1972 U.S. LEXIS 2304 (U.S. 1972).

RESEARCH REFERENCES

ALR.

Use of set gun, trap, or similar device on defendant's own property. 47 A.L.R.3d 646.

7 Am. Jur. Trials, Homicide §§ 1 et seq.

CJS.

40 C.J.S., Homicide §§ 35, 98, 99, 125.

Am. Jur.

40 Am. Jur. 2d, Homicide §§ 46, 48 et seq.

2 Am. Jur. Trials, Investigating Particular Crimes §§ 40-57 (homicide).

Law Reviews.

Murder and Manslaughter in Mississippi: Unintentional Killings, 71 Miss. L.J. 1, Fall, 2001.

§ 97-3-35. Homicide; killing without malice in the heat of passion.

The killing of a human being, without malice, in the heat of passion, but

in a cruel or unusual manner, or by the use of a dangerous weapon, without authority of law, and not in necessary self-defense, shall be manslaughter.

HISTORY: Codes, Hutchinson's 1848, ch. 64, art. 12, Title 3 (10), (12); 1857, ch. 64, arts. 174, 176; 1871, §§ 2637, 2639; 1880, §§ 2885, 2887; 1892, §§ 1158, 1160; 1906, §§ 1236, 1238; Hemingway's 1917, §§ 966, 968; 1930, §§ 994, 996; 1942, §§ 2224, 2226.

Cross References — Manslaughter, as provided in this section, defined as crime of violence, see § 97-3-2.

Penalty for manslaughter, see § 97-3-25.

Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see § 97-43-1 et seq.

Requisites of indictment in homicide cases, see § 99-7-37.

Enhancement of offenses listed in 99-19-401(2) if the instrumentality used in the commission of the 99-19-401(2) offense was initially obtained in the course of the commission of the crime(s) provided for in this section, see § 99-19-401.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Killing in cruel or unusual manner.
3. Provocation.
4. Self-defense.
5. Questions for jury.
6. Evidence; generally.
7. — Warranting manslaughter.
8. — Not warranting manslaughter.
9. — Admissibility.
10. Instructions; generally.
11. — Warrantableness of manslaughter instructions.
12. — — Where evidence justifies murder conviction.
13. — Dangerous weapon.
14. — Request for instructions.
15. — Peremptory instructions.
16. — Reasonable doubt.
17. Heat of passion instruction.
18. Miscellaneous.

1. In general.

Defendant's charge was only reduced to manslaughter pursuant to his plea agreement, and once the guilty plea was withdrawn, his charge of capital murder was reinstated, even if the circuit court neglected to enter an order rescinding the order that had reduced the charge; there was no merit to defendant's contention that he should have been tried on a manslaughter charge instead of a capital murder charge. *Cozart v. State*, 226 So. 3d 639,

2016 Miss. App. LEXIS 270 (Miss. Ct. App. 2016).

Factual basis existed for defendant's guilty pleas where the factual summary expressed by the State, and agreed to by defendant, satisfied all elements of both crimes of manslaughter, Miss. Code Ann. § 97-3-35, and armed robbery, Miss. Code Ann. § 97-3-79; it showed that defendant intended to take the victim's automobile through the exhibition of a deadly weapon and it further demonstrated that defendant did, in fact, take the victim's automobile by shooting the victim and the victim died as a result of his wounds. *Keith v. State*, 999 So. 2d 383, 2008 Miss. App. LEXIS 313 (Miss. Ct. App. 2008), cert. denied, 999 So. 2d 852, 2009 Miss. LEXIS 52 (Miss. 2009).

Defendant's convictions for three counts of manslaughter for his actions in 1964 were appropriate in part because there was no statute of limitations on manslaughter in Mississippi. *Killen v. State*, 958 So. 2d 172, 2007 Miss. LEXIS 207 (Miss. 2007).

Sufficient evidence existed to convict defendant of murder in violation of Miss. Code Ann. § 97-3-19 as defendant wrote goodbye notes to his daughters asking for forgiveness and the two daughters testified that defendant stabbed the victim and then stabbed himself; thus, the jury did not err by not convicting defendant of

manslaughter instead. *Wash v. State*, 931 So. 2d 672, 2006 Miss. App. LEXIS 454 (Miss. Ct. App.), cert. dismissed, 937 So. 2d 450, 2006 Miss. LEXIS 544 (Miss. 2006).

Manslaughter is not a lesser-included offense of murder; therefore, a trial court was not permitted to enter a limited directed verdict on a murder charge and allow a jury to consider the unindicted offense of manslaughter because defendant did not receive notice of the manslaughter charge in the murder indictment. *State v. Shaw*, 2003 Miss. LEXIS 525 (Miss. Oct. 9, 2003), op. withdrawn, sub. op., 880 So. 2d 296, 2004 Miss. LEXIS 1027 (Miss. 2004).

Statute defining manslaughter may be read in the disjunctive, and thus, killing of human being without malice, or by use of dangerous weapon without authority of the law and not in necessary self-defense, may be "manslaughter." *Lanier v. State*, 684 So. 2d 93, 1996 Miss. LEXIS 631 (Miss. 1996).

At trial of wife indicted for murder of her husband, testimony of defendant that during the confrontation, preceding the shooting, victim grabbed her by the hair and pulled her to the ground, pulled her by the hair over to a picnic table and, after setting her on the picnic table, drew her head back, raised his fist to her head and said he was going to kill her, supported the giving of manslaughter instructions. *Mullins v. State*, 493 So. 2d 971, 1986 Miss. LEXIS 2591 (Miss. 1986).

If, after day and one-half of hearing trial of murder and manslaughter case, jury deliberates from 3:21 p.m. until 10:38 p.m., 3 jurors express desire to recess deliberation, but trial court nonetheless sends jury back for further deliberations, verdict comes at 11:07 p.m., special interrogatory confines jury until 11:35 p.m., and there has been excessive deliberation time. *Isom v. State*, 481 So. 2d 820, 1985 Miss. LEXIS 2336 (Miss. 1985).

Indictment for murder includes all lower grades of felonious homicide, including manslaughter, and failure of state to elect between murder and manslaughter does not leave defendant ignorant of charge in violation of Sixth Amendment of United States Constitution and § 26 of

Mississippi Constitution. *Kelly v. State*, 463 So. 2d 1070, 1985 Miss. LEXIS 1878 (Miss. 1985).

The trial court in a murder prosecution did not err in excluding testimony of psychologists as to defendant's state of mind at the time of the killing, where, as long as the complete defense of insanity was not at issue, expert psychiatric testimony was not available to either party to attempt to reduce the charge of murder under § 99-3-19 to one of manslaughter under § 99-3-35. *Taylor v. State*, 452 So. 2d 441, 1984 Miss. LEXIS 1705 (Miss. 1984), but see *May v. State*, 524 So. 2d 957, 1988 Miss. LEXIS 191 (Miss. 1988).

Under this section and § 97-3-27, manslaughter is killing without malice, either in the course of a felony other than rape, burglary, arson or robbery or in the heat of passion. Accordingly, since there was no evidence of "heat of passion," and the robbery element was uncontested, the evidence could not support a verdict of manslaughter without capital murder. *Bell v. Watkins*, 692 F.2d 999, 1982 U.S. App. LEXIS 23546 (5th Cir. Miss. 1982), cert. denied, 464 U.S. 843, 104 S. Ct. 142, 78 L. Ed. 2d 134, 1983 U.S. LEXIS 1426 (U.S. 1983).

A homicide is only manslaughter where the deceased is shown to have been the aggressor. *Jordan v. State*, 248 Miss. 703, 160 So. 2d 926, 1964 Miss. LEXIS 295 (Miss. 1964).

Malice is not a requisite ingredient of manslaughter. *Rogers v. State*, 222 Miss. 609, 76 So. 2d 702, 1955 Miss. LEXIS 644 (Miss. 1955).

The chief distinction between murder and manslaughter is the presence of deliberation and malice in murder and its absence in manslaughter. *Carter v. State*, 199 Miss. 871, 25 So. 2d 470, 1946 Miss. LEXIS 256 (Miss. 1946).

Accused, who after engaging in combat, struck deceased with dangerous weapon, causing death, held guilty of manslaughter. *Dalton v. State*, 141 Miss. 841, 105 So. 784, 1925 Miss. LEXIS 199 (Miss. 1925).

Situations under which felonious homicide is "manslaughter" stated. *Williams v. State*, 127 Miss. 851, 90 So. 705, 1921 Miss. LEXIS 288 (Miss. 1921).

Conviction of manslaughter in prosecution for murder is an acquittal of murder.

Walker v. State, 123 Miss. 517, 86 So. 337, 1920 Miss. LEXIS 50 (Miss. 1920).

2. Killing in cruel or unusual manner.

Where the slayer shot the deceased with a pistol to prevent his choking him to death, the killing was not in a cruel and unusual manner within this section [Code 1942, § 2224]. Klyce v. State, 78 Miss. 450, 28 So. 827, 1900 Miss. LEXIS 96 (Miss. 1900).

3. Provocation.

Reasonable fact-finder could have found that defendant had acted in the heat of passion when he killed his father as there was sufficient evidence that, in the days preceding the shooting, defendant was in a constant state of agitation, predicated upon his father's comments regarding his sexuality and the fact that defendant was especially sensitive to such statements because of earlier life experiences. Nolan v. State, 61 So. 3d 887, 2011 Miss. LEXIS 247 (Miss. 2011).

Verdict of murder under Miss. Code Ann. § 97-3-19 was not against the overwhelming weight of the evidence as the testimony presented a factual dispute for the jury's resolution and the jury found certain testimony to be credible and defendant's attempts to establish a self-defense theory to be contradictory; although defendant cited to Miss. Code Ann. § 97-3-31, which provided for a manslaughter conviction when one killed another while resisting a felony, there was conflicting testimony as to whether the victim was attempting to commit a felony, and although defendant also cited to Miss. Code Ann. § 97-3-35 and claimed the evidence supported a heat of passion manslaughter conviction, there was no evidence that defendant was acting in a state of violent and uncontrollable rage and he only attempted to show that he was afraid of the victim and acted in self-defense. Ray v. State, 27 So. 3d 416, 2009 Miss. App. LEXIS 496 (Miss. Ct. App. 2009), cert. denied, 27 So. 3d 404, 2010 Miss. LEXIS 61 (Miss. 2010).

In defendant's trial for murder, defendant's act of shooting the victim in the head at short range did not qualify as heat of passion of manslaughter because while

the conversation might have been heated with defendant's mother, the victim was a mere bystander to it; the victim's statement that defendant and defendant's mother needed to quit fighting did not cause a normal mind to be roused to the extent that reason was overthrown and that passion usurped the mind destroying judgment. Mullen v. State, 986 So. 2d 320, 2007 Miss. App. LEXIS 605 (Miss. Ct. App. 2007), cert. denied, 987 So. 2d 451, 2008 Miss. LEXIS 559 (Miss. 2008).

After defendant had a confrontation with his wife, she sat down outside a relative's home, and he fired a fatal shot into her head. The record supported the jury's verdict of murder, rather than manslaughter, because there was no evidence that the victim hit, kicked or provoked defendant. Bradford v. State, 910 So. 2d 1232, 2005 Miss. App. LEXIS 598 (Miss. Ct. App. 2005).

A person may form an intent to kill from a sudden passion induced by insult, provocation, or injury from another, and in that moment of passion, while still enraged, if he or she slays the other person, the homicide may be no greater than manslaughter, even though it is not committed in necessary self-defense, depending on the insult, provocation, or injury causing the anger. Windham v. State, 520 So. 2d 123, 1987 Miss. LEXIS 2880 (Miss. 1987).

The trial court in a murder prosecution committed reversible error by refusing submitted instructions on manslaughter, where the testimony of the defendant and the two witnesses to the killing indicated that defendant and the victim, his wife, had been arguing immediately prior to his shooting her, and where one of the witnesses testified that, immediately prior to the shooting, defendant appeared to be very mad, and was walking round and round his wife in an obviously agitated and emotionally disturbed condition, in that such testimony clearly reveals sufficient evidence from which a jury could have concluded that defendant was guilty only of the lesser included offense of manslaughter. Ruffin v. State, 444 So. 2d 839, 1984 Miss. LEXIS 1583 (Miss. 1984).

Words of reproach, criticism or anger do not constitute sufficient provocation to reduce an intentional and unjustifiable ho-

micide from murder to manslaughter. *Gaddis v. State*, 207 Miss. 508, 42 So. 2d 724, 1949 Miss. LEXIS 359 (Miss. 1949).

Facts that accused was provoked over domestic difficulties with wife, that he was intoxicated, that he resented interference of deceased in his family row, neither singly nor collectively, were sufficient to reduce his crime from murder to manslaughter. *Gaddis v. State*, 207 Miss. 508, 42 So. 2d 724, 1949 Miss. LEXIS 359 (Miss. 1949).

Evidence as to provocation and its effect to justified charge on manslaughter. *Hayley v. State*, 123 Miss. 87, 85 So. 129, 1920 Miss. LEXIS 8 (Miss. 1920).

4. Self-defense.

Jury's rejection of defendant's claims of self-defense and heat of passion was not against the weight of the evidence because two officers testified that, just after the stabbing occurred, defendant spontaneously and voluntarily confessed to them that he had stabbed the victim and that the knife he has used was under his bed, and at no point in his interviews or statements to police did he ever claim that he stabbed the victim in self-defense or in the heat of passion. *Miller v. State*, 297 So. 3d 275, 2019 Miss. App. LEXIS 589 (Miss. Ct. App. 2019), cert. denied, 297 So. 3d 1109, 2020 Miss. LEXIS 259 (Miss. 2020).

Instructions to the jury were proper because one instruction stated that the State was required to prove that the shooting of the victim was not in necessary self-defense and that if the State failed to prove any of the elements of manslaughter beyond a reasonable doubt, then the jury was required to find defendant not guilty; and another instruction to the jury required the jury to acquit defendant if the State failed to prove beyond a reasonable doubt that he had not acted in self-defense when he shot the victim. *Lafayette v. State*, 179 So. 3d 96, 2015 Miss. App. LEXIS 606 (Miss. Ct. App. 2015).

Because the record reflected that sufficient evidence was presented for a competent jury to find beyond a reasonable doubt that defendant was guilty of manslaughter and failed to act in reasonable self-defense, defense of others, or defense of his home, the circuit court did not err in

denying defendant's motion for judgment notwithstanding the verdict. *Howell v. State*, 144 So. 3d 211, 2014 Miss. App. LEXIS 424 (Miss. Ct. App. 2014).

Defendant's manslaughter conviction could not be said to be against the overwhelming weight of the evidence even in light of his self-defense argument. Defendant could not rely on the castle-doctrine presumption of the reasonable use of deadly force and the evidence presented to the jury, such as the fact that the victim was unarmed and was in poor health, presented a jury question as to the necessity of defendant's use of deadly force. *Hammond v. State*, 119 So. 3d 1074, 2013 Miss. App. LEXIS 29 (Miss. Ct. App.), cert. denied, 119 So. 3d 328, 2013 Miss. LEXIS 430 (Miss. 2013).

Murder defendant was not entitled to a instruction on imperfect self-defense, reducing the crime to manslaughter, because defendant's testimony that the victim pulled a gun on him first provided no evidentiary basis for finding the required bona fide but unfounded belief. *Young v. State*, 99 So. 3d 159, 2012 Miss. LEXIS 485 (Miss. 2012).

Defendant's conviction for manslaughter was proper under Miss. Code Ann. § 97-3-35 because the evidence was sufficient since a jury could have reasonably found that defendant did not act in necessary self-defense. Defendant admitted that he grabbed a victim, a 61-year-old man in less-than-good health, by the wrists, had pulled the victim towards him, and had struck him three times on the side of the head; uncontradicted physical evidence showed that the victim died of blunt-force trauma to his head. *Booker v. State*, 64 So. 3d 965, 2011 Miss. LEXIS 316 (Miss. 2011).

Defendant's conviction for manslaughter was proper because it was up to the jury to determine whether defendant acted reasonably in necessary self-defense when he shot the victim in the head. The jury could have determined that defendant did not act in necessary self-defense because, at that time, the victim was on the floor and did not present a reasonable threat to defendant's life. *Rogers v. State*, 994 So. 2d 792, 2008 Miss. App. LEXIS 170 (Miss. Ct. App.), cert. denied, 998 So.

2d 1010, 2008 Miss. LEXIS 668 (Miss. 2008).

Defendant's conviction for manslaughter was appropriate because the evidence indicated that in the middle of the fight with the victim, defendant left and then returned with a knife; that was sufficient evidence for the jury to determine that defendant was not acting in self-defense. *Lindsey v. State*, 965 So. 2d 712, 2007 Miss. App. LEXIS 357 (Miss. Ct. App. 2007).

Sufficient evidence was adduced at trial to support a finding that defendant's murder of the victim was not done in self-defense, even though defendant testified that the victim had previously choked defendant, to the point that defendant felt that he was going to die; the evidence was sufficient to find defendant guilty of manslaughter. *Harris v. State*, 937 So. 2d 474, 2006 Miss. App. LEXIS 644 (Miss. Ct. App. 2006).

According to his plea, defendant stated that he killed the victim in the heat of passion and that she did not pose a threat to his life, so he did not kill her out of self-defense. In a manner of speaking, he did plead "not in necessary self-defense." Defendant's pro se argument that an element of the offense was not met in the latter regard was without merit, and his argument that counsel was ineffective was belied by the record, as had defendant gone to trial, he would have faced a possible conviction for depraved heart murder; thus, defendant had no grounds for postconviction relief. *Barnes v. State*, 920 So. 2d 1019, 2005 Miss. App. LEXIS 527 (Miss. Ct. App.), cert. dismissed, 920 So. 2d 1008, 2005 Miss. LEXIS 602 (Miss. 2005), cert. dismissed, 921 So. 2d 344, 2005 Miss. LEXIS 761 (Miss. 2005), cert. denied, 926 So. 2d 922, 2006 Miss. LEXIS 79 (Miss. 2006).

Evidence at trial was controverted as to whether defendant acted in self-defense, such that the jury was entitled to find that defendant was not acting in self-defense when he purposely fired three gunshots into the victim. *Carter v. State*, 858 So. 2d 212, 2003 Miss. App. LEXIS 1003 (Miss. Ct. App. 2003).

"Imperfect self-defense" theory is that defendant killed deceased without malice,

under bona fide belief, but without reasonable cause therefor, that it was necessary for him so to do in order to prevent appellant from inflicting death or great bodily harm upon him. *Lanier v. State*, 684 So. 2d 93, 1996 Miss. LEXIS 631 (Miss. 1996).

Defense instruction that "if a person who is being unlawfully arrested resists that arrest and kills the party seeking to arrest him to prevent such arrest, and killing is not done with malice aforethought, killing is not murder, but manslaughter" was adequate to inform jury on theory of manslaughter as imperfect self-defense. *Lanier v. State*, 684 So. 2d 93, 1996 Miss. LEXIS 631 (Miss. 1996).

A defendant who left an altercation, armed himself with a kitchen knife, and returned to the fray with the intent to and did use the knife on the other party could not claim self defense. *Griffin v. State*, 495 So. 2d 1352, 1986 Miss. LEXIS 2705 (Miss. 1986).

In a homicide prosecution, an accused was not entitled to a manslaughter instruction in absence of evidence that the unarmed victim had made a physical assault upon the accused. *Gates v. State*, 484 So. 2d 1002, 1986 Miss. LEXIS 2421 (Miss. 1986).

In a manslaughter prosecution, instructions on the right to "act on appearances" and "self-defense" were properly refused where the defendant had testified that he did not strike the fatal blow and further, having claimed that he himself was knocked down during the affray, said that he could not say who had struck him. *Mangrum v. State*, 232 So. 2d 703, 1970 Miss. LEXIS 1634 (Miss. 1970).

Although the evidence was to some extent conflicting, state's showing that the deceased was not attacking the defendant with a weapon and that defendant's life was not in fact endangered at the time of the shooting justified a conviction of manslaughter. *McCarty v. State*, 230 Miss. 330, 92 So. 2d 853, 1957 Miss. LEXIS 375 (Miss. 1957).

One believing his life to be in real or apparent danger at hands of another has right to shoot to kill. *McNeal v. State*, 115 Miss. 678, 76 So. 625, 1917 Miss. LEXIS 250 (Miss. 1917).

5. Questions for jury.

Evidence that defendant lured the vic-

tim to a field and shot the victim in the back because defendant thought the victim had “snitched” to police about a burglary supported defendant’s conviction for murder rather than manslaughter; whether the offense was murder or manslaughter was a question for the jury. *Hodge v. State*, 823 So. 2d 1162, 2002 Miss. LEXIS 251 (Miss. 2002).

Trial court did not commit error in not directing verdict for defendant at conclusion of state’s case where jury could have believed version of facts, recounted in state’s closing argument, that defendant parked his car behind building and tiptoed around it so as to surprise his victims, then kicked door in and entered with pistol blazing, wounding wife and killing victim, which inferences would support manslaughter verdict. *Jordan v. State*, 513 So. 2d 574, 1987 Miss. LEXIS 2817 (Miss. 1987).

Where the testimony was disputed and contradictory, the question whether the verdict should be murder or manslaughter was for the jury, and the trial court committed no error in overruling the defendant’s motion to reduce the charge. *Seymore v. State*, 261 So. 2d 453, 1972 Miss. LEXIS 1285 (Miss. 1972).

The issue as to whether an admitted homicide is murder or manslaughter is ordinarily a question for the jury on conflicting evidence. *Kinhead v. State*, 190 So. 2d 838, 1966 Miss. LEXIS 1397 (Miss. 1966).

Where the accused stabbed and killed deceased without justification, both guilt and the grade of the homicide were for determination of the jury and the refusal of the court to give the accused’s requested instruction which limited the grade of homicide to manslaughter was not an error. *Rogers v. State*, 222 Miss. 609, 76 So. 2d 702, 1955 Miss. LEXIS 644 (Miss. 1955).

Ordinarily, whether a homicide is murder or manslaughter is a question for the jury. *Anderson v. State*, 199 Miss. 885, 25 So. 2d 474, 1946 Miss. LEXIS 258 (Miss. 1946).

6. Evidence; generally.

Denial of defendant’s motion for a directed verdict was appropriate, when de-

fendant was the only eyewitness presented at trial who was able to testify to the events surrounding the victim’s death, because defendant’s trial testimony was inconsistent with the physical evidence and the various accounts that defendant gave to others. *Thompson v. State*, 248 So. 3d 942, 2018 Miss. App. LEXIS 290 (Miss. Ct. App. 2018).

Defendant was properly convicted of manslaughter of his brother, pursuant to Miss. Code Ann. § 97-3-35, because any evidentiary error was harmless; defendant was not prohibited from presenting his self-defense theory at trial for consideration by the jury. *Graves v. State*, 45 So. 3d 283, 2010 Miss. App. LEXIS 93 (Miss. Ct. App. 2010).

Defendant’s conviction for murdering his girlfriend was appropriate because defendant’s friend, who was the only eyewitness to the incident, testified that defendant deliberately shot the victim in the head at point-blank range. Deliberate design to kill a person could be formed very quickly and the friend further recounted no “heat of passion” element to forward a possible manslaughter conviction; defendant also did not produce any evidence to that effect. *Fannings v. State*, 997 So. 2d 953, 2008 Miss. App. LEXIS 790 (Miss. Ct. App. 2008).

Defendant’s conviction of culpable negligence manslaughter was supported by sufficient evidence because the evidence enabled the jury to reasonably conclude that defendant pointed a loaded, cocked gun at the victim’s head and pulled the trigger. *Johnson v. State*, 997 So. 2d 256, 2008 Miss. App. LEXIS 779 (Miss. Ct. App. 2008).

Where an eyewitness stated that defendant stabbed a victim, a murder weapon was found, and a doctor who performed the autopsy stated that it would have been nearly impossible for the victim to have inflicted such a wound upon herself, there was sufficient evidence to support a manslaughter conviction under Miss. Code Ann. §§ 97-3-35, 97-3-47. There was no need to give a circumstantial evidence instruction based on the direct testimony of the eyewitness. *Brown v. State*, 970 So. 2d 1300, 2007 Miss. App. LEXIS 826 (Miss. Ct. App. 2007).

Reasonable juror could have found defendant guilty of manslaughter based on the evidence presented; therefore, the verdict was not so contrary to the weight of the evidence, nor had manifest error been committed. *Nichols v. State*, 965 So. 2d 770, 2007 Miss. App. LEXIS 640 (Miss. Ct. App. 2007).

Evidence was sufficient to support defendant's manslaughter conviction under Miss. Code Ann. § 97-3-35 because the testimony from the state's witnesses indicated that: (1) the victim had no weapon; (2) defendant and the victim began fighting; (3) the victim suffered a fatal stab wound to the chest sometime during the fight; (4) defendant left the scene immediately; and (5) defendant initiated the fight; defendant's own witness testified that the victim was uninjured before the fight with defendant, and no evidence was presented indicating that anyone else was involved in the fight. *White v. State*, 962 So. 2d 728, 2007 Miss. App. LEXIS 525 (Miss. Ct. App. 2007).

Weight of the evidence supported defendant's manslaughter conviction under Miss. Code Ann. § 97-3-35 because the evidence was clear that the victim was uninjured prior to his encounter with defendant, and that after the encounter he was bleeding to death from a stab wound to the chest; the only evidence that the victim possessed a knife was defendant's testimony, and a witness testified that the victim did not have a knife. *White v. State*, 962 So. 2d 728, 2007 Miss. App. LEXIS 525 (Miss. Ct. App. 2007).

Where defendant challenged the sufficiency and the weight of the evidence, the trial court properly denied defendant's motion for a directed verdict and his motion for a new trial and found him guilty of manslaughter because: (1) there was evidence that could create a reasonable inference that defendant retrieved an object from his vehicle and then stabbed the victim; (2) the evidence supported a conclusion that defendant was not under attack from the victim, and even that defendant advanced on the victim after the fight had ended; (3) the victim died from excessive bleeding due to a stab wound to his lower chest; and (4) a jury could have found defendant guilty of killing the vic-

tim in a cruel or unusual manner or by the use of a dangerous weapon, without the authority of law, and not in necessary self-defense. *Brownlee v. State*, 950 So. 2d 1063, 2007 Miss. App. LEXIS 131 (Miss. Ct. App.), cert. denied, 958 So. 2d 1232, 2007 Miss. LEXIS 365 (Miss. 2007).

Defendant's conviction for capital murder and arson was proper; the evidence was sufficient because defendant intended to severely beat the victim, and then moved and burned his body. Those actions did not constitute manslaughter in violation of Miss. Code Ann. § 97-3-35. *Fuqua v. State*, 938 So. 2d 277, 2006 Miss. App. LEXIS 164 (Miss. Ct. App.), cert. denied, 937 So. 2d 450, 2006 Miss. LEXIS 541 (Miss. 2006), cert. denied, 549 U.S. 1344, 127 S. Ct. 2037, 167 L. Ed. 2d 774, 2007 U.S. LEXIS 4043 (U.S. 2007).

Defendant's conviction for manslaughter in violation of Miss. Code Ann. § 97-3-35 was proper where the evidence sufficiently permitted a reasonable jury to determine that the defendant acted in the heat of passion by shooting the victim in reaction to the victim's initial assault upon him. *Miller v. State*, 919 So. 2d 1137, 2005 Miss. App. LEXIS 734 (Miss. Ct. App. 2005).

Sufficient evidence existed to convict defendant of manslaughter as three witnesses made photographic and in-court identifications of defendant, testifying that they had seen him shoot the victim, and defendant was the only one who testified that he had been home all night. *Wash v. State*, 880 So. 2d 1054, 2004 Miss. App. LEXIS 226 (Miss. Ct. App. 2004).

Where defendant aimed a loaded, cocked gun at a man's head, the man's companion tried to pull defendant away by grabbing his arm and was fatally shot in the process, and defendant presented no evidence of his own at trial, but merely attempted on appeal to attack the credibility of the State's witnesses, the evidence was sufficient to support his conviction for manslaughter. *Riley v. State*, 855 So. 2d 1004, 2003 Miss. App. LEXIS 281 (Miss. Ct. App.), cert. denied, 859 So. 2d 1017, 2003 Miss. LEXIS 495 (Miss. 2003).

Evidence was sufficient, because the use of a knife to stab a victim to death was sufficient evidence to convict of man-

slaughter through the use of a deadly weapon, and based on witness testimony, the evidence tending to negate the self-defense claim was sufficient to support a guilty verdict. *Martin v. State*, 818 So. 2d 380, 2002 Miss. App. LEXIS 317 (Miss. Ct. App. 2002).

Finding that state presented sufficient evidence that defendant acted with deliberate design in killing victim, so as to preclude directed verdict, was supported by defendant's statement to police following incident, transcript of 911 emergency call from victim, and testimony at trial, all of which indicated sufficient degree of recklessness and indifference to human life pointing to conviction, at the very least, for manslaughter or murder, and not culpable negligence. *Clark v. State*, 693 So. 2d 927, 1997 Miss. LEXIS 162 (Miss. 1997).

During a murder prosecution arising from the shooting death of the defendant's wife, the trial erred when it excluded evidence of the wife's prior threats with a butcher knife which she had made toward the defendant 2 weeks before her death, where the defendant claimed self-defense, since the evidence was relevant on the issue of the defendant's state of mind at the time of the shooting and on the issue of whether the victim may have been the initial aggressor. *Heidel v. State*, 587 So. 2d 835, 1991 Miss. LEXIS 646 (Miss. 1991).

Impeachment of testimony of defendant's wife, who had testified that she did not remember giving statement to anyone in hospital on night of incident, with testimony of officer who interviewed her at hospital was proper, and jury was properly instructed that such testimony was offered only to impeach testimony of witness, not as substantive evidence; questions laying predicate to introduction of prior inconsistent statements of witness included whether or not on specific date, at specific place, and in presence of specific persons, witness made statement in question. *Jordan v. State*, 513 So. 2d 574, 1987 Miss. LEXIS 2817 (Miss. 1987).

Testimony which implicated defendant in igniting fire which resulted in death of victim was sufficient where witnesses testified they saw flame in defendant's hand;

another witness saw defendant on passenger side of victim's car at window; and although she did not see flame, fire did begin on passenger side and moved quickly to engulf victim. *Parker v. State*, 514 So. 2d 767, 1986 Miss. LEXIS 2521 (Miss. 1986), cert. denied, 485 U.S. 1014, 108 S. Ct. 1487, 99 L. Ed. 2d 715, 1988 U.S. LEXIS 1738 (U.S. 1988).

Because the testimony of a doctor substantially contradicted the testimony of defendant and his witness, defendant was not entitled to a directed verdict at the end of the case on the basis of the rule that when defendant or the defendant's witnesses are the only eyewitnesses to a homicide, their version, if reasonable, must be accepted as true, unless contradicted in material particular by a credible witness. *Weeks v. State*, 493 So. 2d 1280, 1986 Miss. LEXIS 2614 (Miss. 1986).

Notwithstanding a defendant's claim that the deceased was the aggressor and that it was in the heat of passion that the defendant hit the deceased several times, testimony that the defendant made threats against the deceased and that the defendant beat the deceased's wife, was sufficient to justify the jury's conclusion, in finding the defendant guilty of murder, that at all times the aggressor was not the deceased but the defendant. *Seymore v. State*, 261 So. 2d 453, 1972 Miss. LEXIS 1285 (Miss. 1972).

Upon the trial of a defendant indicted for murder, the jury was amply warranted in concluding, on conflicting evidence, that the accused was guilty of manslaughter, pursuant to the manslaughter instruction granted the state. *Woods v. State*, 229 Miss. 563, 91 So. 2d 273, 1956 Miss. LEXIS 640 (Miss. 1956).

Although the accused had testified that the shooting of the deceased was accidental, and the other witnesses could not see the accused and the deceased wrestling over the gun at the time it went off, the rule that where a defendant is the only witness to a homicide, his version, if reasonable, must be accepted as true unless substantially contradicted in material particulars by state's credible witnesses, or by the physical facts or facts of common knowledge, was inapplicable, since the jury had before it testimony of events

leading up to the shooting and of the fact that the accused made an unlawful entry into the deceased's house armed with a deadly weapon with the intention to shoot another. *Reed v. State*, 229 Miss. 440, 91 So. 2d 269, 1956 Miss. LEXIS 624 (Miss. 1956).

Accused's statement to a police officer in response to questioning that he had not intended to shoot the deceased but had intended to shoot another, was not a confession but rather an admission. *Reed v. State*, 229 Miss. 440, 91 So. 2d 269, 1956 Miss. LEXIS 624 (Miss. 1956).

The killing with a deadly weapon is assumed to be malicious, and therefore murder, and before the presumption disappears the facts of the killing must appear in the evidence and must change the character of the killing, either showing justification or necessity, before it is reduced from murder; if the facts relied upon to change such presumption are unreasonable and improbable, or if they are contradicted by physical facts and circumstances in evidence, then the jury may find a verdict either of murder or manslaughter according to the circumstances and facts in evidence. *Crockerham v. State*, 202 Miss. 25, 30 So. 2d 417, 1947 Miss. LEXIS 236 (Miss. 1947).

Where the evidence disclosed that the stabbing of deceased occurred during a mutual fight and combat between deceased and accused and that the immediate cause thereof was the vile language directed by deceased to accused, the undisputed proof disclosed a situation where accused could not be guilty of an offense greater than manslaughter. *Anderson v. State*, 199 Miss. 885, 25 So. 2d 474, 1946 Miss. LEXIS 258 (Miss. 1946).

7. — Warranting manslaughter.

Evidence was sufficient to support defendant's manslaughter conviction; although he claimed there were multiple shooters, the evidence tied one gun to the victim and the other gun to defendant, and although he claimed he acted in self-defense and there was evidence he knew the victim threatened to kill him, defendant fled the scene, hid from police, and did not tell them what he claimed had occurred, plus his account of what hap-

pened was contradicted by other testimony and evidence. *Reid v. State*, — So. 3d —, 2019 Miss. App. LEXIS 613 (Miss. Ct. App. Dec. 17, 2019), cert. denied, — So. 3d —, 2020 Miss. LEXIS 323 (Miss. 2020).

Jury's verdict finding defendant guilty of manslaughter was not so contrary to the overwhelming weight of the evidence that to allow the verdict to stand would sanction an unconscionable injustice. Thus, the circuit court's denial of defendant's motion for a new trial was proper. *Birge v. State*, 216 So. 3d 1174, 2017 Miss. App. LEXIS 211 (Miss. Ct. App. 2017).

Sufficient evidence was presented to support the jury's verdict finding defendant guilty of manslaughter. As a result, the circuit court's denial of defendant's motion for a judgment notwithstanding the verdict was proper. *Birge v. State*, 216 So. 3d 1174, 2017 Miss. App. LEXIS 211 (Miss. Ct. App. 2017).

Defendant's conviction for manslaughter was supported evidence defendant shot the victim and by a lack of evidence supporting self-defense, including a lack of evidence corroborating defendant's claim that the victim had a gun, and that defendant waited to call police. *Herrington v. State*, 242 So. 3d 909, 2017 Miss. App. LEXIS 601 (Miss. Ct. App. 2017), cert. denied, 246 So. 3d 67, 2018 Miss. LEXIS 221 (Miss. 2018).

Had the jury been properly instructed on the castle doctrine, the State offered sufficient and credible evidence to support defendant's conviction for heat of passion manslaughter because the evidence showed that the two men were engaged in a heated argument, with the victim holding a gun and preventing defendant from leaving during the altercation; and the victim was shot in the back, presumably retreating from defendant's firing of the gun. *Husband v. State*, 204 So. 3d 353, 2016 Miss. App. LEXIS 472 (Miss. Ct. App. 2016).

Sufficient evidence supported the jury's verdict of manslaughter; there was testimony that defendant had committed the abuse of the child, a doctor referred to the child's death as a homicide, and the child's injuries were described as abusive head trauma, which dispelled that it could have been second-impact syndrome, which de-

fendant tried to prove was the cause of death. *Cozart v. State*, 226 So. 3d 639, 2016 Miss. App. LEXIS 270 (Miss. Ct. App. 2016).

Verdict convicting defendant of manslaughter was not against the overwhelming weight of the evidence because, although defendant argued that the victim had a gun, there was no testimony that the victim made any overt act toward defendant other than raising his shirt to reveal the gun that was tucked into his waistband; and there was no testimony that defendant attempted to remove the gun from his waistband. *Lafayette v. State*, 179 So. 3d 96, 2015 Miss. App. LEXIS 606 (Miss. Ct. App. 2015).

Evidence was sufficient to convict defendant of manslaughter because there was evidence that an altercation between defendant and another individual occurred at the club, that a beer bottle was thrown, and that defendant responded by shooting his gun into the air at least twice; there was testimony that the victim showed defendant a weapon that was concealed in his waistband; and, although the club's security guard testified that he attempted, for several minutes, to calm defendant and to get him to leave the building, the record reveals that instead of leaving the club, defendant shot and killed the victim. *Lafayette v. State*, 179 So. 3d 96, 2015 Miss. App. LEXIS 606 (Miss. Ct. App. 2015).

Evidence supported defendant's manslaughter conviction because defendant admitted to fighting with the victim at defendant's auto repair shop, defendant escaped from the victim at least twice and walked to defendant's office where defendant kept a gun, the victim was shot in defendant's office by defendant's gun, defendant had gunshot residue on both hands, defendant was holding the gun when police officers arrived, and officers testified that they heard defendant say something about shooting the victim and/or wanting to shoot the victim again. *Flynt v. State*, 183 So. 3d 1, 2015 Miss. LEXIS 532 (Miss. 2015).

Evidence was sufficient to sustain defendant's heat-of-passion manslaughter conviction where the testimony showed that he and the victim had an altercation

during which defendant waved a knife around and then stabbed the victim, there was no evidence that the victim had a weapon, and defendant stated that the victim had not threatened him and he was not in fear for his life. *Byrd v. State*, 158 So. 3d 1146, 2015 Miss. LEXIS 129 (Miss. 2015).

There was sufficient evidence to support a conviction for manslaughter; the jury was given instructions on self-defense, the duty to retreat, and manslaughter. Defendant's assertion of self-defense did not occur until after her arrest, and no other party heard the threats that the victim allegedly made prior to the shooting. *Knight v. State*, 157 So. 3d 839, 2015 Miss. App. LEXIS 35 (Miss. Ct. App. 2015).

There was sufficient evidence to convict defendant of manslaughter in violation of Miss. Code Ann. § 97-3-35 because the State put on evidence tending to show that defendant had a deliberate design to kill the victim, and there was corroborated testimony that the victim was neither confronting nor threatening defendant at the time he was shot; the only weapon found on the premises was defendant's handgun. *Vaughn v. State*, 111 So. 3d 1289, 2013 Miss. App. LEXIS 225 (Miss. Ct. App. 2013).

Overwhelming weight of the evidence did not preponderate against defendant's manslaughter conviction because no gun was found in the car where the victim was shot, the victim survived the shooting long enough to name defendant as his shooter, and defendant admitted to several family members that he had killed someone but did not allege self-defense; where the evidence would justify a conviction of murder, the defendant may not complain of a conviction of the lesser offense of manslaughter. *Burdette v. State*, 110 So. 3d 296, 2013 Miss. LEXIS 75 (Miss. 2013).

Defendant's manslaughter conviction in violation of Miss. Code Ann. § 97-3-35 was proper because his version of the incident satisfied the elements of manslaughter; therefore, the circuit court was within its discretion to determine that the *Weathersby* rule did not apply. *Booker v. State*, 64 So. 3d 988, 2010 Miss. App. LEXIS 329 (Miss. Ct. App. 2010), *aff'd*, 64 So. 3d 965, 2011 Miss. LEXIS 316 (Miss. 2011).

Defendant's manslaughter conviction was appropriate because the evidence was sufficient. When viewing the testimony of his mother in a light most favorable to the prosecution, defendant acted wholly without authority of law in stabbing the victim, his mother's boyfriend, in the neck with a kitchen knife. According to the mother, her boyfriend did not try to hit defendant; the boyfriend only tried to close the bedroom door after defendant somehow unlocked his mother's bedroom door. *Martin v. State*, 43 So. 3d 504, 2010 Miss. App. LEXIS 122 (Miss. Ct. App. 2010).

Defendant's manslaughter conviction, pursuant to Miss. Code Ann. § 97-3-35, was supported by sufficient evidence because both versions of the shooting in evidence at trial supported the conclusion that defendant's use of deadly force was either unnecessary or premature and was not exercised in necessary self-defense, as defined in Miss. Code Ann. § 97-3-15(f). *Pruitt v. State*, 28 So. 3d 585, 2010 Miss. LEXIS 44 (Miss. 2010).

Where defendant admitted to deputies and investigator that he had shot the victim, but claimed the death was an accident, following a minor argument, and that he and the victim were playing with the gun when it discharged, viewing the evidence in the light most favorable to the verdict, there was sufficient evidence supporting the jury verdict of manslaughter under Miss. Code Ann. § 97-3-35. *Barfield v. State*, 22 So. 3d 1175, 2009 Miss. LEXIS 583 (Miss. 2009).

Evidence was sufficient to convict defendant of manslaughter under Miss. Code Ann. § 97-3-35 as she was the only other person in the house, a deadly weapon was used, there was no evidence of self-defense, and scientific evidence of the gunshot wound showed that the victim could not have inflicted it himself, either by accident or suicide. Further, there was no prejudice to defendant as she was convicted of the lesser-included offense where proof would have supported conviction of the greater offense of deliberate-design murder. *Simpson v. State*, 993 So. 2d 400, 2008 Miss. App. LEXIS 334 (Miss. Ct. App.), cert. denied, 997 So. 2d 924, 2008 Miss. LEXIS 552 (Miss. 2008), cert. de-

nied, 555 U.S. 1188, 129 S. Ct. 1348, 173 L. Ed. 2d 614, 2009 U.S. LEXIS 1379 (U.S. 2009).

Where an inmate pled guilty to murder, but argued that it was a "crime of passion," it was not error to deny the inmate's motion for the production of the transcript of the partial trial because the inmate improperly equated a "crime of passion" with a killing in the heat of passion, and there was nothing to suggest that the victim did anything in the moments prior to death to provoke or arouse sufficient passion to cause the inmate to kill the victim in a moment of rage. *Lawrence v. State*, 970 So. 2d 1291, 2007 Miss. App. LEXIS 366 (Miss. Ct. App. 2007).

Defendant's conviction for manslaughter in violation of Miss. Code Ann. § 97-3-35 was affirmed as two witnesses saw defendant shoot the victim three times after the victim had initially walked away from the argument with defendant and did not approach defendant's car until defendant went to follow him. *Shipp v. State*, 921 So. 2d 1280, 2006 Miss. App. LEXIS 132 (Miss. Ct. App. 2006).

There was sufficient evidence to support a conviction for murder under Miss. Code Ann. § 97-3-19(1)(a), rather than manslaughter under Miss. Code Ann. § 97-3-35, where the facts showed that defendant had been having domestic problems with his wife, he cashed a check for a large sum of money, and then went to her work where he shot her to death. *Bennett v. State*, 956 So. 2d 964, 2006 Miss. App. LEXIS 675 (Miss. Ct. App. 2006), cert. denied, 2007 Miss. LEXIS 293 (Miss. May 17, 2007).

Verdict was not against the overwhelming weight of the evidence, and therefore defendant's manslaughter conviction was affirmed, because there was significant evidence from which the jury could have found that defendant did not shoot the victim in self-defense, including direct and circumstantial evidence contradicting defendant's version of the incident, including the facts that no gun or jacket were found on the victim and defendant's statement that he shot the victim because he did not want to "tussle." *Smith v. State*, 945 So. 2d 414, 2006 Miss. App. LEXIS 594 (Miss. Ct. App. 2006).

Evidence was sufficient to support defendant's conviction because: (1) the evidence was undisputed that the victim was killed with a pistol; (2) both the state and the defense presented evidence that an argument took place before the shooting occurred; and (3) the state presented evidence that defendant shot the victim as a matter of convenience and that he and his girlfriend attempted to cover-up the shooting. *Smith v. State*, 945 So. 2d 414, 2006 Miss. App. LEXIS 594 (Miss. Ct. App. 2006).

In order to find defendant guilty of manslaughter, the jury had to find that (1) he killed a human being, (2) without malice, (3) in the heat of passion, (4) by the use of a deadly weapon, (5) without authority of law, and (6) not in necessary self-defense. The evidence was sufficient to convict defendant of manslaughter because (1) defendant and the victim got into a fight; (2) the victim retreated to the porch of a house, where defendant used a pipe to deliver a fatal blow to the victim's head; (3) it was not shown that defendant was acting in self-defense; and (4) defendant fled the scene of the crime; thus, the trial court did not err in denying defendant's motion for a directed verdict. *Sullinger v. State*, 935 So. 2d 1067, 2006 Miss. App. LEXIS 25 (Miss. Ct. App.), cert. denied, 936 So. 2d 367, 2006 Miss. LEXIS 423 (Miss. 2006).

Defendant's manslaughter conviction was affirmed as two 10-year-old children testified that defendant killed the victim with a baseball bat, and even if the assault was in self-defense or defense of others, defendant acted unreasonably when he struck the victim in the head with the bat more than once. *Cooper v. State*, 911 So. 2d 665, 2005 Miss. App. LEXIS 654 (Miss. Ct. App. 2005).

Trial court did not err by refusing to grant defendant a directed verdict because defendant's testimony supported the jury verdict of manslaughter. Defendant admitted that he killed the victim during a dispute that involved physical violence and that he had repeatedly struck the victim on the head with a wooden board, and that he had stabbed the victim in the neck with a filet knife while the victim was on the ground; the

state also offered sufficient evidence to allow the jury to find that defendant's actions were not in necessary self-defense. *Ward v. State*, 935 So. 2d 1047, 2005 Miss. App. LEXIS 996 (Miss. Ct. App. 2005), cert. denied, 936 So. 2d 367, 2006 Miss. LEXIS 414 (Miss. 2006).

Evidence was sufficient to support defendant's manslaughter conviction where the determination of whether defendant committed the crime while acting in the heat of passion was properly submitted to the jury for resolution, and the jury made the determination against defendant; the jury could, on the evidence presented, find defendant guilty of manslaughter. *Schankin v. State*, 910 So. 2d 1113, 2005 Miss. App. LEXIS 169 (Miss. Ct. App.), cert. denied, 920 So. 2d 1008, 2005 Miss. LEXIS 566 (Miss. 2005).

Where defendant was indicted for murder under Miss. Code Ann. § 97-3-19(1)(a), and the State failed to prove the charge, the trial judge should have been authorized to issue a limited directed verdict as to the murder charge and allow the State to proceed on the lesser unindicted offense of manslaughter, under Miss. Code Ann. § 97-3-35. *State v. Shaw*, 880 So. 2d 296, 2004 Miss. LEXIS 1027 (Miss. 2004).

Testimony that defendant voluntarily left his car to meet the much larger victim's challenge to fight, did not lock his car doors or attempt to leave the scene, and fatally stabbed the victim, was sufficient to prove that he intended to inflict serious physical injury to the victim during the course of mutual combat, and that no self-defense justification existed. *Robinson v. State*, 858 So. 2d 887, 2003 Miss. App. LEXIS 903 (Miss. Ct. App. 2003).

Where defendant aimed a loaded, cocked gun at a man's head, the man's companion tried to pull defendant away by grabbing his arm and was fatally shot in the process, and defendant presented no evidence of his own at trial, but merely attempted on appeal to attack the credibility of the State's witnesses, the evidence was sufficient to support his conviction for manslaughter. *Riley v. State*, 855 So. 2d 1004, 2003 Miss. App. LEXIS 281 (Miss. Ct. App.), cert. denied, 859 So. 2d 1017, 2003 Miss. LEXIS 495 (Miss. 2003).

Where witnesses, including a defense witness, testified that defendant had a gun, and a victim was fatally shot, there was sufficient evidence to find defendant guilty of manslaughter. *Hope v. State*, 840 So. 2d 747, 2003 Miss. App. LEXIS 208 (Miss. Ct. App. 2003).

Evidence was legally sufficient to establish that the defendant was guilty of the offenses of manslaughter by culpable negligence and shooting into a motor vehicle where several eyewitnesses testified that the defendant fired his weapon into a vehicle approximately nine times and another witness stated that the defendant confessed that he had shot at someone and "he didn't know if they were dead or alive." *Ratcliff v. State*, 752 So. 2d 435, 1999 Miss. App. LEXIS 680 (Miss. Ct. App. 1999).

Evidence was sufficient to support a conviction for manslaughter in the heat of passion where (1) shortly before the killing, the defendant had received two brutal beatings inflicted upon her head and body by the victim, (2) the defendant left the scene of the killing shortly before it occurred, armed herself, and returned to the scene, and (3) when the defendant re-entered the scene, the victim took at least two steps towards her, whereupon she cursed and stated that "you ain't gonna hit on me no more," and she shot him one time. *Wade v. State*, 748 So. 2d 771, 1999 Miss. LEXIS 328 (Miss. 1999).

The court reversed the defendant's murder conviction and remanded for re-sentencing regarding a manslaughter charge where it was clear that the defendant's ill will toward the victim was engendered by the beating she had just endured by the victim; thus, this was a killing in the heat of passion and arguably also a case of imperfect self-defense. As such, manslaughter was the appropriate verdict. *Wade v. State*, 724 So. 2d 1007, 1998 Miss. App. LEXIS 1043 (Miss. Ct. App. 1998), *aff'd*, 748 So. 2d 771, 1999 Miss. LEXIS 328 (Miss. 1999).

Conviction for manslaughter committed in heat of passion would not be sustained by evidence that defendant and victim had been playing with gun all day, defendant picked up bracelet and asked victim if he could wear it, victim told him no, the

2 started joking around and horseplaying, defendant grabbed gun and cocked it, defendant put gun to victim's head, gun went off, and defendant fell to ground and started crying. *Hankins v. City of Grenada* (In re City of Grenada), 669 So. 2d 85, 1996 Miss. LEXIS 121 (Miss. 1996).

The evidence was sufficient to support a conviction of manslaughter where the victim was shot to death, the defendant did not testify that he shot the victim in order to defend against the victim's assault but instead claimed that the gun accidentally discharged, and there was evidence in the record supporting the premise that the gun was fired in the heat of passion. *Green v. State*, 631 So. 2d 167, 1994 Miss. LEXIS 13 (Miss. 1994).

Defendant's statement that "I didn't mean to do it, baby, my baby" was sufficient evidence on which to base an instruction on manslaughter under this section and would have supported a verdict of guilty of manslaughter; if there is any evidence that may warrant a manslaughter instruction, certainly one should be given. *Roberts v. State*, 458 So. 2d 719, 1984 Miss. LEXIS 1952 (Miss. 1984).

The facts which accused admitted on the witness stand showing to a moral certainty and beyond a reasonable doubt that she killed the deceased in the heat of passion with a dangerous weapon, and that at the time she was in no danger from the deceased of death or great bodily harm, warranted a conviction of manslaughter. *King v. State*, 185 Miss. 433, 188 So. 554, 1939 Miss. LEXIS 175 (Miss. 1939).

Although the evidence was conflicting, proof for the state, which the jury had the right to accept, showing that the deceased was not attacking the defendant with a weapon and that defendant's life was not in fact endangered at the time of the shooting, justified a conviction of manslaughter. *Scott v. State*, 185 Miss. 454, 188 So. 546, 1939 Miss. LEXIS 171 (Miss. 1939).

As to whether one guilty of murder or manslaughter, jury have wide discretion where quality of act in issue; verdict for manslaughter upon indictment for murder held authorized by the evidence. *Woodward v. State*, 130 Miss. 611, 94 So. 717, 1922 Miss. LEXIS 232 (Miss. 1922).

8. — Not warranting manslaughter.

Trial court properly denied defendant's motion for a new trial because the evidence was sufficient to find that defendant killed the victim with deliberate design, and not in a heat of passion where defendant began acting aggressively toward the victim in a store, kept his right hand in his pocket, argued with him outside the store, and fired into the car in which the victim was a passenger when it lurched toward the curb and bystanders, the jury could have found that the unintentional bump of a bystander, which resulted in no injuries, was not a sufficient provocation to reduce the killing from murder to manslaughter, and the jury could have found that defendant did not kill the victim in the midst of a violent and uncontrollable rage. *Baker v. State*, — So. 3d —, 2020 Miss. App. LEXIS 590 (Miss. Ct. App. Oct. 20, 2020).

Defendant's deliberate design murder conviction was not against the weight of the evidence because (1) a victim's anger did not provoke defendant enough to reduce murder to heat-of-passion manslaughter, (2) defendant had no good-faith belief the victim threatened defendant, and (3) defendant acted with malice, all defeating manslaughter based on heat of passion or imperfect self-defense. *Crump v. State*, 237 So. 3d 808, 2017 Miss. App. LEXIS 385 (Miss. Ct. App. 2017), cert. denied, 237 So. 3d 1268, 2018 Miss. LEXIS 93 (Miss. 2018).

Defendant clearly intended to shoot his wife when he saw that she had removed some of his belongings from the house, and he had sufficient time to contemplate shooting her, which evidenced deliberate design murder, not heat-of-passion manslaughter; simply throwing someone's belongings out during an argument does not amount to reasonable provocation of a degree to evoke an uncontrolled response of anger, rage, hatred, furious resentment or terror. *Blanden v. State*, 276 So. 3d 1204, 2018 Miss. App. LEXIS 450 (Miss. Ct. App. 2018).

Evidence was sufficient and the weight of the evidence supporting the verdict finding defendant guilty of murder was substantial because the eyewitnesses maintained that defendant walked up be-

hind the victim, unprovoked, and shot him in the back; the victim was unarmed; there was no case for self-defense; defendant was not in a heightened emotional state; and, regarding the previous alleged acts of violence by the victim against defendant, a two-month cooling off period could not be considered an immediate act of provocation for manslaughter. *Day v. State*, 126 So. 3d 1011, 2013 Miss. App. LEXIS 840 (Miss. Ct. App. 2013).

Weight and sufficiency of the evidence supported defendant's conviction for deliberate-design murder, as the evidence showed that he had retrieved a gun after a confrontation with the victim had ended, returned to the scene, and then shot the victim multiple times, even after the victim was lying in the street; the evidence did not support a verdict for manslaughter based on heat of passion, and did not support defendant's claim of self-defense. *Davis v. State*, 130 So. 3d 1141, 2013 Miss. App. LEXIS 490 (Miss. Ct. App. 2013), cert. denied, 131 So. 3d 578, 2014 Miss. LEXIS 73 (Miss. 2014).

Defendant's claim that he was only guilty of, at most, manslaughter, in violation of Miss. Code Ann. § 97-3-35, lacked merit in defendant's murder trial, as his claim of imperfect self-defense and assertion that he was under duress at the time of the killing was rejected by the jury; rather, there was evidence that defendant had retrieved a gun, that he and the victim had been involved in a verbal and physical altercation for a long period of time, and that defendant deliberately shot the victim in the back of the head. *Branch v. State*, 118 So. 3d 646, 2013 Miss. App. LEXIS 649 (Miss. Ct. App.), cert. denied, 117 So. 3d 330, 2013 Miss. LEXIS 376 (Miss. 2013).

Evidence supported the murder conviction under Miss. Code Ann. § 97-3-19(1)(a), instead of a manslaughter conviction under Miss. Code Ann. § 97-3-35, because (1) witnesses testified that a fight outside of a club between defendant and the victim lasted a couple of minutes; (2) when defendant's sibling broke up the fight, defendant and the victim separated; (3) some people talked to defendant and attempted to calm defendant down; and (4) defendant, after several minutes, re-

turned to the scene of the altercation, pulled out a gun, and shot and pursued the victim. In addition, the jury was instructed as to both murder and manslaughter. *Moore v. State*, 52 So. 3d 339, 2010 Miss. LEXIS 574 (Miss. 2010).

Defendant's murder conviction was appropriate because he was not entitled to a manslaughter instruction under Miss. Code Ann. § 97-3-35. Defendant failed to produce any evidence showing that he was in a state of violent or uncontrolled rage or that he had been provoked. *Whittington v. State*, 49 So. 3d 107, 2010 Miss. App. LEXIS 182 (Miss. Ct. App.), cert. denied, 49 So. 3d 1139, 2010 Miss. LEXIS 636 (Miss. 2010).

After the victim stated that he wanted to have sex with defendant's sister, defendant became enraged, picked up a lead pipe, walked away from the campsite, told two witnesses that he was going to kill the victim, returned to the campsite ten minutes later, and beat the victim in the head repeatedly with the pipe; defendant took the victim's keys and truck, put the body in the truck, drove to Alabama, and put the victim's body on the side of the road. The evidence was sufficient to support defendant's conviction for capital murder in violation of Miss. Code Ann. § 97-3-19(2)(e), rather than manslaughter under Miss. Code Ann. § 97-3-35. *Woods v. State*, 14 So. 3d 767, 2009 Miss. App. LEXIS 233 (Miss. Ct. App. 2009).

9. —Admissibility.

Photographs taken by a pathologist in his postmortem examination of the decedent, showing internal organs removed, were admissible into evidence in a homicide prosecution where the photographs were probative and relevant in showing that blows administered by the defendant caused the death of the decedent. *Porter v. State*, 564 So. 2d 31, 1990 Miss. LEXIS 283 (Miss. 1990).

Admission of testimony of officer that when he arrived at scene of crime approximately 2 minutes after receiving call he asked victim what had happened and victim responded "I can't believe they set me on fire" was proper under *res gestae* exception to hearsay rule. *Parker v. State*, 514 So. 2d 767, 1986 Miss. LEXIS 2521

(Miss. 1986), cert. denied, 485 U.S. 1014, 108 S. Ct. 1487, 99 L. Ed. 2d 715, 1988 U.S. LEXIS 1738 (U.S. 1988).

Trial judge was within his discretion in admitting photographs showing victim as rescuers attempted to cut his clothes from his body after fire was put out, because pictures had other people present therein and were descriptive of events described at trial, despite argument of defendant that such photographs should not have been admitted into evidence because he stipulated to identity of deceased and cause of death. *Parker v. State*, 514 So. 2d 767, 1986 Miss. LEXIS 2521 (Miss. 1986), cert. denied, 485 U.S. 1014, 108 S. Ct. 1487, 99 L. Ed. 2d 715, 1988 U.S. LEXIS 1738 (U.S. 1988).

Trial judge committed error when he refused to allow defendant to offer into evidence testimony from previous trial, which had ended in mistrial, of person who had admitted and even bragged about having thrown fatal match and then recanted, and in then not allowing defendant to call another witness to impeach testimony of one who recanted; first witness testimony was admissible under former testimony exception to hearsay rule, and impeaching witness testimony was admissible as impeachment of that testimony. *Parker v. State*, 514 So. 2d 767, 1986 Miss. LEXIS 2521 (Miss. 1986), cert. denied, 485 U.S. 1014, 108 S. Ct. 1487, 99 L. Ed. 2d 715, 1988 U.S. LEXIS 1738 (U.S. 1988).

Color photographs of deceased and scene of crime are admissible into evidence at homicide trial, at which defendant is ultimately convicted of manslaughter, where photographs depict location of wound and tend to negate defendant's assertion that deceased had reached under shirt as if going for gun prior to shooting and where pictures of interior of bar in which shooting occurred tend to negate defendant's statement that he placed decedent in chair after shooting. *Kelly v. State*, 463 So. 2d 1070, 1985 Miss. LEXIS 1878 (Miss. 1985).

It was not reversible error for trial court to refuse permission to introduce into evidence shells and cartridges found near the decedent's car, where there was no evidence to show that a shotgun was used in

the altercation between defendant and her “boyfriend”. *Lanier v. State*, 291 So. 2d 695, 1974 Miss. LEXIS 1733 (Miss. 1974).

10. Instructions; generally.

In a manslaughter case, the trial court committed reversible error in giving a castle-doctrine jury instruction favoring the victim because a castle-doctrine instruction had never been given to a victim regarding the mandatory rebuttable presumption that a person was entitled to use whatever force was necessary to meet or repel an attack from another person, and such an instruction was patently inappropriate as the statute clearly indicated that the rebuttable presumption was granted to defendant, not the victim; and a reasonable juror could have interpreted the challenged instruction to create a presumption that lessened the State’s burden of proof and required rebuttal evidence from defendant to overcome the presumption. *Husband v. State*, 204 So. 3d 353, 2016 Miss. App. LEXIS 472 (Miss. Ct. App. 2016).

In defendant’s trial for murder in violation of Miss. Code Ann. § 97-3-19(1)(a) and aggravated assault in violation of Miss. Code Ann. § 97-3-7(2)(b), defendant was not entitled to have the requested jury instructions on the lesser-included offense of manslaughter under Miss. Code Ann. § 97-3-35 because defendant requested a self-defense instruction, while the definition of manslaughter required that it was not in necessary self-defense, and there was no evidentiary basis of provocation of a degree to evoke an uncontrolled response of anger, rage, hatred, furious resentment or terror. *McCune v. State*, 989 So. 2d 310, 2008 Miss. LEXIS 347 (Miss. 2008).

In a manslaughter prosecution, defendant was entitled to an instruction as to his theory of case: that he was entitled to use a knife to defend himself from a much larger man capable of inflicting serious bodily harm with his hands alone; the failure to give this instruction was reversible error. *Robinson v. State*, 858 So. 2d 887, 2003 Miss. App. LEXIS 903 (Miss. Ct. App. 2003).

In a felony murder prosecution, the trial court did not err in denying defendant a

lesser-included offense instruction on heat of passion manslaughter, Miss. Code Ann. § 97-3-35, as the granting of such an instruction would have been purely speculative and not supported by the evidence. *Moody v. State*, 841 So. 2d 1067, 2003 Miss. LEXIS 104 (Miss. 2003).

Defendant was not entitled to a manslaughter instruction where the record showed that defendant made threats against those he believed “snitched,” and those statements showed defendant’s malicious state of mind, which negated his ability to refute such inference. *Gray v. State*, 846 So. 2d 260, 2002 Miss. App. LEXIS 599 (Miss. Ct. App. 2002).

Absent evidence that defendant acted in heat of passion, court’s manslaughter instruction was not warranted, and therefore giving “deliberate design” instruction and manslaughter instruction was harmless error. *Catchings v. State*, 684 So. 2d 591, 1996 Miss. LEXIS 214 (Miss. 1996).

It is possible for a “deliberate design” to kill a person to exist, as required for murder under § 97-3-19(1)(a), and the slaying nevertheless be no greater than manslaughter; thus, a special murder instruction, which instructed the jury that “deliberate design” can be formed at the very moment of the fatal act, and that if “deliberate design” existed then the defendant should be found guilty of murder, was in conflict with the manslaughter instruction based on this section, which defines manslaughter as “killing without malice in the heat of passion.” *Windham v. State*, 520 So. 2d 123, 1987 Miss. LEXIS 2880 (Miss. 1987).

Rule, that if the defendant or his witnesses are the only witnesses to an occurrence, then their testimony and version of the occurrence must be accepted as true unless substantially contradicted in material particulars by credible witnesses, physical facts or facts commonly known, is one of law to be applied by the court, and it is not a proper subject for a jury instruction. *Griffin v. State*, 495 So. 2d 1352, 1986 Miss. LEXIS 2705 (Miss. 1986).

In murder prosecution, state is entitled, upon request, to instruction submitting lesser included offense of manslaughter committed in heat of passion to jury even though heat of passion is affirmative ele-

ment of manslaughter not present in murder. *Cook v. State*, 467 So. 2d 203, 1985 Miss. LEXIS 1974 (Miss. 1985).

Instruction which impermissibly directs jury to find defendant guilty of murder if homicide victim was willfully and deliberately killed by defendant without authority of law is not cured by giving of instruction properly setting forth distinction between murder and manslaughter. *Smith v. State*, 463 So. 2d 1028, 1984 Miss. LEXIS 1633 (Miss. 1984), overruled, *Ferrell v. State*, 733 So. 2d 788, 1999 Miss. LEXIS 87 (Miss. 1999).

In a murder prosecution, an instruction which substantially restricts or cuts off defendant's right to defend upon the ground of self-defense is erroneous and requires the grant of a new trial. *McMullen v. State*, 291 So. 2d 537, 1974 Miss. LEXIS 1726 (Miss. 1974).

An instruction for the state to the effect that murder is the felonious killing of a human being with malice aforethought, and with premeditated design to take the life of the party killed; and that manslaughter is the felonious killing of a human being in the heat of passion and in sudden combat and without malice aforethought and without the deliberate design to take the life of the party killed is erroneous in that the first part of the instruction omits the essential ingredient that the killing was done "without authority of law", and the second part of the instruction is also defective because it does not incorporate the essential elements required by this section [Code 1942, § 2226] that the killing was "not in necessary self-defense." *Boyles v. State*, 223 So. 2d 651, 1969 Miss. LEXIS 1286 (Miss. 1969), cert. denied, 396 U.S. 1005, 90 S. Ct. 558, 24 L. Ed. 2d 497, 1970 U.S. LEXIS 3301 (U.S. 1970).

A jury may return a verdict of manslaughter in a murder case, although there is no instruction given to the jury on manslaughter. *Farmer v. Thomas*, 207 So. 2d 96, 1968 Miss. LEXIS 1598 (Miss. 1968).

Since even though the killing might have been done in the heat of passion, the defendant would have been guilty of manslaughter, the court did not commit reversible error in refusing defendant's in-

struction as to the burden of proof which would have permitted the jury to acquit if the killing had been done in the heat of passion; especially where, in view of the instructions granted to defendant, error if any, in refusing the instruction was harmless (overruling in part *Blalack v. State*, 79 M 517, 31 So 105). *Rivers v. State*, 245 Miss. 329, 97 So. 2d 236, 1957 Miss. LEXIS 578 (Miss. 1957).

An instruction which defines manslaughter as unlawful and felonious killing without malice in the heat of passion, by the use of a dangerous weapon, without authority of law, and not necessarily self-defense, either real or apparent, is correct. *Jones v. State*, 58 So. 2d 655 (Miss. 1952).

In a prosecution for murder an instruction that if jury believed from the evidence that the defendant intentionally and unlawfully pointed a pistol at and toward a crowd not in self-defense and not in unlawful discharge of an official duty and discharged the pistol so intentionally pointed or aimed and by this discharge killed the deceased, then the jury should return a verdict of not guilty was improper. *Bass v. State*, 54 So. 2d 259 (Miss. 1951).

The phrase in a manslaughter instruction "but in a cruel and unusual manner" is not proper where the homicide in question was in the most usual manner, insofar as the instrument (revolver) used to bring about the death was concerned. *Vance v. State*, 182 Miss. 840, 183 So. 280, 1938 Miss. LEXIS 200 (Miss. 1938).

Instruction that killing of a human being without malice in heat of passion is manslaughter held erroneous for failure to include statutory requirement of use of deadly weapon without authority of law, and not in necessary self-defense. *Busby v. State*, 177 Miss. 68, 170 So. 140, 1936 Miss. LEXIS 233 (Miss. 1936).

Charge on manslaughter, leaving out phrase "in the heat of passion," held not harmful to accused. *Dalton v. State*, 141 Miss. 841, 105 So. 784, 1925 Miss. LEXIS 199 (Miss. 1925).

11. — Warrantableness of manslaughter instructions.

Defendant was not entitled to a heat-of-passion-manslaughter instruction as a

lesser-included offense of murder because the evidence was overwhelming that defendant killed his mother with deliberate design as the pathologist testified that the victim had been struck five to six times in the face, and three to four times in the side and back of the head, and that she had been strangled for more than one minute before succumbing; and defendant testified that he had contemplated killing the victim, then followed through. *Abeyta v. State*, 137 So. 3d 305, 2014 Miss. LEXIS 223 (Miss. 2014).

Because mere words could never constitute reasonable provocation, the victim's threat to cut off defendant, an adult child, financially did not rise to the level of reasonable provocation sufficient to reduce murder to manslaughter; thus, a jury instruction on the lesser-included offense of manslaughter was properly denied. *Abeyta v. State*, 137 So. 3d 305, 2014 Miss. LEXIS 223 (Miss. 2014).

In defendant's murder trial, although his claim that the trial judge erred in failing to sua sponte craft a separate heat-of-passion manslaughter instruction was barred due to waiver, it also lacked merit because the jury was instructed in that regard, such that there was no manifest injustice. *Davis v. State*, 130 So. 3d 1141, 2013 Miss. App. LEXIS 490 (Miss. Ct. App. 2013), cert. denied, 131 So. 3d 578, 2014 Miss. LEXIS 73 (Miss. 2014).

Conviction for depraved-heart murder was supported by the evidence. Defendant was not acting in the heat of passion, and thus, a manslaughter conviction was not warranted by the evidence, as defendant's own testimony showed that he was not provoked by the victim; he argued merely that he had no part in the victim's murder. *Leggett v. State*, 54 So. 3d 317, 2011 Miss. App. LEXIS 78 (Miss. Ct. App. 2011).

Defendant's convictions for two counts of murder were proper because the evidence was consistent with the State's theory that defendant shot the victims while they slept. Therefore, the facts did not warrant a manslaughter instruction under Miss. Code Ann. § 97-3-35. *Neese v. State*, 993 So. 2d 837, 2008 Miss. App. LEXIS 644 (Miss. Ct. App. 2008).

In a murder case, a heat of passion manslaughter instruction under Miss.

Code Ann. § 97-3-35 was not warranted where a verbal argument and physical confrontation did not rise to the requisite level, defendant was not in a state of violent or uncontrollable rage when she shot into an occupied vehicle, and she denied shooting the victim. *Cooper v. State*, 977 So. 2d 1220, 2007 Miss. App. LEXIS 701 (Miss. Ct. App. 2007).

There was no evidentiary basis for a manslaughter instruction in the record where the arguments of counsel as to what defendant may or may not have felt at the time were irrelevant; there was nothing to indicate that defendant was frightened or that he acted in the heat of passion when he shot and killed the victim, and defendant's own statements to police indicated that he did not act in the heat of passion but rather acted deliberately in shooting the victim. *Fair v. State*, 976 So. 2d 932, 2007 Miss. App. LEXIS 509 (Miss. Ct. App. 2007), cert. denied, 977 So. 2d 343, 2008 Miss. LEXIS 90 (Miss. 2008).

Defendant's murder conviction was upheld because the trial court did not err in rejecting defendant's requested manslaughter instruction, as nothing in defendant's testimony or the testimony of the other witnesses supported an instruction that defendant killed the victim in the heat of passion or in self-defense, and the record was devoid of any evidence indicating that the relationship between defendant and the victim was contentious. *Cotton v. State*, 933 So. 2d 1048, 2006 Miss. App. LEXIS 520 (Miss. Ct. App. 2006).

Based on testimony by defendant that "things were starting to escalate" with the victim, that he had been "sucker-punched" by the victim when he returned home that evening, and that a struggle between the two immediately ensued, and testimony by witnesses that defendant and the victim had been involved in a dispute at the beach earlier in the afternoon, a jury could determine that the defendant had killed the victim in the heat of passion, and not with malice aforethought, thus the trial court did not err by granting a manslaughter instruction. *Ward v. State*, 935 So. 2d 1047, 2005 Miss. App. LEXIS 996 (Miss. Ct. App. 2005), cert. denied, 936 So. 2d 367, 2006 Miss. LEXIS 414 (Miss. 2006).

Trial court did not err by failing to instruct a jury on the crime of manslaughter where the evidence showed that defendant and another person planned to kill a victim several hours in advance of the crime. *Johnson v. State*, 876 So. 2d 387, 2003 Miss. App. LEXIS 943 (Miss. Ct. App. 2003), cert. denied, 878 So. 2d 66, 2004 Miss. LEXIS 881 (Miss. 2004).

Defendant's statement that the victim died from a gunshot wound to the head resulting from an argument and physical struggle with defendant over household finances presented a prima facie case for manslaughter, and the trial court was fully justified in refusing defendant's requested instruction on circumstantial evidence. *Barnes v. State*, 854 So. 2d 1, 2003 Miss. App. LEXIS 145 (Miss. Ct. App.), cert. denied, 859 So. 2d 392, 2003 Miss. LEXIS 509 (Miss. 2003).

In a felony murder prosecution, the trial court did not err denying defendant a lesser-included offense instruction on heat of passion manslaughter, Miss. Code Ann. § 97-3-35, as the granting of such an instruction would have been purely speculative and not supported by the evidence. *Moody v. State*, 841 So. 2d 1067, 2003 Miss. LEXIS 104 (Miss. 2003).

Because the evidence showed that defendant murdered the victim while the victim slept, there was no evidentiary basis that warranted a manslaughter instruction, as contended by defendant. *Evans v. State*, 844 So. 2d 470, 2002 Miss. App. LEXIS 470 (Miss. Ct. App. 2002), cert. denied, 846 So. 2d 229, 2003 Miss. App. LEXIS 483 (Miss. Ct. App. 2003).

The defendant in a murder prosecution was not entitled to have the jury instructed with regard to manslaughter based on heat of passion where the defendant testified at trial that he had nothing whatever to do with the killing at issue and other evidence only revealed that there was a shoving match between the defendant and the victim. *Turner v. State*, 773 So. 2d 952, 2000 Miss. App. LEXIS 333 (Miss. Ct. App. 2000).

The defendant in a murder prosecution was not entitled to have the jury instructed on manslaughter as a lesser included offense because there was no evidence that the defendant acted in the heat

of passion or that the victim, his girlfriend, provoked him; the mere fact that they were arguing before the shooting was insufficient to reduce the crime to manslaughter, especially where the victim was shot in the back while she was running away from the defendant and screaming for help. *Avera v. State*, 761 So. 2d 900, 2000 Miss. App. LEXIS 124 (Miss. Ct. App. 2000).

In capital murder trial based on allegation that defendant killed child victim while engaged in commission of child abuse or battery, evidence that defendant used victim as shield while struggling with victim's mother was insufficient to support heat of passion manslaughter instruction, in view of evidence that defendant planned robbery of victim's home, had told victim's mother that he was going to kill her and her family, and did not stab victim until after struggle with mother. *Jackson v. State*, 684 So. 2d 1213, 1996 Miss. LEXIS 7 (Miss. 1996), cert. denied, 520 U.S. 1215, 117 S. Ct. 1703, 137 L. Ed. 2d 828, 1997 U.S. LEXIS 2937 (U.S. 1997).

In prosecution for murder of policeman, trial court committed reversible error in denying defense request for instruction on involuntary manslaughter theory, which was warranted by the facts, and instead instructing jury on heat of passion theory, which had no evidentiary support. *Lanier v. State*, 684 So. 2d 93, 1996 Miss. LEXIS 631 (Miss. 1996).

Planning to conduct robbery of home at time when defendant believed residents would be at church and defendant's statements that he had come to kill residents precluded finding that killings were in heat of passion and, thus, defendant prosecuted on capital murder charges for killing while engaged in commission of child abuse was not entitled to jury instruction on lesser included offense on homicide for killing without malice in heat of passion. *Jackson v. State*, 672 So. 2d 468, 1996 Miss. LEXIS 718 (Miss. 1996).

No error was committed by a trial court in a capital murder prosecution in refusing to give a manslaughter instruction where the only justification for such an instruction would have been if the slaying had been committed in the heat of passion

without premeditation, and premeditation was evidenced by the defendant's actions in arming himself with 2 deadly weapons, getting the victim into a car by trickery, and directing her at knife point to drive into a secluded wooded area miles away where he raped her, cut her throat, and then shot her. *Thorson v. State*, 653 So. 2d 876, 1994 Miss. LEXIS 600 (Miss. 1994).

A capital murder defendant was not entitled to a manslaughter instruction based on the defendant's contention that the victim's stabbing death was accidental, where statements regarding an accidental stabbing made by the defendant to a third party shortly after the incident were inconsistent, the autopsy revealed that the stab wound could not have been inflicted under any one of the inconsistent scenarios related by the defendant, and the defendant's scenarios of an accidental stabbing would constitute evidence of innocence of any crime rather than evidence of the crime of manslaughter. *Holland v. State*, 587 So. 2d 848, 1991 Miss. LEXIS 648 (Miss. 1991).

There was no evidence of sudden provocation that would warrant the giving of a manslaughter instruction in a prosecution for murder of the defendant's former wife, in spite of the testimony of attorneys who represented the defendant during his divorce proceedings and the testimony of the defendant's family, all of whom noticed a change in the defendant after the divorce, since a long-standing domestic dispute did not constitute grounds for a manslaughter instruction. *Graham v. State*, 582 So. 2d 1014, 1991 Miss. LEXIS 359 (Miss. 1991).

Evidence in a murder trial was insufficient to support a manslaughter instruction where the defendant did not testify, the only account of the slaying was the defendant's statements to the investigating officer and the testimony of eyewitnesses, there was no gross insult, and the defendant and the victim were not engaged in physical combat, and thus there was no evidence upon which any jury could rationally conclude that the defendant shot the victim as a result of provoked rage. *Barnett v. State*, 563 So. 2d 1377, 1990 Miss. LEXIS 284 (Miss. 1990).

A murder defendant's statement that he had gone crazy and could not stop, that the victim would not stop "messing" with him, without explaining how the victim was "messing" with him, did not indicate that the defendant acted in lawful self-defense or that the victim committed an outrageous act justifiably provoking the defendant into a rage, so as to entitle the defendant to a manslaughter instruction. *Nicolaou v. State*, 534 So. 2d 168, 1988 Miss. LEXIS 524 (Miss. 1988).

An instruction limiting the verdict to murder was erroneous where the evidence could have warranted a jury verdict of manslaughter. *McMullen v. State*, 291 So. 2d 537, 1974 Miss. LEXIS 1726 (Miss. 1974).

Instruction on manslaughter in prosecution for murder, was proper where evidence on behalf of accused warranted conviction for manslaughter. *Leflore v. State*, 44 So. 2d 393 (Miss. 1950).

12. — — Where evidence justifies murder conviction.

Defendant, who was convicted of capital murder with the underlying felony of robbery, was not entitled to a manslaughter instruction because there was no evidentiary basis for an imperfect-self-defense, fighting words, or depraved heart murder theory. *Batiste v. State*, 121 So. 3d 808, 2013 Miss. LEXIS 295 (Miss. 2013), cert. denied, 572 U.S. 1117, 134 S. Ct. 2287, 189 L. Ed. 2d 178, 2014 U.S. LEXIS 3424 (U.S. 2014).

Court rejected as without merit defendant's claim that the trial court erred in failing to grant his motion for a judgment notwithstanding the verdict, given that the jury was instructed to consider whether the victim's killing was murder, manslaughter, or committed in self-defense and the jury had sufficient evidence to convict defendant of murder; although defendant argued that the facts supported either excusable or justifiable homicide, the facts were conflicting and created a jury question, as testimony and physical evidence contradicted defendant's testimony that the victim backed him up steps and defendant having left the scene immediately after the stabbing created the impression that he knew the victim was

no longer a threat. *Ray v. State*, 27 So. 3d 416, 2009 Miss. App. LEXIS 496 (Miss. Ct. App. 2009), cert. denied, 27 So. 3d 404, 2010 Miss. LEXIS 61 (Miss. 2010).

Where the evidence showed that defendant had conducted his own investigation to find out who was having sexual relations with his wife, after identifying the victim as the one having the affair, proceeded to the victim's house armed with a gun, phoned his attorney and informed him of his intention to kill someone, and shot the unarmed victim, there was abundant evidence that the killing at issue was done with deliberate design so as to support a murder conviction, and the circuit court did not err in refusing defendant's manslaughter instruction. *Shorter v. State*, 33 So. 3d 512, 2009 Miss. App. LEXIS 830 (Miss. Ct. App. 2009).

Where a witness testified that he did not see the victim make any threatening movements before defendant drew his pistol and shot the victim, defendant was convicted of murder. The trial court did not err by denying defendant's proposed instructions on heat-of-passion manslaughter under Miss. Code Ann. § 97-3-35; although the words "heat of passion" were not included in the jury instructions, the jury had the option of finding defendant guilty of manslaughter. *Smith v. State*, 76 So. 3d 170, 2009 Miss. App. LEXIS 174 (Miss. Ct. App.), cert. denied, 19 So. 3d 82, 2009 Miss. LEXIS 520 (Miss. 2009).

Trial court did not err by refusing to instruct the jury on heat-of-passion manslaughter because: (1) the record indicated that at most, defendant and the victim were engaged in a verbal argument and perhaps some minor physical altercation; (2) words alone were not enough to require a heat-of-passion instruction; (3) pushing or shoving was also insufficient to require the instruction absent testimony that defendant was acting out of "violent or uncontrollable rage"; (4) the record was void of any evidence that defendant was in a state of violent or uncontrollable rage, since by defendant's own testimony, he was so drunk that he did not even remember killing the victim; and (5) it is apparent that defendant's actions were calculated and fell more in line with deliberate-

design murder. *Burton v. State*, 999 So. 2d 379, 2008 Miss. App. LEXIS 302 (Miss. Ct. App. 2008), cert. denied, 999 So. 2d 852, 2009 Miss. LEXIS 34 (Miss. 2009).

Where appellant was convicted of capital murder while in the commission of a robbery, it was not error to deny appellant's requested lesser-included offense jury instruction on manslaughter, because (1) appellant admitted the killing and the robbery so appellant's intent was irrelevant, and (2) the only evidence to support heat of passion was a single comment by the victim about appellant's girlfriend. *Fryou v. State*, 987 So. 2d 461, 2008 Miss. App. LEXIS 205 (Miss. Ct. App. 2008).

Although a doctor testified that the victim's injuries were consistent with passion, there was absolutely no evidence supporting the theory that defendant's passion was the result of reasonable provocation; also, evidence that the panties in defendant's pocket might have sparked an angry altercation between the victim and defendant during which he killed her would have required far too much speculation on behalf of the jury to enable a finding of reasonable provocation. Thus, the trial court properly declined to instruct the jury on heat of passion manslaughter under Miss. Code Ann. § 97-3-35. *Staten v. State*, 989 So. 2d 938, 2008 Miss. App. LEXIS 76 (Miss. Ct. App.), cert. denied, 993 So. 2d 832, 2008 Miss. LEXIS 400 (Miss. 2008).

In a murder case under Miss. Code Ann. § 97-3-19(1)(a), a trial court did not err by refusing to give an instruction on manslaughter despite evidence of abuse, since the evidence did not show that defendant murdered his father in the heat of passion where he had considered killing him; defendant had forged the victim's name on a life insurance policy, bought a gun, used gloves, and shot the victim eight times. *Clemons v. State*, 952 So. 2d 314, 2007 Miss. App. LEXIS 174 (Miss. Ct. App. 2007), overruled in part, *Williams v. State*, 32 So. 3d 486, 2010 Miss. LEXIS 202 (Miss. 2010).

Trial court properly denied defendant's proposed heat of passion manslaughter instruction where there was no violent, uncontrollable rage at the time of the incident; three eyewitnesses testified that

defendant blocked in a truck belonging to his estranged wife's boyfriend, walked over to the truck, opened the door, and shot three times. *Livingston v. State*, 943 So. 2d 66, 2006 Miss. App. LEXIS 417 (Miss. Ct. App.), cert. denied, 942 So. 2d 164, 2006 Miss. LEXIS 708 (Miss. 2006).

In a felony murder prosecution, the trial court did not err denying defendant a lesser-included offense instruction on heat of passion manslaughter, Miss. Code Ann. § 97-3-35, as the granting of such an instruction would have been purely speculative and not supported by the evidence. *Moody v. State*, 841 So. 2d 1067, 2003 Miss. LEXIS 104 (Miss. 2003).

A defendant should not be denied a manslaughter instruction where he or she could have been lawfully indicted and prosecuted for manslaughter as easily as capital murder. *Butler v. State*, 608 So. 2d 314, 1992 Miss. LEXIS 588 (Miss. 1992).

It was not error for trial court to give jury manslaughter instruction where facts of case presented issue to jury on murder, despite defendant not asking for instruction and objecting to such instruction. *Crawford v. State*, 515 So. 2d 936, 1987 Miss. LEXIS 2888 (Miss. 1987).

The trial court in a murder prosecution properly refused to instruct jury on the lesser-included offense of manslaughter, as defined in this section, since there was no evidentiary basis in the record that the defendant had acted without malice aforethought and in the heat of passion. *Fairchild v. State*, 459 So. 2d 793, 1984 Miss. LEXIS 1983 (Miss. 1984).

In a prosecution for capital murder of a police officer while acting within his official capacity, a manslaughter instruction was properly refused, where it was unwarranted by the evidence, and where the instruction tendered by the defendant was erroneous inasmuch as it omitted "by the use of a deadly weapon, without authority of law and not in necessary self-defense." *Johnson v. State*, 416 So. 2d 383, 1982 Miss. LEXIS 1935 (Miss. 1982).

Trial court did not err in murder prosecution in granting an instruction advising the jury that should they convict defendant of manslaughter, the court might sentence defendant to the penitentiary for a term not to exceed 20 years. *Flanagan v.*

National Fire Ins. Co., 277 So. 2d 115, 1973 Miss. LEXIS 1407 (Miss. 1973).

Where defendant was convicted of manslaughter under an instruction granted by the state to that effect and the evidence would have justified a conviction of murder, an instruction on manslaughter, even if not authorized by the evidence, was not reversible error. *West v. State*, 233 Miss. 730, 103 So. 2d 437, 1958 Miss. LEXIS 434 (Miss. 1958).

Where the full acceptance of the state's evidence would have sustained a finding that the defendant was guilty of murder, but the jury could, and evidently did, find that the defendant shot in the heat of passion, instructions, both as to murder and manslaughter, were proper. *Barnett v. State*, 232 Miss. 208, 98 So. 2d 656, 1957 Miss. LEXIS 461 (Miss. 1957).

Where the evidence is sufficient to convict for murder the defendant cannot complain of the granting of a manslaughter instruction, if he has been convicted of manslaughter. *Woods v. State*, 229 Miss. 563, 91 So. 2d 273, 1956 Miss. LEXIS 640 (Miss. 1956).

Granting to state of two instructions defining manslaughter and authorizing verdict in that degree is not reversible error in murder prosecution in which there is present no element of manslaughter and jury finds defendant guilty of murder. *Merrell v. State*, 39 So. 2d 306 (Miss. 1949).

Where defendant is convicted of manslaughter on a charge of murder, he cannot complain of the giving of a murder instruction, as he was not prejudiced thereby. *Crockerham v. State*, 202 Miss. 25, 30 So. 2d 417, 1947 Miss. LEXIS 236 (Miss. 1947).

13. —Dangerous weapon.

Omission of statutory phrase "by use of dangerous weapon" in manslaughter instruction is harmless where all witnesses, including defendant, have testified that deceased was killed with pistol belonging to defendant and instructions are not otherwise erroneous. *Kelly v. State*, 463 So. 2d 1070, 1985 Miss. LEXIS 1878 (Miss. 1985).

In a case where it was alleged that the defendant "stomped" the decedent to

death it was not prejudicial error to grant the state's instruction that manslaughter is the killing of a human being without malice with a dangerous weapon in the language of this section [Code 1942, § 2226], although more properly the instruction should have been framed under Code 1942, § 2225. *King v. State*, 251 Miss. 161, 168 So. 2d 637, 1964 Miss. LEXIS 337 (Miss. 1964).

In a prosecution for manslaughter where instruction to the jury omitted the words "by the use of a dangerous weapon," which are contained in the statutory definition of the crime of manslaughter, the omission was harmless. *Robinson v. State*, 223 Miss. 303, 78 So. 2d 134, 1955 Miss. LEXIS 381 (Miss. 1955).

14. —Request for instructions.

Trial court did not abuse its discretion in denying jury instructions for culpable-negligence and heat-of-passion manslaughter because the evidence did not support the instructions; defendant admitted in his oral and written statements to having hit the victim with a welding rod in an effort to steal his money. *Thomas v. State*, 249 So. 3d 331, 2018 Miss. LEXIS 272 (Miss. 2018).

Defendant's requested instruction on manslaughter was properly denied in defendant's trial for capital murder because the evidence did not support a lesser-included instruction. *Husband v. State*, 23 So. 3d 550, 2009 Miss. App. LEXIS 332 (Miss. Ct. App. 2009), cert. dismissed, 31 So. 3d 1217, 2010 Miss. LEXIS 218 (Miss. 2010).

In a case in which defendant was convicted of murder, the trial court properly refused defendant's requested jury instructions on manslaughter, as there was insufficient evidence in the record to support the elements of manslaughter. There was no evidence in the record from which the jury could have determined the killing occurred during heat of passion. *Alford v. State*, 5 So. 3d 1138, 2008 Miss. App. LEXIS 512 (Miss. Ct. App. 2008), cert. denied, 11 So. 3d 1250, 2009 Miss. LEXIS 185 (Miss. 2009).

Where the accused stabbed and killed the decedent without justification, under the state's evidence it was not incumbent

on the prosecution to request a manslaughter instruction, although it would have been proper to do so. *Rogers v. State*, 222 Miss. 609, 76 So. 2d 702, 1955 Miss. LEXIS 644 (Miss. 1955).

Accused, convicted of manslaughter, cannot complain on appeal of court's failure to define manslaughter, if he did not ask for such instruction. *Dalton v. State*, 141 Miss. 841, 105 So. 784, 1925 Miss. LEXIS 199 (Miss. 1925).

15. —Peremptory instructions.

Defendant was not entitled to peremptory instruction that jury must rest its verdict exclusively on testimony of defendant and his wife, who were sole eyewitnesses to events, where defendant's account given to officers shortly after incident differed in material particulars from his testimony at trial; in first statement, defendant merely said that he had shot wife and victim, without mentioning any struggle; defendant's statement made at police station and testimony at trial was of struggle between defendant and victim; struggle of magnitude described by defendant should reasonably have been mentioned to officers at scene and those who later investigated incident. *Jordan v. State*, 513 So. 2d 574, 1987 Miss. LEXIS 2817 (Miss. 1987).

Instruction given by court, after jury states that it is hung at vote of 10 votes in favor of murder verdict and 2 in favor of manslaughter verdict which in effect peremptorily directs jury to return manslaughter conviction without regard to personal convictions of jurors is impermissibly coercive where instruction is given after jury has deliberated for equivalent of full day without agreeing and verdict convicting defendant of manslaughter instead of murder is returned within minutes after instruction is given. *Isom v. State*, 481 So. 2d 820, 1985 Miss. LEXIS 2336 (Miss. 1985).

16. —Reasonable doubt.

In a manslaughter prosecution arising out of use of deadly weapon, the lower court did not commit error in refusing to grant accused's requested instruction, purporting to define the doctrine of reasonable doubt, where the accused had

obtained other instructions which correctly stated the applicable rules of law relating to the presumption of innocence and requirement of proof of guilt beyond every reasonable doubt. *Whitehead v. State*, 246 Miss. 530, 151 So. 2d 196, 1963 Miss. LEXIS 475 (Miss. 1963).

Where practically all of the evidence was direct testimony, the defendant was not entitled to an instruction that the state's proof must exclude every other reasonable hypothesis consistent with his innocence. *Reed v. State*, 229 Miss. 440, 91 So. 2d 269, 1956 Miss. LEXIS 624 (Miss. 1956).

17. Heat of passion instruction.

Defendant was not entitled to a heat-of-passion manslaughter instruction under Miss. Code Ann. § 97-3-35 as a lesser included offense of murder under Miss. Code Ann. § 99-7-37(2) since: (1) defendant's testimony that he snapped did not elevate the shooting to the heat of passion; (2) two witnesses testified that defendant approached the victim from behind and shot him; and (3) even if the victim had previously assaulted him and defendant suspected that he had had a sexual relationship with his wife, there was not an immediate and reasonable provocation.

Sanders v. State, 103 So. 3d 775, 2012 Miss. App. LEXIS 795 (Miss. Ct. App. 2012).

18. Miscellaneous.

Trial court did not err by refusing to instruct the jury on heat-of-passion manslaughter because there was no evidence defendant acted in a "heat of passion"; defendant himself testified that he was only trying to reason with the victim and that the victim's alleged sexual advances had nothing to do with why defendant killed him. *Curtis v. State*, 298 So. 3d 446, 2020 Miss. App. LEXIS 388 (Miss. Ct. App. 2020).

Where a decedent was killed in a collision with an employer's employee, and the widow brought a wrongful death suit, the collision was excluded from coverage under the employer's commercial automobile insurance policy because (1) the employee's manslaughter conviction collaterally estopped defendants from re-litigating the question of whether the employee intended to cause the decedent's death, and (2) the manslaughter conviction negated any finding that the decedent's death was an "accident." *Capital City Ins. Co. v. Hurst*, 632 F.3d 898, 2011 U.S. App. LEXIS 2160 (5th Cir. Miss. 2011).

RESEARCH REFERENCES

ALR.

Mental or emotional condition as diminishing responsibility for crime. 22 A.L.R.3d 1228.

Standard for determination of reasonableness of criminal defendant's belief, for purposes of self-defense claim, that physical force is necessary – modern cases. 73 A.L.R.4th 993.

Homicide: Liability where death immediately results from treatment or mistreatment of injury inflicted by defendant. 50 A.L.R.5th 467.

Am. Jur.

40 Am. Jur. 2d, Homicide §§ 48 et seq.

2 Am. Jur. Trials, Investigating Particular Crimes §§ 40-57 (homicide).

7 Am. Jur. Trials, Homicide §§ 1 et seq.

CJS.

40 C.J.S., Homicide §§ 35, 98, 99, 125.

Law Reviews.

1984 Mississippi Supreme Court Review: Criminal Law. 55 Miss. L. J. 77, March, 1985.

Practice References.

Ronald L. Schoenberg, Criminal Law Deskbook (Matthew Bender).

§ 97-3-37. Homicide; killing of an unborn child; “human being” includes unborn child at every stage of gestation from conception until live birth for purposes of offenses of assault and homicide; “unborn child” defined; intentional injury to pregnant woman; penalties; provisions of section not applicable to legal medical procedures, including abortion.

(1) For purposes of the offenses enumerated in this subsection (1), the term “human being” includes an unborn child at every stage of gestation from conception until live birth and the term “unborn child” means a member of the species homo sapiens, at any stage of development, who is carried in the womb:

- (a) Section 97-3-7, simple and aggravated assault and domestic violence;
- (b) Section 97-3-15, justifiable homicide;
- (c) Section 97-3-17, excusable homicide;
- (d) Section 97-3-19, murder, capital murder;
- (e) Section 97-3-27, homicide while committing a felony;
- (f) Section 97-3-29, homicide while committing a misdemeanor;
- (g) Section 97-3-33, killing a trespasser unnecessarily;
- (h) Section 97-3-35, killing without malice in the heat of passion;
- (i) Section 97-3-45, homicide by means of a dangerous animal;
- (j) Section 97-3-47, all other homicides;
- (k) Section 97-3-61, poisoning with intent to kill or injure.

(2) A person who intentionally injures a pregnant woman is guilty of a crime as follows:

(a) If the conduct results in a miscarriage or stillbirth by that individual, a felony punishable by imprisonment for not more than twenty (20) years or a fine of not more than Seven Thousand Five Hundred Dollars (\$7,500.00), or both.

(b) If the conduct results in serious physical injury to the embryo or fetus, a felony punishable by imprisonment for not more than twenty (20) years or a fine of not more than Five Thousand Dollars (\$5,000.00), or both.

(c) If the conduct results in minor physical injury to the embryo or fetus, a misdemeanor punishable by imprisonment for not more than six (6) months or a fine of not more than One Thousand Dollars (\$1,000.00), or both.

(3) The provisions of this section shall not apply to any legal medical procedure performed by a licensed physician or other licensed medical professional, including legal abortions, when done at the request of a mother of an unborn child or the mother’s legal guardian, or to the lawful dispensing or administration of lawfully prescribed medication.

(4) Nothing contained in this section shall be construed to prohibit prosecution of an offender pursuant to the provisions of any other applicable statute.

HISTORY: Codes, Hutchinson’s 1848, ch. 64, art. 12, Title 3 (8); 1857, ch. 64,

art. 172; 1871, § 2635; 1880, § 2883; 1892, § 1156; 1906, § 1234; Hemingway's 1917, § 964; 1930, § 992; 1942, § 2222; Laws, 2000, ch. 337, § 1; Laws, 2004, ch. 515, § 3; Laws, 2004, ch. 521, § 1; Laws, 2011, ch. 307, § 1, eff from and after July 1, 2011.

Joint Legislative Committee Note — Section 3 of ch. 515 Laws, 2004, effective from and after passage (approved May 4, 2004), amended this section. Section 1 of ch. 521, Laws, 2004, effective from and after July 1, 2004 (approved May 6, 2004), also amended this section. As set out above, this section reflects the language of Section 1 of ch. 521, Laws, 2004, pursuant to Section 1-3-79 which provides that whenever the same section of law is amended by different bills during the same legislative session, and the effective dates of the amendments are the same, the amendment with the latest approval date shall supersede all other amendments to the same section approved on an earlier date.

Cross References — Suspension or revocation of a physician's license for participating in an abortion, see § 73-25-29.

Killing of an unborn child, as provided in this section, defined as crime of violence, see § 97-3-2.

Penalty for manslaughter, see § 97-3-25.

Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see § 97-43-1 et seq.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Evidence.

1. In general.

In order to sustain a conviction under this section, it is not necessary to prove that the defendant knew that the mother was pregnant or that the deceased baby was "quick." *Sitton v. State*, 760 So. 2d 28, 1999 Miss. App. LEXIS 595 (Miss. Ct. App. 1999).

In a prosecution for manslaughter arising from an automobile accident in which a woman and her twin unborn fetuses were killed, the court properly admitted into evidence an autopsy photograph of the unborn twins since it was of considerable probative value in demonstrating that the babies were "quick." *Sitton v. State*, 1999 Miss. App. LEXIS 446 (Miss. Ct. App. June 29, 1999), op. withdrawn, sub. op., 760 So. 2d 28, 1999 Miss. App. LEXIS 595 (Miss. Ct. App. 1999).

Evidence was sufficient to show child was "quick" as used in statute and to support conviction for manslaughter in death of unborn fetus where state presented testimony of husband of victim to effect that at times prior to shooting he

had placed his hand over victim's stomach and had felt unborn child move and expert medical testimony showed that babies move in womb from roughly 10th week of gestation and this baby was almost 32 weeks. *Willis v. State*, 518 So. 2d 667, 1988 Miss. LEXIS 16 (Miss. 1988).

Evidence was sufficient to support conviction for manslaughter in death of unborn fetus, despite claim of defendant that state failed to prove willful intent to harm child, where defendant threatened victim and then willfully fired 4 shots at her with shotgun, knowing this would likely result in death of unborn child. *Willis v. State*, 518 So. 2d 667, 1988 Miss. LEXIS 16 (Miss. 1988).

Evidence was sufficient to show defendant knew victim was pregnant and to support conviction for manslaughter in death of unborn fetus where there was undisputed testimony that woman was obviously pregnant, in her 7th month, there was substantial evidence that defendant knew victim personally and also knew or should have known of her pregnancy, and defendant lived with victim's brother-in-law about 1/10 mile away and visited often in home during her pregnancy; photographs of victim confirmed obviousness of her pregnancy. *Willis v.*

State, 518 So. 2d 667, 1988 Miss. LEXIS 16 (Miss. 1988).

Where defendant allegedly murdered the mother of an unborn quick child, resulting in the death of the child, that the act did not merge into one crime of murder under this section, and, therefore, the death of the unborn child could support a separate charge of manslaughter. *State v. Willis*, 457 So. 2d 959, 1984 Miss. LEXIS 1957 (Miss. 1984).

A state may not require that abortions, prior to the end of the first trimester, be performed only in hospitals. *Doe v. Bolton*, 410 U.S. 179, 93 S. Ct. 739, 35 L. Ed. 2d 201, 1973 U.S. LEXIS 112 (U.S. 1973).

Prior to the end of the first trimester of pregnancy, an attending physician, in consultation with his patient, is free to determine, without regulation by the state, that in his medical judgment, the patient's pregnancy should be terminated, and if such a decision is reached, the physician's judgment may be effectuated by an abortion free of interference by the state. *Roe v. Wade*, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147, 1973 U.S. LEXIS 159 (U.S. 1973), overruled in part, *Planned Parenthood v. Casey*, 505 U.S. 833, 112 S. Ct. 2791, 120 L. Ed. 2d 674, 1992 U.S. LEXIS 4751 (U.S. 1992).

From and after the end of the first trimester of pregnancy, a state may regulate the abortion procedure to the extent

that the regulation reasonably relates to the preservation and protection of maternal health. *Roe v. Wade*, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147, 1973 U.S. LEXIS 159 (U.S. 1973), overruled in part, *Planned Parenthood v. Casey*, 505 U.S. 833, 112 S. Ct. 2791, 120 L. Ed. 2d 674, 1992 U.S. LEXIS 4751 (U.S. 1992).

State regulation protective of fetal life after viability has both logical and biological justifications, and if a state is interested in protecting fetal life after viability, it may proscribe abortion during that period except when it is necessary to preserve the life or health of the mother. *Roe v. Wade*, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147, 1973 U.S. LEXIS 159 (U.S. 1973), overruled in part, *Planned Parenthood v. Casey*, 505 U.S. 833, 112 S. Ct. 2791, 120 L. Ed. 2d 674, 1992 U.S. LEXIS 4751 (U.S. 1992).

2. Evidence.

A photograph of two unborn fetuses was properly admitted into evidence as the picture was of considerable probative value in demonstrating that the babies were "quick", and where the photograph showed two well-formed infants lying on a blanket, the fetuses were clean, and the only visible inference of injury was the presence of several small birthmarks on the face of one infant. *Sitton v. State*, 760 So. 2d 28, 1999 Miss. App. LEXIS 595 (Miss. Ct. App. 1999).

RESEARCH REFERENCES

ALR.

Necessity, to warrant conviction of abortion, that fetus be living at time of commission of acts. 16 A.L.R.2d 949.

Pregnancy as element of abortion or homicide based thereon. 46 A.L.R.2d 1393.

Entrapment defense in sex offense prosecutions. 53 A.L.R.2d 1156.

Homicide based on killing of unborn child. 40 A.L.R.3d 444.

Proof of live birth in prosecution for killing newborn child. 65 A.L.R.3d 413.

Homicide: sufficiency of evidence of mother's neglect of infant born alive, in

minutes or hours immediately following unattended birth, to establish culpable homicide. 40 A.L.R.4th 724.

Am. Jur.

40 Am. Jur. 2d, Homicide, §§ 8, 9.

49 Am. Jur. Proof of Facts 2d 191, Damages for Wrongful Death of Child.

Lawyers' Edition.

Validity, under Federal Constitution, of abortion laws. 28 L. Ed. 2d 1053.

Practice References.

Ronald L. Schoenberg, Criminal Law Deskbook (Matthew Bender).

§ 97-3-39. Homicide; drunken doctor, etc., unintentionally causing death.

If any physician or other person, while in a state of intoxication, shall, without a design to effect death, administer or cause to be administered, any poison, drug, or other medicine, or shall perform any surgical operation on another, which shall cause the death of such other person, he shall be guilty of manslaughter.

HISTORY: Codes, Hutchinson's 1848, ch. 64, art. 12, Title 3 (17); 1857, ch. 64, art. 181; 1871, § 2644; 1880, § 1892, § 1165; 1906, § 1243; Hemingway's 1917, § 973; 1930, § 1001; 1942, § 2231.

Cross References — Suspension or revocation of physician's license, see § 73-25-27. Manslaughter, as provided in this section, defined as crime of violence, see § 97-3-2. Penalty for manslaughter, see § 97-3-25.

RESEARCH REFERENCES

ALR.

When intoxication deemed involuntary so as to constitute a defense to criminal charge. 73 A.L.R.3d 195.

Homicide: physician's withdrawal of life supports from comatose patient. 47 A.L.R.4th 18.

Homicide: Liability where death immediately results from treatment or mis-

treatment of injury inflicted by defendant. 50 A.L.R.5th 467.

Am. Jur.

40 Am. Jur. 2d, Homicide § 94.

CJS.

40 C.J.S., Homicide §§ 126-129, 133.

§ 97-3-41. Homicide; overloading boat.

Any person navigating any boat or vessel for gain, who shall wilfully or negligently receive so many passengers, or such quantity of lading, that by means thereof such boat or vessel shall sink or overset, and thereby any human being shall be drowned or otherwise killed, shall be guilty of manslaughter.

HISTORY: Codes, Hutchinson's 1848, ch. 64, art. 12, Title 3 (15); 1857, ch. 64, art. 179; 1871, § 2642; 1880, § 2890; 1892, § 1163; 1906, § 1241; Hemingway's 1917, § 971; 1930, § 999; 1942, § 2229.

Cross References — Liability of ships and vessels for causing injury or death, see § 11-7-175.

Manslaughter, as provided in this section, defined as crime of violence, see § 97-3-2. Penalty for manslaughter, see § 97-3-25.

RESEARCH REFERENCES

ALR.

Criminal liability for injury or death

caused by operation of pleasure boat. 8 A.L.R.4th 886.

Am. Jur.

40 Am. Jur. 2d, Homicide § 93.

CJS.

40 C.J.S., Homicide, §§ 126-129, 133.

Law Reviews.

Murder and Manslaughter in Mississippi: Unintentional Killings, 71 Miss. L.J. 1, Fall, 2001.

§ 97-3-43. Homicide; ignorant or negligent management of steamboat or railroad engine.

If any captain, engineer, or any other person having charge of a steamboat or railroad engine connected with a car or cars used for the conveyance of passengers; or if the engineer or other person having charge of the boiler of such boat or engine, or of any other apparatus for the generation of steam, shall, from ignorance or gross neglect, or for the purpose of excelling any other boat in speed, or for the purpose of unusual speed, create or allow to be created such an undue quantity of steam as to burst or break the boiler or other apparatus in which it shall be generated, or any apparatus or machinery connected therewith, or shall thereby cause the said engine or cars to run off of said railroad track, or from any other ignorant or gross neglect shall permit or cause such cars or engine to be thus thrown, by which bursting, breaking, or running off the track any person shall be killed, every such captain, engineer, or other person, shall be guilty of manslaughter.

HISTORY: Codes, Hutchinson's 1848, ch. 64, art. 12, Title 3 (16); 1857, ch. 64, art. 180; 1871, § 2643; 1880, § 2891; 1892, § 1164; 1906, § 1242; Hemingway's 1917, § 972; 1930, § 1000; 1942, § 2230.

Cross References — Actions for wrongful death, see § 11-7-13.

Liability of ships and vessels for causing death or injury, see § 11-7-175.

Liability of railroads for causing death or injury, see §§ 77-9-229 et seq.

Manslaughter, as provided in this section, defined as crime of violence, see § 97-3-2.

Penalty for manslaughter, see § 97-3-25.

RESEARCH REFERENCES

Am. Jur.

40 Am. Jur. 2d, Homicide §§ 92, 93.

CJS.

40 C.J.S., Homicide §§ 126-129, 133.

Law Reviews.

Murder and Manslaughter in Mississippi: Unintentional Killings, 71 Miss. L.J. 1, Fall, 2001.

§ 97-3-45. Homicide; owner of dangerous animal.

If the owner of a mischievous animal, knowing its propensity, wilfully suffer it to go at large, or shall keep it without ordinary care, and such animal, while so at large, or not confined, kill any human being who shall have taken reasonable precautions to avoid the animal, such owner shall be guilty of manslaughter.

HISTORY: Codes, Hutchinson's 1848, ch. 64, art. 12, Title 3 (14); 1857, ch. 64,

art. 178; 1871, § 2641; 1880, § 2889; 1892, § 1162; 1906, § 1240; Hemingway's 1917, § 970; 1930, § 998; 1942, § 2228.

Cross References — Manslaughter, as provided in this section, defined as crime of violence, see § 97-3-2.

Penalty for manslaughter, see § 97-3-25.

JUDICIAL DECISIONS

ANALYSIS

1. Evidence sufficient.
2. Jury instructions.

1. Evidence sufficient.

Evidence was sufficient to support defendant's convictions of dangerous animal manslaughter because the State proved that he had knowledge of his dogs' dangerous propensity before the victims' deaths as a deputy testified that three of the dogs were chained up in defendant's yard and were agitated, barking, and straining against their chains. The bodies of both victims were found on public property near a public road and a jury could reasonably conclude that the victim would stay on public property road to avoid dogs protecting private property. *Hodges v.*

State, 285 So. 3d 711, 2019 Miss. App. LEXIS 566 (Miss. Ct. App. 2019).

2. Jury instructions.

Jury instructions, as a whole, omitted the essential element that the jury find that defendant knew that his dogs had a dangerous propensity, and therefore his convictions of dangerous animal manslaughter were reversed, because neither the written nor the oral instructions required the jury to find that defendant knew of his dogs' dangerous propensity and the only knowledge element in the instructions was that the jury find that defendant owned vicious dogs knowing their propensity to go at large. *Hodges v.* State, 285 So. 3d 711, 2019 Miss. App. LEXIS 566 (Miss. Ct. App. 2019).

RESEARCH REFERENCES

ALR.

Landlord's liability to third person for injury resulting from attack on leased premises by dangerous or vicious animal kept by tenant. 81 A.L.R.3d 638.

Am. Jur.

40 Am. Jur. 2d, Homicide § 96.

CJS.

40 C.J.S., Homicide §§ 126-129, 133.

§ 97-3-47. Homicide; all other killings.

Every other killing of a human being, by the act, procurement, or culpable negligence of another, and without authority of law, not provided for in this title, shall be manslaughter.

HISTORY: Codes, Hutchinson's 1848, ch. 64, art. 12, Title 3 (19); 1857, ch. 64, art. 182; 1871, § 2645; 1880, § 2893; 1892, § 1166; 1906, § 1244; Hemingway's 1917, § 974; 1930, § 1002; 1942, § 2232.

Cross References — Manslaughter, as provided in this section, defined as crime of violence, see § 97-3-2.

Penalty for manslaughter, see § 97-3-25.

Enhancement of offenses listed in 99-19-401(2) if the instrumentality used in the commission of the 99-19-401(2) offense was initially obtained in the course of the commission of the crime(s) provided for in this section, see § 99-19-401.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Unlawful act or procurement.
3. Culpable negligence; generally.
4. —As wanton disregard to human life.
5. Negligent operation of vehicle on highway; generally.
6. —Culpable negligence found or supported.
7. —Culpable negligence not found or supported.
8. —Driving while intoxicated.
9. Indictment.
10. Burden and degree of proof.
11. Instructions; generally.
12. —Peremptory instructions.
13. Deliberations of jury; verdict.
14. Corpus Delicti.
15. Double jeopardy.
16. Evidence sufficient.
17. Relationship to voluntary manslaughter.
18. Sentencing.
19. Evidence insufficient.

1. In general.

Defendants were properly convicted of manslaughter because the form of the verdict constituted an intelligent answer to the issues submitted to the jury and allowed the jury's intent to be understood in a reasonably clear manner. *James v. State*, 146 So. 3d 985, 2014 Miss. App. LEXIS 66 (Miss. Ct. App.), cert. denied, 146 So. 3d 981, 2014 Miss. LEXIS 463 (Miss. 2014).

Defendants were properly convicted of manslaughter because defendant's did not fail to receive a fair and impartial trial due to juror misconduct. *James v. State*, 146 So. 3d 985, 2014 Miss. App. LEXIS 66 (Miss. Ct. App.), cert. denied, 146 So. 3d 981, 2014 Miss. LEXIS 463 (Miss. 2014).

Trial court did not err in denying an inmate's motion for post-conviction relief because the record contained sufficient evidence that the inmate pleaded guilty to culpable-negligence manslaughter, Miss. Code Ann. § 97-3-47, and aggravated assault, Miss. Code Ann. § 97-3-7, with knowledge and understanding of the elements of each crime when the prosecutor's

on-the-record statement reiterated the charging language in the indictment and evinced an accurate showing that the inmate was informed of the essential elements of the crimes; factual bases existed for the pleas because there was substantial evidence that the inmate committed the crimes. and through his plea petitions, the inmate was specifically informed of the statutory maximum and minimum punishment that each crime carried. *Williams v. State*, 31 So. 3d 69, 2010 Miss. App. LEXIS 46 (Miss. Ct. App. 2010).

In a manslaughter case, defendant's right to a fundamentally fair trial was denied because the trial court refused to allow the admission of the testimony of two police officers under Miss. R. Evid. 404(a)(2) where there was sufficient testimony to create a jury issue as to whether the victim was the aggressor in the incident that led to his death; the officers' testimony was relevant to show prior incidents so that the jury could have placed itself in defendant's shoes at the time of the incident. *Miller v. State*, 956 So. 2d 221, 2007 Miss. LEXIS 278 (Miss. 2007).

Defendant's unlawful killing of the victim clearly met all of the elements outlined in Miss. Code Ann. § 97-3-47, and the jury would have been entitled to find him guilty of manslaughter on the record before the appellate court; there was no error in defendant's representation at the plea proceeding, much less any error so prejudicial to rise to the level required by *Strickland and Beville*; thus, defendant failed to prove an exception to the procedural bar for post-conviction relief. *Smith v. State*, 922 So. 2d 43, 2006 Miss. App. LEXIS 126 (Miss. Ct. App. 2006).

Appellate court affirmed defendant's sentence for 15 years after pleading guilty to manslaughter under Miss Code Ann. § 97-3-47 because Miss. Code Ann. § 97-3-25 provided that the sentencing range was two to 20 years. *Henderson v. State*, 929 So. 2d 391, 2006 Miss. App. LEXIS 384 (Miss. Ct. App. 2006).

Where defendant presented evidence that he was insane when he caused a fatal auto accident, and the State did not prove beyond a reasonable doubt that he was

sane, his manslaughter conviction was against the overwhelming weight of evidence and he was entitled to a new trial. *Hawthorne v. State*, 883 So. 2d 86, 2004 Miss. LEXIS 1173 (Miss. 2004).

Evidence was more than sufficient to allow the case to go to a jury, and the jury's verdict was not against the overwhelming weight of the evidence: a witness testified as to the events that led to the shooting including that defendant had the gun in his hands, and defendant admitted having fired the shot that killed the victim. *Pitts v. State*, 832 So. 2d 1281, 2002 Miss. App. LEXIS 843 (Miss. Ct. App. 2002).

While much of the reported case law on the statute deals with manslaughter convictions based on the theory of culpable negligence, the language of the statute is sufficient to encompass the other general form of common law involuntary manslaughter. *Miller v. State*, 733 So. 2d 846, 1998 Miss. App. LEXIS 1039 (Miss. Ct. App. 1998).

Conviction of manslaughter by culpable negligence was supported by evidence that defendant and victim had been playing with gun all day, defendant picked up bracelet and asked victim if he could wear it, victim told him no, the 2 started joking around and horseplaying, defendant grabbed gun and cocked it, defendant put gun to victim's head, gun went off, and defendant fell to ground and started crying; defendant's actions showed conscious, wanton, and reckless disregard of likely fatal consequences of his willful act that created unreasonable risk. *Hankins v. City of Grenada (In re City of Grenada)*, 669 So. 2d 85, 1996 Miss. LEXIS 121 (Miss. 1996).

The evidence was insufficient to support a manslaughter conviction where a witness told at least 2 people that the victim was reaching for a pistol at the time of the incident and a gun was found on the ground near the victim's body; although on the witness stand the witness denied making these statements, he was forced to admit that he had signed a written statement to that effect. *Kirkland v. State*, 573 So. 2d 681, 1990 Miss. LEXIS 852 (Miss. 1990).

The evidence was not sufficient to establish that the defendant was guilty of man-

slaughter by culpable negligence with respect to an automobile accident where the State proved only that the defendant's car collided with the rear of a pickup truck and that the defendant was driving while intoxicated, the defendant and his passenger testified that the defendant was driving well, and not recklessly, negligently, unlawfully, or at a high rate of speed, and no other witnesses contradicted the testimony of the defendant and his passenger. However, the evidence was sufficient to support a conviction for the lesser included offense of negligently killing another while under the influence of intoxicating liquor. *Evans v. State*, 562 So. 2d 91, 1990 Miss. LEXIS 280 (Miss. 1990).

This section is an involuntary manslaughter statute and applies whether the instrument causing death was a motor vehicle or some other instrument or instrumentality. *Craig v. State*, 520 So. 2d 487, 1988 Miss. LEXIS 44 (Miss. 1988).

Prosecuting examination may examine defendant in manslaughter prosecution who raises defenses of justifiable homicide by reason of self-defense as well as excusable homicide by reason of accident or misfortune regarding why defendant did not back off or flee when deceased pulled knife on defendant where jury is specifically instructed that defendant is under no duty to flee but rather has right to stand ground. *Burge v. State*, 472 So. 2d 392, 1985 Miss. LEXIS 2129 (Miss. 1985).

It is for jury to decide whether slaying constitutes manslaughter or justifiable homicide by reason of self-defense or excusable homicide by reason of accident or misfortune where evidence shows that during course of argument, deceased displayed knife, defendant pulled gun, pointed it at deceased and cocked it, and during ensuing scuffle, gun discharged, striking deceased. *Burge v. State*, 472 So. 2d 392, 1985 Miss. LEXIS 2129 (Miss. 1985).

Where the victim was found in a ditch near the defendant's pickup truck with his breastbone and all of his ribs broken, and with a punctured lung, and he died of massive hemorrhage and pulmonary edema and congestion, and there was strong circumstantial evidence pointing to the defendant as the assailant of the vic-

tim, including the defendant's admission to state witnesses that he had been drinking heavily that day and that he had struck the victim although he did not intend to kill him, the evidence was sufficient to support a conviction of manslaughter. *Vaughn v. Electrolux Corp.*, 245 So. 2d 24, 1971 Miss. LEXIS 1351 (Miss. 1971).

Under an indictment for manslaughter, evidence that the killing was murder is admissible. *Andrews v. State*, 237 Miss. 875, 116 So. 2d 749, 1960 Miss. LEXIS 257 (Miss. 1960).

In a suit to cancel a claim of husband to property of wife on the ground that he had feloniously slain his wife in Ohio and thereby forfeited his right to the property under Code 1942, § 479, the fact that the husband pleaded guilty to manslaughter in Ohio does not admit a wilful killing but the husband should be allowed to introduce evidence to explain the circumstances of killing. *Henry v. Toney*, 211 Miss. 93, 50 So. 2d 921, 1951 Miss. LEXIS 335 (Miss. 1951).

In manslaughter, the malice or intent to kill must arise from a present provocation and this provocation must stem from the deceased. *Gaddis v. State*, 207 Miss. 508, 42 So. 2d 724, 1949 Miss. LEXIS 359 (Miss. 1949).

Simple negligence will not support a conviction under this provision. *General Contract Purchase Corp. v. Armour*, 125 F.2d 147, 1942 U.S. App. LEXIS 4334 (5th Cir. Miss. 1942).

As respects degree of negligence necessary to constitute manslaughter, criminality cannot be predicated on mere negligence or carelessness, but may be predicated on gross negligence or carelessness constituting such a departure from what would be conduct of ordinarily careful and prudent man under same circumstances as to furnish evidence of indifference to consequences. *Bailey v. State*, 176 Miss. 579, 169 So. 765, 1936 Miss. LEXIS 145 (Miss. 1936).

2. Unlawful act or procurement.

A father who punished his child and as result of which the child died, was guilty of manslaughter even though he did not intend to kill the child. *Hancock v. State*,

209 Miss. 523, 47 So. 2d 833, 1950 Miss. LEXIS 410 (Miss. 1950).

Where one accused of manslaughter under this section [Code 1942, § 2232] feloniously put in motion a series of five successive events, causally and naturally connected from beginning to end, without the intervention of any distinctly separate and independent agencies to interrupt and overcome the progress of the events in their natural course, accused's wrong was not only a contributing cause but was the proximate cause of death. *Henderson v. State*, 199 Miss. 629, 25 So. 2d 133, 1946 Miss. LEXIS 234 (Miss. 1946).

Where the evidence was such that the jury could infer that the defendant began the difficulty with the deceased, and even though the deceased was the aggressor, the act was unlawful, the killing being the unanticipated result flowing from the fight in which fists and feet were used, a verdict of manslaughter was justified. *McCaffrey v. State*, 185 Miss. 659, 187 So. 740, 1939 Miss. LEXIS 146 (Miss. 1939).

Evidence that accused gave six-year-old child three swallows of whisky, that child died of alcoholic poisoning, and that smaller quantities of whisky would be necessary to endanger life of child than in case of adult held insufficient to sustain conviction of manslaughter under culpable negligence statute, in absence of expert testimony that three swallows of whisky is sufficient, as probability, to kill or seriously injure healthy six-year-old child. *Jabron v. State*, 172 Miss. 135, 159 So. 406, 1935 Miss. LEXIS 116 (Miss. 1935).

Evidence held sufficient to support manslaughter, where defendant permitted wife to shoot herself. *Gregory v. State*, 152 Miss. 133, 118 So. 906, 1928 Miss. LEXIS 235 (Miss. 1928).

Killing held to amount to no more than manslaughter, where defendant was resisting unlawful act. *Fletcher v. State*, 129 Miss. 207, 91 So. 338, 1922 Miss. LEXIS 2 (Miss.), modified, 129 Miss. 578, 92 So. 556, 1922 Miss. LEXIS 56 (Miss. 1922).

3. Culpable negligence; generally.

Jury was properly informed on depraved-heart murder and culpable-negligent manslaughter; the court gave de-

praved-heart murder jury instruction which stated that if the jury found that appellant killed the victim while engaged in the commission of an act eminently dangerous to others and evincing a depraved heart, disregarding the value of human life, whether or not he had any intention of actually killing the victim, then the jury should find appellant guilty of murder. Culpable negligence was defined as the conscious and wanton or reckless disregard of the probabilities of fatal consequences to others as a result of the willful creation of an unreasonable risk thereof and it was negligence of a degree so gross as to be tantamount to a wanton disregard of or utter indifference to the safety of human life; accordingly, the jury instructions given fully explained the difference between depraved-heart murder and culpable-negligence manslaughter. *Westbrook v. State*, 29 So. 3d 828, 2009 Miss. App. LEXIS 648 (Miss. Ct. App. 2009), cert. denied, 29 So. 3d 774, 2010 Miss. LEXIS 124 (Miss. 2010), cert. denied, 562 U.S. 849, 131 S. Ct. 98, 178 L. Ed. 2d 62, 2010 U.S. LEXIS 5934 (U.S. 2010).

Defendant's conviction for capital murder and arson was proper; the evidence was sufficient because defendant intended to severely beat the victim, and then moved and burned his body. Those actions did not constitute culpable negligence manslaughter under Miss. Code Ann. § 97-3-47. *Fuqua v. State*, 938 So. 2d 277, 2006 Miss. App. LEXIS 164 (Miss. Ct. App.), cert. denied, 937 So. 2d 450, 2006 Miss. LEXIS 541 (Miss. 2006), cert. denied, 549 U.S. 1344, 127 S. Ct. 2037, 167 L. Ed. 2d 774, 2007 U.S. LEXIS 4043 (U.S. 2007).

In a prosecution under Miss. Code Ann. § 97-3-47, where defendant admitted giving the victim two oxycodone pills (for which he had a prescription) and finding her unconscious the next morning; the victim's brother testified that he saw defendant attempt to inject the victim with the drug, that she later appeared intoxicated, became ill, and vomited; and a pathologist testified that the oxycodone level in the victim's blood was about 5 ½ times higher than the toxic level of oxycodone, the trial court properly denied de-

fendant's motion for a peremptory instruction, as the evidence sufficiently proved that the defendant was guilty of culpable negligence. *Nichols v. State*, 868 So. 2d 355, 2003 Miss. App. LEXIS 682 (Miss. Ct. App. 2003), cert. denied, 868 So. 2d 345, 2004 Miss. LEXIS 255 (Miss. 2004).

Where defendant, a security guard, shot a man inside a car, who had allegedly waived a gun at defendant, and defendant argued the evidence only supported a charge of culpable negligence manslaughter, in each of the cases cited by defendant, the killing had been unintentional, but in defendant's case, there was no evidence in the record to suggest that defendant did not intend to shoot, and substantial evidence supported defendant's conviction for depraved heart murder. *Steele v. State*, 852 So. 2d 78, 2003 Miss. App. LEXIS 464 (Miss. Ct. App. 2003), cert. denied, 870 So. 2d 666, 2004 Miss. LEXIS 395 (Miss. 2004).

The mere act of taking a four year old child on a camping excursion to an area by a river does not, of itself, demonstrate such an indifference for the safety of the child as to rise to the level of culpable negligence for purposes of a criminal manslaughter charge; furthermore, demonstrating the close proximity of the river to the camping area is not enough, standing alone, to criminalize a custodial parent's failure to provide flotation devices for the children to wear. *Edwards v. State*, 755 So. 2d 443, 1999 Miss. App. LEXIS 32 (Miss. Ct. App. 1999).

The evidence was sufficient to support the conviction of a 14 year old defendant for manslaughter where, after being scolded by several children for his teasing another child about her excessive weight, he shot the overweight child in the head after she asked him to "stop playing." *Towner v. State*, 726 So. 2d 251, 1998 Miss. App. LEXIS 1106 (Miss. Ct. App. 1998).

The crime of aggravated DUI proscribed in § 63-11-30(4) is a lesser included offense necessarily encompassed under the crime of manslaughter by culpable negligence set forth in this section. *Mayfield v. State*, 612 So. 2d 1120, 1992 Miss. LEXIS 861 (Miss. 1992).

Depraved-heart murder as defined in § 97-3-19(1)(b) and culpable-negligence

manslaughter as defined in this section are distinguishable simply by degree of mental state of culpability, in that depraved-heart murder involves a higher degree of recklessness from which malice or deliberate design may be implied; thus, an instruction on depraved-heart murder did not amount to a “denial, or substantial diminishing, of a manslaughter consideration” by the jury. *Windham v. State*, 602 So. 2d 798, 1992 Miss. LEXIS 227 (Miss. 1992).

Evidence indicating that defendant had alcohol problem for previous 15 years, offered in rebuttal to testimony of defendant that he had never been admitted to hospital for alcohol abuse except on one occasion, was not admitted in error where evidence was overwhelming that defendant was guilty. *Whitley v. State*, 511 So. 2d 929, 1987 Miss. LEXIS 2691 (Miss. 1987).

“Culpable negligence,” as used in this section, means negligence evincing a reckless disregard for the value of human life, and carries the same legal meaning whether the instrument causing the death is an automobile or something less commonplace; thus, the record in a manslaughter prosecution supported the jury verdict of culpable negligence where it disclosed, *inter alia*, that defendant, while drunk, had driven into the wrong lane of traffic on a straight stretch of road with an unobstructed view. *Gandy v. State*, 373 So. 2d 1042, 1979 Miss. LEXIS 2325 (Miss. 1979).

The actions of a 17-year-old defendant in driving a school bus after being instructed not to, reversing the usual route and driving in the opposite direction so that children were not discharged at the side of the road but had to pass in front of the bus to reach the side of the road, failing to count children as they left the bus, and not watching those counted until they had passed in front of the bus and reached a position of safety, amounted to simple negligence but not criminal or culpable negligence supporting a conviction of manslaughter for the death of a child who was run over and killed by the bus driven by the defendant. *Bethea v. Bethea*, 259 So. 2d 686, 1972 Miss. LEXIS 1537 (Miss. 1972).

In a manslaughter prosecution, when the testimony of negligence reaches that degree of carelessness which is denominated as gross negligence and which constitutes such a departure from what would be the conduct of an ordinarily careful and prudent person under the circumstances, so as to furnish evidence of indifference to consequences, the issue becomes a question for the jury at that point. *Day v. Phelps*, 244 So. 2d 18, 1971 Miss. LEXIS 1317 (Miss. 1971).

The character of one's conduct as culpable negligence within the meaning of this section [Code 1942, § 2232] is affected by the circumstances. *Smith v. State*, 197 Miss. 802, 20 So. 2d 701, 1945 Miss. LEXIS 313 (Miss. 1945).

Indifference to consequences must, to constitute culpable negligence within the meaning of this section [Code 1942, § 2232], involve a disregard for the safety of human life. *Smith v. State*, 197 Miss. 802, 20 So. 2d 701, 1945 Miss. LEXIS 313 (Miss. 1945).

To sustain a conviction of criminal homicide attributable to negligence, it must be shown that a homicide was not improbable under all facts existing at the time. *Smith v. State*, 197 Miss. 802, 20 So. 2d 701, 1945 Miss. LEXIS 313 (Miss. 1945).

One may violate the law and yet not be culpably negligent in fact. *Cutshall v. State*, 191 Miss. 764, 4 So. 2d 289, 1941 Miss. LEXIS 185 (Miss. 1941).

Culpable negligence within the meaning of the statute is that degree of negligence or carelessness which is denominated as gross negligence and which constitutes a departure from what would be the conduct of an ordinarily careful and prudent man under the same circumstances as to furnish evidence of indifference to consequences, and the statute does not apply to a case of simple or mere negligence. *Scott v. State*, 183 Miss. 788, 185 So. 195, 1938 Miss. LEXIS 292 (Miss. 1938).

“Culpable negligence” within statute declaring that killing of a human being by culpable negligence is manslaughter held to mean that degree of negligence or carelessness which is denominated as “gross negligence” and which constitutes such a departure from what would be the conduct

of an ordinarily careful and prudent man under same circumstances as to furnish evidence of indifference to consequences. *Shows v. State*, 175 Miss. 604, 168 So. 862, 1936 Miss. LEXIS 93 (Miss. 1936).

Culpable negligence within manslaughter statute is omission to do something, or doing something which reasonable, prudent person would or would not do. *Robertson v. State*, 153 Miss. 770, 121 So. 492, 1928 Miss. LEXIS 197 (Miss. 1928).

One pointing loaded pistol at another and discharging it by act of culpable negligence, resulting in death, is guilty of manslaughter. *Robertson v. State*, 153 Miss. 770, 121 So. 492, 1928 Miss. LEXIS 197 (Miss. 1928).

4. —As wanton disregard to human life.

Defendant argued that the trial court erred in denying his motion for a directed verdict because his actions did not constitute culpable negligence, which was required to sustain a conviction for manslaughter. However, the jury heard evidence that he was driving at a high speed, ran through the red light, hit the victim without applying his brakes, and then deliberately evaded the police; the evidence was sufficient to demonstrate a wanton disregard for the safety of human life, and it was sufficient to establish culpable negligence. *Montgomery v. State*, 910 So. 2d 1169, 2005 Miss. App. LEXIS 403 (Miss. Ct. App.), cert. dismissed, 921 So. 2d 344, 2005 Miss. LEXIS 759 (Miss. 2005).

Under this section culpable negligence is “the conscious and wanton or reckless disregard of the probabilities of fatal consequences to others as a result of the willful creation of an unreasonable risk thereof.” In order to maintain the charge, the State must prove, beyond a reasonable doubt, guilt of such gross negligence on the occasion complained of as to evince a wanton or reckless disregard for the safety of human life, or such an indifference to the consequences of an act under the surrounding circumstances as to render such conduct tantamount to willfulness. *Evans v. State*, 562 So. 2d 91, 1990 Miss. LEXIS 280 (Miss. 1990).

Defendant’s negligence did not reach the degree required to establish culpable

negligence within the meaning of this section, where the version of the death given by defendant, that he was unloading his shotgun and, believing there was no shell in the chamber, pointed the gun toward the ceiling and pulled the trigger, resulting in the death of his fiancée, was uncontradicted, where the record failed to show any horseplay with the shotgun, drunkenness, brawling, or any other reckless conduct tantamount to a wanton disregard of human life, and where no evidence suggested that defendant had intentionally killed his fiancée; thus, his conviction would be reversed. *Phillips v. State*, 379 So. 2d 318, 1980 Miss. LEXIS 1838 (Miss. 1980).

Involuntary manslaughter by culpable negligence within the meaning of Code 1942 § 2232, is the conscious and wanton or reckless disregard of the probabilities of fatal consequences to others as the result of the wilful creation of an unreasonable risk. *Campbell v. State*, 285 So. 2d 891, 1973 Miss. LEXIS 1309 (Miss. 1973).

“Culpable negligence”, as used in the statute is negligence of a higher degree than that which in civil cases is held to be gross negligence, and must be tantamount to a wanton disregard of, or utter indifference to, the safety of human life, so clearly evidenced as to place it beyond every reasonable doubt. *Moore v. State*, 238 Miss. 103, 117 So. 2d 469, 1960 Miss. LEXIS 384 (Miss. 1960); *Grinnell v. State*, 230 So. 2d 555, 1970 Miss. LEXIS 1551 (Miss. 1970).

The term culpable negligence should be construed to mean a negligence of a higher degree than that which in civil cases is held to be gross negligence, and must be a negligence of a degree so gross as to be tantamount to a wanton disregard of, or utter indifference to, the safety of human life, and this shall be so clearly evidenced as to place it beyond reasonable doubt. *Sullivan v. State*, 213 Miss. 14, 56 So. 2d 93, 1952 Miss. LEXIS 327 (Miss. 1952).

Culpable negligence within the meaning of this section [Code 1942, § 2232] is not merely such negligence as in a civil case would be gross negligence, but must be tantamount to a wanton disregard of, or utter indifference to, the safety of hu-

man life, and must be so clearly evident as to place it beyond a reasonable doubt. *Smith v. State*, 197 Miss. 802, 20 So. 2d 701, 1945 Miss. LEXIS 313 (Miss. 1945); *Downs v. State*, 206 Miss. 831, 41 So. 2d 19, 1949 Miss. LEXIS 304 (Miss. 1949); *Coleman v. State*, 208 Miss. 612, 45 So. 2d 240, 1950 Miss. LEXIS 278 (Miss. 1950).

Culpable negligence within the meaning of this section [Code 1942, § 2232] is the conscious and wanton or reckless disregard of the probabilities of fatal consequences to others as the result of the wilful creation of an unreasonable risk thereof. *Smith v. State*, 197 Miss. 802, 20 So. 2d 701, 1945 Miss. LEXIS 313 (Miss. 1945); *Henderson v. State*, 199 Miss. 629, 25 So. 2d 133, 1946 Miss. LEXIS 234 (Miss. 1946); *Coleman v. State*, 208 Miss. 612, 45 So. 2d 240, 1950 Miss. LEXIS 278 (Miss. 1950).

5. Negligent operation of vehicle on highway; generally.

In the absence of proof that defendant's drinking prior to operating an automobile on the highway proximately caused the death of another, she should not be convicted of manslaughter under this section. *Frazier v. State*, 289 So. 2d 690, 1974 Miss. LEXIS 1680 (Miss. 1974).

Where the only eyewitnesses to a fatal accident were the defendant and his passenger, and both testified that the deceased jumped in front of the defendant's automobile at a time when the automobile was traveling on the roadway in a prudent and reasonable manner, and the only evidence adverse to the defendant was testimony from one witness that he noticed the odor of intoxicating liquor around the defendant's vehicle, but would not say that the defendant was intoxicated, and the fact that defendant's automobile traveled a distance after striking the deceased, the closeness of the question of the defendant's criminal liability under the culpable negligence statute and the fact that the defendant received none but abstract instructions, and none on his theory of the case, required that another jury decide the matter under proper instruction. *Cook v. State*, 248 So. 2d 434, 1971 Miss. LEXIS 1467 (Miss. 1971).

Where the defendant was charged with culpable negligence in the operation of an

automobile on a public highway, resulting in the death of another, he was entitled to have admitted the testimony of qualified witnesses that he had the general reputation in the community of his residence of being a careful driver. *Rosser v. State*, 230 Miss. 573, 93 So. 2d 470, 1957 Miss. LEXIS 399 (Miss. 1957).

Where a motorist killed three persons who were standing on the shoulder of the highway, each homicide constituted a single and separate offense for which the defendant may be tried without being put in jeopardy for the same offense. *Burton v. State*, 226 Miss. 31, 79 So. 2d 242, 1955 Miss. LEXIS 605 (Miss. 1955).

In prosecution under this section [Code 1942, § 2232] for involuntary manslaughter with motor vehicle, it must be shown that homicide was not improbable under all facts existing at time, in order to sustain conviction of criminal homicide attributable to negligence. *Coleman v. State*, 208 Miss. 612, 45 So. 2d 240, 1950 Miss. LEXIS 278 (Miss. 1950).

Defendant's criminal liability is to be determined primarily by what occurred at the time of, and immediately prior to his striking and running over the victim, but the jury is entitled to consider his subsequent conduct, including his denial to the officers that he had had any accident at all, as a circumstance in determining whether his entire conduct had been characterized by a spirit of wanton disregard for the safety of others. *Cutshall v. State*, 203 Miss. 553, 35 So. 2d 318, 1948 Miss. LEXIS 306 (Miss. 1948).

Where a witness in prosecution for manslaughter by culpable negligence in the operation of a motor car was permitted to examine his prior written statement to refresh his recollection, admission of testimony to the limited extent that the witness' memory was refreshed by the statement and the questions of the prosecuting attorney predicated thereon did not violate Section 26 of the Constitution on the ground that the written statement was given in the absence of defendant and without the privilege of cross-examination, where it was not introduced in evidence as an ex parte statement or deposition and the jury was not permitted to read, or hear the statement read, on the

trial. *Cutshall v. State*, 203 Miss. 553, 35 So. 2d 318, 1948 Miss. LEXIS 306 (Miss. 1948).

The gist of the offense of involuntary manslaughter with a motor vehicle is criminal negligence, which must be wanton or reckless under circumstances implying danger to human life. *Smith v. State*, 197 Miss. 802, 20 So. 2d 701, 1945 Miss. LEXIS 313 (Miss. 1945); *Coleman v. State*, 208 Miss. 612, 45 So. 2d 240, 1950 Miss. LEXIS 278 (Miss. 1950); *Hatcher v. State*, 230 Miss. 257, 92 So. 2d 552, 1957 Miss. LEXIS 365 (Miss. 1957); *Smith v. State*, 233 Miss. 886, 103 So. 2d 360, 1958 Miss. LEXIS 453 (Miss. 1958).

In manslaughter prosecution of truck driver charged with culpable negligence in driving truck over center line of highway at high rate of speed resulting in a "side-swiping" of another truck and the killing of a passenger, evidence as to whether defendant was driving over center line of highway as charged held for jury. *Shows v. State*, 175 Miss. 604, 168 So. 862, 1936 Miss. LEXIS 93 (Miss. 1936).

Motorists' habitual violation of statute, limiting speed in closely built-up territory to twenty miles an hour, and disregard of pedestrians' right by many motorists, furnish no excuse for courts to refuse to enforce law or depart therefrom in case wherein facts justify conviction of motorist for manslaughter in causing pedestrian's death by wilful violation of speed law. *Wilson v. State*, 173 Miss. 372, 161 So. 744, 1935 Miss. LEXIS 231 (Miss. 1935).

Culpable negligence of defendant charged with manslaughter, based on alleged negligent operation of automobile, held for jury. *Bradford v. State*, 158 Miss. 210, 127 So. 277, 1930 Miss. LEXIS 2 (Miss. 1930).

6. —Culpable negligence found or supported.

Although the testimony showed that there were two guns fired, a .45 caliber pistol and a 9 millimeter pistol, the evidence was sufficient to convict defendant of manslaughter by culpable negligence because, in firing his 9 millimeter pistol, which he admitted to firing, across a crowded parking lot, the jury could have found that defendant possessed the con-

scious and wanton or reckless disregard of the probabilities of fatal consequences to others as the result of the willful creation of an unreasonable risk required to convict him of manslaughter by culpable negligence. *Gary v. State*, 11 So. 3d 769, 2009 Miss. App. LEXIS 324 (Miss. Ct. App. 2009).

In a prosecution for manslaughter arising out of the negligent operation of a motor vehicle on the highway, the conviction would be affirmed where the evidence established that the defendant had driven his truck into the path of an on-coming vehicle, that the defendant had made no attempt to avoid the accident, and that his blood contained a level of alcohol sufficient to impair his reflexes. *Atkinson v. State*, 392 So. 2d 205, 1980 Miss. LEXIS 2153 (Miss. 1980).

Notwithstanding that defendant's automobile did not strike the automobile driven by the deceased, and that the negligence of the driver whom defendant was racing in applying his brakes in such a manner as to cause his automobile to skid into the oncoming automobile driven by the deceased was the immediate cause of death, the defendant aided and abetted the other driver in the doing of an act obviously dangerous to persons using the highway in reckless and utter disregard for human life and constituted culpable negligence within the meaning of Code 1942 § 2232. *Campbell v. State*, 285 So. 2d 891, 1973 Miss. LEXIS 1309 (Miss. 1973).

Evidence which established that the defendant collided with the victims' truck while traveling a speed of 70 to 75 miles per hour in the wrong lane of a dry road surface, while the weather was clear, was sufficient to sustain an involuntary manslaughter conviction. *Patrick v. State*, 249 So. 2d 667, 1971 Miss. LEXIS 1176 (Miss. 1971), cert. denied, 404 U.S. 1038, 92 S. Ct. 712, 30 L. Ed. 2d 730, 1972 U.S. LEXIS 3932 (U.S. 1972).

A father pursued by a patrolman because of driving without lights is properly convicted of negligent manslaughter where he instructed his 16-year-old son to drive as fast as possible and not stop, and the car struck another. *Griffin v. State*, 242 Miss. 376, 135 So. 2d 198, 1961 Miss. LEXIS 572 (Miss. 1961).

One operating automobile at 55-65 m.p.h. along a relatively narrow street in a thickly built-up residential neighborhood, striking and killing a child, may properly be convicted of "culpable negligence". *Moore v. State*, 238 Miss. 103, 117 So. 2d 469, 1960 Miss. LEXIS 384 (Miss. 1960).

In a prosecution for manslaughter with an automobile, the jury was amply justified in finding under the evidence that the accused was guilty of culpable negligence in hitting a child riding a bicycle. *Hatcher v. State*, 230 Miss. 257, 92 So. 2d 552, 1957 Miss. LEXIS 365 (Miss. 1957).

Where there was evidence that accused recklessly and with a wilful and wanton disregard of the safety of others and of human life, attempted at a high rate of speed to pass a car at the crest of a hill, before he could see where he was going, or who was coming toward him and as a direct result of culpable negligence he collided with an oncoming automobile, and killed a passenger, the evidence sustained conviction for manslaughter. *Dendy v. State*, 224 Miss. 208, 79 So. 2d 827, 1955 Miss. LEXIS 481 (Miss. 1955).

Accused's culpable negligence in turning into the path of and colliding with oncoming automobile was the proximate cause of the death of passenger in latter vehicle, where evidence showed that the collision resulted in bodily injuries to deceased, causing her to lose a considerable quantity of blood, and a partial paralysis on her right side, necessitating her taking to bed, where she remained until as a consequence pneumonia developed and the pneumonia resulted in her death. *Henderson v. State*, 199 Miss. 629, 25 So. 2d 133, 1946 Miss. LEXIS 234 (Miss. 1946).

Evidence warranted jury finding that truck driver, in turning out to pass truck in front of him and into the path of oncoming automobile, could have seen, if he had looked, such automobile, in support of conviction of manslaughter for death of passenger in such automobile, in the resulting collision. *Henderson v. State*, 199 Miss. 629, 25 So. 2d 133, 1946 Miss. LEXIS 234 (Miss. 1946).

Motorist exceeding speed fixed by law fails to exercise legal measure of due care

prescribed by state, and speed so much above legal rate as to leave no doubt that excess was intentional and wilful constitutes culpable want of due care as respects injuries proximately resulting therefrom, so that homicide proximately caused by such wilful excessive speed is manslaughter. *Wilson v. State*, 173 Miss. 372, 161 So. 744, 1935 Miss. LEXIS 231 (Miss. 1935).

Evidence of motorist's wilful and intentional operation of automobile at speed grossly exceeding statutory limit across pedestrians' path alongside railroad track at street crossing and death of pedestrian as proximate or concurrently proximate result of such law violation held to sustain conviction of manslaughter. *Williams v. State*, 161 Miss. 406, 137 So. 106, 1931 Miss. LEXIS 269 (Miss. 1931), overruled in part, *State v. Buckhalter*, 119 So. 3d 1015, 2013 Miss. LEXIS 405 (Miss. 2013).

7. —Culpable negligence not found or supported.

Evidence was insufficient to sustain defendant's conviction of culpable negligence manslaughter because there was no evidence presented at trial that defendant was speeding or driving recklessly and there was no evidence presented to establish that defendant had been driving while impaired or that defendant had been drinking on the day of the crash. All the evidence showed was that defendant, who may have had a cooler of beer and two open beers in his vehicle, lost control of his vehicle while negotiating a curve and crossed into the victim's lane, thereby causing her death; as such, the State failed to show that defendant's actions rose to the level of wanton or reckless conduct or that defendant was negligence to such a degree that he was totally indifferent to the safety of human life. *Tate v. State*, 16 So. 3d 699, 2008 Miss. App. LEXIS 786 (Miss. Ct. App. 2008), cert. denied, 17 So. 3d 99, 2009 Miss. LEXIS 411 (Miss. 2009).

The passing of an overtaken vehicle to the right, when done under circumstances not involving apparent or appreciable danger to human life, is not culpable negligence within the purview of this section [Code 1942, § 2232]. *Goudy v. State*, 203

Miss. 366, 35 So. 2d 308, 1948 Miss. LEXIS 280 (Miss. 1948).

The careless and negligent driving of an automobile on the wrong side of a highway is not culpable negligence per se within the meaning of this section [Code 1942, § 2232]. *Smith v. State*, 197 Miss. 802, 20 So. 2d 701, 1945 Miss. LEXIS 313 (Miss. 1945).

The statute does not apply to a case in which the uncontradicted proof was that a motorist was driving between 40 and 45 miles an hour outside of a business or residential district, that although it was dark, his lights were in good condition and lighted the road ahead of him, that although it was snowing, the visibility was good, that he was watching the road as he went, and that there was no sign or intimation on the highway of a small neighborhood road out of which an unlighted bicycle came darting at 25 miles an hour. *General Contract Purchase Corp. v. Armour*, 125 F.2d 147, 1942 U.S. App. LEXIS 4334 (5th Cir. Miss. 1942).

That a motorist was driving too fast, and because of an attempt to turn at an intersection, and in order to avoid a collision with another automobile, he lost control of his car, ran over the deceased and struck a post near the sidewalk, consisted of simple or mere negligence not within the purview of the statute. *Scott v. State*, 183 Miss. 788, 185 So. 195, 1938 Miss. LEXIS 292 (Miss. 1938).

8. —Driving while intoxicated.

Court affirmed defendant's conviction of negligently causing the death of another while operating a vehicle under the influence of cocaine because the properly admitted urine analysis showed that defendant had ingested cocaine, and the court was unable to say that a reasonable juror could not have found beyond a reasonable doubt that defendant was guilty. *Jones v. State*, 881 So. 2d 209, 2002 Miss. App. LEXIS 869 (Miss. Ct. App. 2002), *aff'd*, 2003 Miss. LEXIS 588 (Miss. Oct. 30, 2003).

There was insufficient evidence to support a conviction of culpable negligence manslaughter where (1) the evidence sufficiently established the requisite antecedent link between the defendant's op-

eration of the motor vehicle in an intoxicated state and the car crash that resulted in the victim's death, and (2) the defendant's conduct demonstrated a sufficient wanton and reckless disregard for the safety of human life and an apathy for the consequences of his actions as to make that conduct comparable to willfulness. *Beckham v. State*, 735 So. 2d 1059, 1999 Miss. App. LEXIS 115 (Miss. Ct. App. 1999).

Interim digital display of defendant's alcoholic blood level by intoxilyzer was admissible in prosecution for vehicular homicide while under influence of intoxicating liquor, despite fact that test was not completed due to failure of defendant to blow into device for sufficient period of time; both administering officer and officer who calibrated intoxilyzer testified that interim reading would only show erroneously low level, not erroneously high level, of blood alcohol, intoxilyzer was shown to be working properly, and defendant did not attack officers' credentials or their relevant experience or object to their opinion testimony. *Temple v. State*, 679 So. 2d 611, 1996 Miss. LEXIS 417 (Miss. 1996).

Defendant convicted of vehicular homicide while under influence of intoxicating liquor showed no prejudice from denial of his pretrial motion for continuance even though counsel was appointed eight days prior to trial and had two other trials scheduled in interim, as defendant made adequate presentation of evidence, and, despite suggestion that, with more time, defendant could have supplied expert testimony refuting intoxilyzer testimony, record reflected no posttrial effort to demonstrate that such testimony was available. *Temple v. State*, 679 So. 2d 611, 1996 Miss. LEXIS 417 (Miss. 1996).

An officer's failure to inform the defendant that he had a right to refuse the officer's request for a blood sample did not render the test results inadmissible in a manslaughter prosecution against the defendant where the officer had probable cause to obtain the blood sample in that the officer knew that the defendant was the driver of an automobile which had collided head on with another vehicle, the collision occurred on a straight and level

highway when the road condition was dry, the officer knew that at least two people were dead in the vehicle which the defendant hit, the officer had observed a beer in the defendant's vehicle, and the defendant had slurred speech and dilated pupils. For a search which would otherwise be illegal, absent consent, knowledgeable waiver of one's constitutional right not to be searched is guaranteed by Article 3, § 23 of the Mississippi Constitution. However, blood searches which are based upon probable cause are not illegal, and, therefore, the question of the defendant's knowledgeable waiver was not relevant. *Longstreet v. State*, 592 So. 2d 16, 1991 Miss. LEXIS 840 (Miss. 1991).

Evidence that the defendant ran a stop sign while intoxicated and collided with a truck resulting in the death of a passenger was not sufficient to prove manslaughter by culpable negligence under this section but was sufficient to support a conviction for the lesser included offense of negligently killing another while under the influence of an intoxicating liquor pursuant to § 63-11-30. *Childs v. State*, 521 So. 2d 882, 1988 Miss. LEXIS 118 (Miss. 1988).

Results of blood-alcohol test performed on defendant after automobile accident resulting in death of 2 people were admissible where officers at scene of accident smelled alcohol and saw several beer cans and whiskey bottle on floorboard, at hospital informed defendant that he was being charged with 2 counts of manslaughter, read defendant his rights, and requested and obtained his consent for blood sample; evidence was sufficient to provide probable cause to search for and seize evidence of intoxication; contention of defendant that test results should not have been admissible because evidence indicated he was unable to consent was rejected, although testimony showed that defendant was belligerent and slurred his speech, was unco-operative, and unsuccessfully resisted efforts to procure blood sample. *Whitley v. State*, 511 So. 2d 929, 1987 Miss. LEXIS 2691 (Miss. 1987).

In prosecution for vehicular manslaughter, defendant's culpable negligence was established by evidence that defendant's vehicle eased off road along straight and

level stretch of interstate highway, striking rear of decedent's vehicle which was wholly off highway and displaying tail-lights, and that defendant smelled of alcohol, slurred his speech, and evidenced a .19 percent level of blood alcohol. *Gibson v. State*, 503 So. 2d 230, 1987 Miss. LEXIS 2338 (Miss. 1987).

Admission into evidence of results of blood alcohol test at trial for manslaughter and aggravated assault arising out of a motor vehicle accidents was reversible error, where deputy sheriff who investigated the accident had insufficient probable cause to request a blood alcohol test for defendant driver, in view of deputy's statement that he smelled no odor of alcohol on defendant either at the accident scene or at the hospital, he observed no whiskey bottles or beer cans in defendant's car, no aspect of defendant's speech, appearance or behavior indicated that he was under the influence of alcohol, and deputy admitted that the real reason for requesting the blood alcohol test was because it was sheriff department policy to do so when someone was killed in an automobile accident. *Cole v. State*, 493 So. 2d 1333, 1986 Miss. LEXIS 2641 (Miss. 1986).

Evidence was insufficient to support a manslaughter conviction arising out of an automobile accident, where, although defendant was intoxicated, he was driving in the proper lane of travel, there was no evidence that his automobile had been operating in an unsafe manner, the victim's automobile was parked in the middle of defendant's lawful lane of traffic with no lights on at 2 a.m., and skid marks at least 82 feet 9 inches before the point of impact indicated that he took reasonable evasive action once he saw the victim's vehicle. *Dickerson v. State*, 441 So. 2d 536, 1983 Miss. LEXIS 3022 (Miss. 1983).

Where defendant's conviction for manslaughter grew out of an automobile accident which occurred at a time when he was said to have been driving on the wrong side of the road, while intoxicated, at a speed of over 100 miles an hour, there was more than ample testimony to sustain the charge that the accident and death of the driver of the automobile struck by the defendant was the result of defendant's culpable negligence within the meaning of

this section [Code 1942, § 2232]. *Chaffin v. State*, 227 So. 2d 478, 1969 Miss. LEXIS 1362 (Miss. 1969).

One who, in the nighttime and in a drunken condition, drives an automobile on a public highway, proceeding upgrade at a rate of speed of approximately 75 miles per hour, zigzagging from side to side and driving on the wrong side of the highway, evinces a wanton and reckless disregard for the safety of human life, and such indifference to the consequences of his act as to render his conduct tantamount to wilfulness as to be guilty of manslaughter. *Hynum v. State*, 222 Miss. 817, 77 So. 2d 313, 1955 Miss. LEXIS 671 (Miss. 1955).

Evidence that defendant was drunk while driving truck on the highway, that he was weaving from side to side on the highway, and collided with another car, killing a passenger therein, sustained conviction under this section [Code 1942, § 2232]. *Lester v. State*, 209 Miss. 171, 46 So. 2d 109, 1950 Miss. LEXIS 376 (Miss. 1950).

Regardless of the deserved condemnation of drunken driving and the fact that it often results in criminal and culpable negligence, mere intoxication of the driver of an automobile at the time of an accident is not sufficient to sustain a conviction of manslaughter; and an instruction in such case should clearly connect the fact of intoxication causally with the resultant death and should be made a factor in the definition of culpable negligence. *Lee v. State*, 192 Miss. 785, 7 So. 2d 875, 1942 Miss. LEXIS 73 (Miss. 1942).

The fact of intoxication in the driving of an automobile is not sufficient to sustain conviction for manslaughter unless it thereby contributed to the death by constituting an element of culpable negligence. *Lee v. State*, 192 Miss. 785, 7 So. 2d 875, 1942 Miss. LEXIS 73 (Miss. 1942).

That the defendant was driving while intoxicated, is sufficient in a prosecution for the misdemeanor but for it to be a factor in a case involving culpable negligence it must create an abnormal mental and physical condition which tends to deprive one of the clearness of intellect and control of himself which he would otherwise possess, and in order for the influ-

ence of intoxicating liquors to be a factor in showing criminally culpable negligence causing death it must contribute proximately both to the establishment of such negligence and to the resultant death. While the jury would be warranted in taking into account any mental and physical condition which they found due to the influence of intoxicating liquor, it is not the fact but the effect of the intoxication which is relevant. *Cutshall v. State*, 191 Miss. 764, 4 So. 2d 289, 1941 Miss. LEXIS 185 (Miss. 1941).

While the driving of a vehicle by one under the influence of intoxicating liquor is a misdemeanor, and the driving of an automobile in this condition is therefore per se negligence, it does not mean that such evidence constitutes a prima facie case of manslaughter, and although a jury may find that the conduct of the operator of an automobile constituted gross negligence, the violation of the statute is not culpable negligence per se. *Cutshall v. State*, 191 Miss. 764, 4 So. 2d 289, 1941 Miss. LEXIS 185 (Miss. 1941).

Driving while under the influence of intoxicating liquor, and the culpable negligence resulting in the death of a human being are separate offenses for which one could be separately prosecuted, and neither prosecution would bar the other. *Cutshall v. State*, 191 Miss. 764, 4 So. 2d 289, 1941 Miss. LEXIS 185 (Miss. 1941).

Driving automobile while intoxicated, in violation of statute, is negligence and is culpable, if intoxication is such as to render driver incapable of driving with care essential to safety of occupants and others. *Williams v. State*, 161 Miss. 406, 137 So. 106, 1931 Miss. LEXIS 269 (Miss. 1931), overruled in part, *State v. Buckhalter*, 119 So. 3d 1015, 2013 Miss. LEXIS 405 (Miss. 2013).

At common law, homicide of which intoxication rendering automobilist incapable of driving with care essential to safety of others is proximate cause, is "manslaughter." *Williams v. State*, 161 Miss. 406, 137 So. 106, 1931 Miss. LEXIS 269 (Miss. 1931), overruled in part, *State v. Buckhalter*, 119 So. 3d 1015, 2013 Miss. LEXIS 405 (Miss. 2013).

9. Indictment.

Defendant's indictments for culpable-negligence manslaughter and aggravated

assault were not deficient because the indictments contained the essential elements of the crimes and fairly informed defendant of the charges to allow defendant to prepare a defense. *Hardy v. State*, 137 So. 3d 289, 2014 Miss. LEXIS 227 (Miss. 2014).

To the extent they conflict with the ruling that a manslaughter indictment that asserts wilful killing is fatally flawed, the Mississippi Supreme Court overrules *Williams v. State*, 161 Miss. 406, 137 So. 106 (1931) and *Yazzie v. State*, 366 So. 2d 240 (Miss. 1979). *State v. Buckhalter*, 119 So. 3d 1015, 2013 Miss. LEXIS 405 (Miss. 2013).

Defendant's indictment for manslaughter was properly dismissed because it was fatally flawed. Language in the indictment that defendant "willfully" caused the death of her unborn child stated conduct that was addressed in other Miss. Code Ann. tit. 97 statutes, rendering the manslaughter statute inapplicable. *State v. Buckhalter*, 119 So. 3d 1015, 2013 Miss. LEXIS 405 (Miss. 2013).

In a prosecution for manslaughter by negligent operation of an automobile, the citation of an incorrect statute in the indictment, later amended to substitute this section, did not constitute reversible error since the citation of the statute in an indictment is mere surplusage. *Cowan v. State*, 399 So. 2d 1346, 1981 Miss. LEXIS 2016 (Miss. 1981).

The trial court was correct in overruling defendant's demurrer to the indictment in a prosecution for manslaughter, notwithstanding the contention that the indictment should have charged that the death had occurred "by culpable negligence" and that use of the word "willfully" resulted in a charge of voluntary rather than involuntary manslaughter. *Yazzie v. State*, 366 So. 2d 240, 1979 Miss. LEXIS 2197 (Miss. 1979), overruled in part, *State v. Buckhalter*, 119 So. 3d 1015, 2013 Miss. LEXIS 405 (Miss. 2013).

Where an indictment charged that the defendant unlawfully, feloniously and by culpable negligence, did kill a person contrary to Code 1942, § 2220 and against the peace and dignity of the State of Mississippi, the indictment adequately charged the defendant with the offense of

manslaughter by culpable negligence in operation of an automobile, despite the mistake in citation of the statute, inasmuch as reference to the code section in the indictment was surplusage and unnecessary to the charge of the crime for which the defendant was tried. *Dendy v. State*, 224 Miss. 208, 79 So. 2d 827, 1955 Miss. LEXIS 481 (Miss. 1955).

Manslaughter indictment charging culpable negligence held not defective because not setting forth conduct constituting culpable negligence. *Williams v. State*, 161 Miss. 406, 137 So. 106, 1931 Miss. LEXIS 269 (Miss. 1931), overruled in part, *State v. Buckhalter*, 119 So. 3d 1015, 2013 Miss. LEXIS 405 (Miss. 2013).

Manslaughter indictment charging defendant wilfully and feloniously killed certain person by culpable negligence held not defective because of word "wilful." *Williams v. State*, 161 Miss. 406, 137 So. 106, 1931 Miss. LEXIS 269 (Miss. 1931), overruled in part, *State v. Buckhalter*, 119 So. 3d 1015, 2013 Miss. LEXIS 405 (Miss. 2013).

Indictment for manslaughter setting up alleged negligence in operation of automobile was sufficient against demurrer. *Bradford v. State*, 158 Miss. 210, 127 So. 277, 1930 Miss. LEXIS 2 (Miss. 1930).

10. Burden and degree of proof.

Defendant's conviction for manslaughter by culpable negligence in violation of Miss. Code Ann. § 97-3-47 was proper because, although defendant had testified that he struck the victim only in self-defense, the overwhelming weight of the evidence suggested otherwise, including the fact that the victim was beaten well after any possible initial threat had passed. *Shirley v. State*, 942 So. 2d 322, 2006 Miss. App. LEXIS 855 (Miss. Ct. App. 2006).

Defendant's guilty plea to manslaughter and robbery was voluntary because he was informed of the elements of both offenses, the trial court assured itself that the elements had been explained prior to accepting defendant's guilty plea, and the specific elements appeared on several documents that defendant signed. *Neal v. State*, 936 So. 2d 463, 2006 Miss. App. LEXIS 589 (Miss. Ct. App. 2006).

In order to maintain the charge that the accused had killed a human being through culpable negligence, it was incumbent upon the state to prove beyond a reasonable doubt that the accused was guilty of such gross negligence as to evince on his part a wanton and reckless disregard for the safety of human life, or such an indifference to the consequences of his act under the surrounding circumstances as to render his conduct tantamount to wilfulness. *Hynum v. State*, 222 Miss. 817, 77 So. 2d 313, 1955 Miss. LEXIS 671 (Miss. 1955).

In prosecution for manslaughter by culpable negligence, state has burden of showing beyond reasonable doubt and to exclusion of every other reasonable hypothesis that defendant is guilty of such culpable negligence as to justify conviction of manslaughter. *Downs v. State*, 206 Miss. 831, 41 So. 2d 19, 1949 Miss. LEXIS 304 (Miss. 1949).

In a prosecution under this section [Code 1942, § 2232] for the killing of a human being through culpable negligence, it is not necessary to allege or prove that the killing was wilfully done, but it is incumbent upon the state to prove beyond a reasonable doubt that defendant was guilty of such gross negligence as to evince a wanton or reckless disregard for the safety of human life or such an indifference to the consequences of his act under the surrounding circumstances as to render his conduct tantamount to wilfulness. *Smith v. State*, 197 Miss. 802, 20 So. 2d 701, 1945 Miss. LEXIS 313 (Miss. 1945).

11. Instructions; generally.

Trial court did not abuse its discretion in denying jury instructions for culpable-negligence and heat-of-passion manslaughter because the evidence did not support the instructions; defendant admitted in his oral and written statements to having hit the victim with a welding rod in an effort to steal his money. *Thomas v. State*, 249 So. 3d 331, 2018 Miss. LEXIS 272 (Miss. 2018).

Trial court did not err by refusing a proposed theory-of-the-case instruction because the instruction was redundant. *James v. State*, 146 So. 3d 985, 2014 Miss. App. LEXIS 66 (Miss. Ct. App.), cert. de-

nied, 146 So. 3d 981, 2014 Miss. LEXIS 463 (Miss. 2014).

Because the record provided evidence corroborating an accomplice's testimony, the trial court was not required to instruct the jury to regard the accomplice's testimony with great caution and suspicion. *James v. State*, 146 So. 3d 985, 2014 Miss. App. LEXIS 66 (Miss. Ct. App.), cert. denied, 146 So. 3d 981, 2014 Miss. LEXIS 463 (Miss. 2014).

Trial court properly refused a requested instruction because, reading all the given instructions together, the jury was fairly, fully, and accurately instructed regarding its duty to consider and weigh the credibility of witness testimony. *James v. State*, 146 So. 3d 985, 2014 Miss. App. LEXIS 66 (Miss. Ct. App.), cert. denied, 146 So. 3d 981, 2014 Miss. LEXIS 463 (Miss. 2014).

In a culpable-negligence manslaughter case, where evidence of the defendant's intoxication was presented to prove culpability, the trial court erred by denying defendant's requested jury instruction stating that the operation of a motor vehicle while under the influence of intoxicants could be a factor indicating criminally culpable negligence if the influence of intoxicants proximately contributed to the negligence of the defendant. *Hudson v. State*, 45 So. 3d 1193, 2009 Miss. App. LEXIS 868 (Miss. Ct. App. 2009), cert. dismissed, 2010 Miss. LEXIS 550 (Miss. Oct. 21, 2010).

In a murder case, there was no error in refusing to instruct the jury on manslaughter where defendant was not claiming self-defense at trial, but alleged that someone else committed the crime. *Green v. State*, 982 So. 2d 471, 2008 Miss. App. LEXIS 62 (Miss. Ct. App. 2008).

Where defendant was charged with murdering her ex-boyfriend, the jury was properly instructed regarding manslaughter by culpable negligence under Miss. Code Ann. § 97-3-47. Based on defendant's written confession that she went to the victim's house to discuss their relationship, brought a pistol with her, had an argument with the victim, the gun accidentally discharged, and she attempted set fire to his truck, the evidence was legally sufficient to support the jury ver-

dict convicting defendant of murder and not manslaughter. *Brown v. State*, 981 So. 2d 1007, 2007 Miss. App. LEXIS 806 (Miss. Ct. App. 2007), cert. denied, 981 So. 2d 298, 2008 Miss. LEXIS 222 (Miss. 2008).

In a murder case, defendant's right to a fair trial was not violated when the jury was not instructed on manslaughter under Miss. Code Ann. § 97-3-47 because there was nothing to support a claim that a shooting was accidental where defendant pointed a gun at the victim and shot her from four feet away; moreover, the evidence indicated that defendant acted with malice where defendant and the victim were arguing so much that the victim's daughter was praying for her life prior to the shooting. *Page v. State*, 989 So. 2d 887, 2007 Miss. App. LEXIS 551 (Miss. Ct. App. 2007), cert. denied, 993 So. 2d 832, 2008 Miss. LEXIS 439 (Miss. 2008).

In a murder case, the facts did not support a culpable negligence manslaughter instruction because: (1) although defendant stated he was scared of victim, he followed victim into the woods; (2) defendant's revolver was fired three times; (3) firing the revolver three times was unlikely to be an accident because the gun's trigger actually had to be pulled three times; and (4) witnesses stated that they did not see a struggle for the gun and that defendant pointed the gun at the victim and shot him. *Chandler v. State*, 946 So. 2d 355, 2006 Miss. LEXIS 689 (Miss. 2006).

Where the objective of an instruction is to distinguish culpable negligence manslaughter from depraved heart murder, "culpable negligence" should be defined as "negligence of a degree so gross as to be tantamount to a wanton disregard of, or utter indifference to, the safety of human life." *Clayton v. State*, 652 So. 2d 720, 1995 Miss. LEXIS 136 (Miss. 1995).

It was not error for a trial court to refuse to give a defendant's requested instruction regarding manslaughter by culpable negligence, which offered the civil definition of negligence to permit the jury to compare civil negligence with the culpable negligence required for conviction under this section, since such an instruc-

tion is not required for comparison purposes. However, this does not mean that trial courts should never give an instruction for such purposes; it is a practice that should be encouraged, especially since juries are inclined to convict under this section when the evidence rises to no more than simple negligence. *Robinson v. State*, 571 So. 2d 275, 1990 Miss. LEXIS 720 (Miss. 1990).

The use in an instruction for the prosecution under Code 1942, § 2232 of the term "gross negligence" rather than the statutory term "culpable negligence" was not erroneous in view of the fact that the instruction also referred to the commission of acts evidencing a complete disregard for human life. *Parks v. State*, 267 So. 2d 302, 1972 Miss. LEXIS 1411 (Miss. 1972), cert. denied, 411 U.S. 947, 93 S. Ct. 1923, 36 L. Ed. 2d 408, 1973 U.S. LEXIS 2633 (U.S. 1973).

In a murder prosecution, refusal of the trial court to grant an instruction that if the jury should not be satisfied in their own minds beyond a reasonable doubt and to the exclusion of every other reasonable hypothesis that the defendant had wilfully, unlawfully, feloniously, and of his malice aforethought, killed and murdered the victim, then it could not find him guilty of anything, was proper where there was evidence from which the jury was fully justified in returning a verdict of guilty of manslaughter. *Pitts v. State*, 257 So. 2d 521, 1972 Miss. LEXIS 1463 (Miss. 1972).

An instruction defining manslaughter by culpable negligence was proper under the facts of a homicide prosecution, in which it was shown that the defendant had recklessly shot at and into a house known to be occupied by human beings. *Roberson v. State*, 257 So. 2d 505, 1972 Miss. LEXIS 1458 (Miss. 1972).

In a prosecution for involuntary manslaughter by culpable negligence, a charge to the jury defining culpable negligence as such negligence as evinces a flagrant and reckless disregard for the safety of others or wilful indifference to the injury liable to follow, was erroneous as defining gross negligence rather than culpable negligence. *Grinnell v. State*, 230 So. 2d 555, 1970 Miss. LEXIS 1551 (Miss. 1970).

Instructions in prosecution under this statute [Code 1942, § 2232] held erroneous in charging the jury that they could find the defendant guilty if he was driving while intoxicated. *Jones v. State*, 244 Miss. 596, 145 So. 2d 446, 1962 Miss. LEXIS 483 (Miss. 1962).

While, in a prosecution for manslaughter arising out of an automobile accident, the trial court might properly have granted an instruction announcing the rule of reasonable doubt and informing the jurors that each and every one must believe defendant guilty beyond a reasonable doubt before he should vote to convict, it was not error to refuse to so instruct where other instructions announced the same rules of applicable law and prescribed the duties of the jurors. *Smith v. State*, 233 Miss. 886, 103 So. 2d 360, 1958 Miss. LEXIS 453 (Miss. 1958).

Where, in a prosecution for manslaughter arising out of an automobile accident, much of the testimony was given by eye-witnesses to the event, the accused could not complain of the court's refusal to instruct that the jurors should believe the accused guilty beyond every reasonable doubt and to the exclusion of every reasonable hypothesis before voting to convict, which instruction was applicable to cases resting entirely upon circumstantial evidence. *Smith v. State*, 233 Miss. 886, 103 So. 2d 360, 1958 Miss. LEXIS 453 (Miss. 1958).

In a prosecution for murder an instruction that if jury believed from the evidence that the defendant intentionally and unlawfully pointed a pistol at and toward a crowd not in self-defense and not in unlawful discharge of an official duty and discharged the pistol so intentionally pointed or aimed and by this discharge killed the deceased, then the jury should return a verdict of not guilty was improper. *Bass v. State*, 54 So. 2d 259 (Miss. 1951).

It is not error to grant to state manslaughter instruction, it being contended by defense that accused was either guilty of murder or was justified in committing homicide in necessary self-defense, when under all of evidence accused cannot be properly convicted of greater offense than

manslaughter and even that offense is not satisfactorily proved beyond every reasonable doubt. *Leflore v. State*, 44 So. 2d 393 (Miss. 1950).

Instruction that "culpable negligence" within the meaning of this section [Code 1942, § 2232] "is that degree of negligence or carelessness which is denominated as gross negligence and which constitutes a departure from what would be the conduct of an ordinarily careful and prudent man under the same circumstances as to furnish evidence of indifference to consequence," constituted reversible error. *Reynolds v. State*, 199 Miss. 409, 24 So. 2d 781, 1946 Miss. LEXIS 211 (Miss. 1946).

Instruction in prosecution against motorist for killing a human being through culpable negligence, defining the offense in terms of gross negligence, constituted prejudicial error. *Smith v. State*, 197 Miss. 802, 20 So. 2d 701, 1945 Miss. LEXIS 313 (Miss. 1945); *Gardner v. State*, 23 So. 2d 925 (Miss. 1945).

It is reversible error to give an instruction, in manslaughter prosecution for culpable negligence in operating motor vehicle, misleading the jury into believing that mere passing of truck on a hill and curve is, of itself, culpable negligence. *McKinney v. State*, 196 Miss. 826, 18 So. 2d 446, 1944 Miss. LEXIS 261 (Miss. 1944).

In a trial on a charge of manslaughter based on culpable negligence in the driving of a truck, an instruction to the jury that it was a violation of the criminal law to drive a motor vehicle on the highway while under the influence of intoxicating liquor, and that if they believed the defendant unlawfully operated a truck on the highway while under the influence of intoxicating liquor, and in a manner constituting culpable negligence, and that as an approximate result thereof the decedent was killed, it would be their duty to find the defendant guilty as charged, was prejudicial error, since it characterized certain acts as crimes so as to place the jury in the position of finding the defendant guilty of one crime because guilty of another. *Cutshall v. State*, 191 Miss. 764, 4 So. 2d 289, 1941 Miss. LEXIS 185 (Miss. 1941).

In prosecution for manslaughter by automobile, instruction that, if defendant

was exceeding twenty miles per hour and exceeding speed at which reasonable or prudent man would have driven, he was guilty of culpable negligence, and authorizing conviction if death was proximate result of such culpable negligence, held reversible error. *Bailey v. State*, 176 Miss. 579, 169 So. 765, 1936 Miss. LEXIS 145 (Miss. 1936).

In prosecution for manslaughter by automobile, error in instruction for state which was concrete and stated facts warranting conviction for acts constituting mere negligence held not cured by abstract instruction given for defendant defining culpable negligence. *Bailey v. State*, 176 Miss. 579, 169 So. 765, 1936 Miss. LEXIS 145 (Miss. 1936).

In prosecution of truck driver for killing another through culpable negligence, instruction which gave such definitions for "culpable negligence" as the omission to do something which a reasonable, prudent, and honest man would do, or the doing of something which such a man would not do under circumstances surrounding particular case, held reversible error as authorizing conviction on simple negligence. *Shows v. State*, 175 Miss. 604, 168 So. 862, 1936 Miss. LEXIS 93 (Miss. 1936).

Instruction on rate of speed on highway where territory contiguous thereto was closely built up held erroneous under evidence. *Bradford v. State*, 158 Miss. 210, 127 So. 277, 1930 Miss. LEXIS 2 (Miss. 1930).

Instruction jury could not convict defendant for manslaughter, but of murder, or nothing, held properly refused. *Robertson v. State*, 153 Miss. 770, 121 So. 492, 1928 Miss. LEXIS 197 (Miss. 1928).

12. —Peremptory instructions.

Defendant was not entitled to a peremptory instruction under *Weathersby v. State*, 165 Miss. 207, 209, 147 So. 481, 482 (1933), in a manslaughter case where the physical and testimonial evidence contradicted defendant's statement that a victim was shot at close range. *Speagle v. State*, 956 So. 2d 237, 2006 Miss. App. LEXIS 616 (Miss. Ct. App. 2006), cert. denied, 957 So. 2d 1004, 2007 Miss. LEXIS 296 (Miss. 2007).

A defendant who was convicted of involuntary manslaughter was entitled to a peremptory instruction based on the *Weathersby* Rule, and the trial court erred in failing to direct a verdict for him where the defendant was the only eyewitness, there was no substantial contradiction in the defendant's statements before and during the trial, and the State presented no evidence which substantially contradicted the defendant's version of the altercation between the victim and the defendant, which indicated that the victim was the aggressor and that the victim died because of a heart attack which was not caused by any action of the defendant. *Pritchett v. State*, 560 So. 2d 1017, 1990 Miss. LEXIS 206 (Miss. 1990).

In a manslaughter prosecution, evidence, including testimony that the defendant at 6:30 p.m. was so operating his automobile as to weave from side to side on the road making it difficult for other motorists to pass, that at 7:30 p.m. he was driving in the center of the road and drove his automobile on the side of the road occupied by an oncoming truck driven by the deceased, and that after the accident a pint bottle of whisky about three-quarters empty was found at his feet, but not including positive evidence that the defendant was drunk or had been drinking, at best created a mere suspicion that the defendant was intoxicated, and failed to sustain submission of the question to the jury, so that a motion for a directed verdict in the defendant's favor should have been sustained. *Day v. Phelps*, 244 So. 2d 18, 1971 Miss. LEXIS 1317 (Miss. 1971).

In prosecution for manslaughter by culpable negligence in operation of automobile on highway, peremptory instruction for defendant should have been granted by trial court at conclusion of evidence which showed that defendant was driving car in prudent and proper manner, free of recklessness prior to accident and that when confronted with emergency created by oncoming speeding automobile and presence of boy on bicycle in center of road and sudden darting of boy toward right lane of traffic, defendant immediately swerved car to right onto shoulder of highway and made every reasonable effort to avoid striking boy, even to extent of wreck-

ing his automobile. *Downs v. State*, 206 Miss. 831, 41 So. 2d 19, 1949 Miss. LEXIS 304 (Miss. 1949).

Error in conviction of crime under this section [Code 1942, § 2232] on insufficient evidence may be raised for the first time on appeal, even though defendant made no request for a peremptory charge; however, defendant would not be discharged but case would be remanded to permit defendant to make request for peremptory charge in lower court. *Ruffin v. State*, 203 Miss. 1, 32 So. 2d 882, 1947 Miss. LEXIS 366 (Miss. 1947).

In prosecution for manslaughter by automobile, where case presented fact issue as to whether defendant was guilty of gross negligence in driving truck, peremptory instruction for defendant held not warranted. *Bailey v. State*, 176 Miss. 579, 169 So. 765, 1936 Miss. LEXIS 145 (Miss. 1936).

13. Deliberations of jury; verdict.

Evidence did not support murder defendant's proposed instructions on culpable negligence; defendant went to convenience store where former paramour worked, the two argued, former paramour locked herself in office, defendant became belligerent and former paramour refused to open door, defendant went to automobile and returned with shotgun, defendant shot door several times in attempt to enter room, defendant shot door knob off with first shot, and defendant then loaded and fired three more shots through door while former paramour screamed and frantically attempted to summon help. *Clark v. State*, 693 So. 2d 927, 1997 Miss. LEXIS 162 (Miss. 1997).

In prosecution for manslaughter when jury during deliberations asked the bailiff what the penalty was for manslaughter and the bailiff replied that penalty was from one month to ten years, and the jury subsequently found defendant guilty of manslaughter and recommended that accused be given mercy of the court, such communication affected the integrity of the verdict and required reversal of conviction. *Horn v. State*, 216 Miss. 439, 62 So. 2d 560, 1953 Miss. LEXIS 654 (Miss. 1953).

14. Corpus Delicti.

In defendant's manslaughter trial, two

eyewitnesses and a police officer testified as to the extent and severity of the victim's injuries immediately after the accident. The victim's wife testified that her husband had not been involved in any other accidents in which he could have sustained severe injuries, and she also testified that he died four days later in a hospital; thus, the State proved its corpus delicti and, in any event, an autopsy was not required to establish corpus delicti. *Montgomery v. State*, 910 So. 2d 1169, 2005 Miss. App. LEXIS 403 (Miss. Ct. App.), cert. dismissed, 921 So. 2d 344, 2005 Miss. LEXIS 759 (Miss. 2005).

15. Double jeopardy.

Defendant's protection against double jeopardy was not violated where he was convicted of both manslaughter and robbery because Miss. Code Ann. § 97-3-47 did not contain as an element that the killing occurred during the commission of some other crime. *Neal v. State*, 936 So. 2d 463, 2006 Miss. App. LEXIS 589 (Miss. Ct. App. 2006).

Denial of the inmate's petition for post-conviction relief was proper where double jeopardy protection was not implicated because Miss. Code Ann. § 63-11-30(5) required an element not required by Miss. Code Ann. § 97-3-47, namely, that of intoxication. *Ramage v. State*, 914 So. 2d 274, 2005 Miss. App. LEXIS 772 (Miss. Ct. App. 2005).

16. Evidence sufficient.

Jury could have found that defendant was the driver of the truck when it caused the accident that killed the victim and that defendant left the scene, and thus the evidence supported his convictions; his parents loaned him the truck, his books were found inside, before the accident he was seen at a bar, he had a motive to leave the scene given his recent conviction of driving under the influence and his license suspension, and his DNA also matched the DNA on the truck's driver's side airbag. *Manyfield v. State*, 296 So. 3d 240, 2020 Miss. App. LEXIS 319 (Miss. Ct. App. 2020).

Defendant's conviction for culpable negligence manslaughter was not against the weight of the evidence because (1) cul-

pable negligence manslaughter was a lesser-included offense of the deliberate design murder for which defendant was indicted, and (2) the evidence allowed a reasonable jury to conclude that defendant barred the victim's departure from the parties' confrontation, defeating defendant's self-defense claim. *Brisco v. State*, 295 So. 3d 498, 2019 Miss. App. LEXIS 481 (Miss. Ct. App. 2019), cert. denied, 293 So. 3d 834, 2020 Miss. LEXIS 142 (Miss. 2020).

According to defendant's testimony, he fired an initial burst of shots over his left shoulder then continued to fire at the victim when the victim ran away. The appellate court noted that such actions have been deemed sufficient to support a culpable-negligence manslaughter conviction. *Wise v. State*, 263 So. 3d 668, 2018 Miss. App. LEXIS 342 (Miss. Ct. App. 2018), cert. denied, 263 So. 3d 665, 2019 Miss. LEXIS 69 (Miss. 2019).

Evidence was sufficient to convict defendant of culpable-negligence manslaughter and the verdict was not against the manifest weight of the evidence because, although the evidence showed that defendant's blood-alcohol content was under the legal limit, and the State failed to prove he had ingested any illegal substances prior to the accident, the State did show that defendant had several illegal substances in his system at the time of the accident; there was ample proof that defendant was driving recklessly as he evaded a police roadblock, ran a stop sign, led officers on a high-speed chase, lost control of the SUV, and careened down an embankment; and defendant's passenger was killed in the accident. *Brisco v. State*, 142 So. 3d 1107, 2014 Miss. App. LEXIS 398 (Miss. Ct. App. 2014).

Sufficient evidence supported defendant's conviction for culpable-negligence manslaughter because uncontradicted evidence demonstrated that defendant operated a boat in a reckless manner (speeding, failing to reduce speed when approaching a group of persons (adults and children) and operating from a standing position) all while under the influence. *Hardy v. State*, 137 So. 3d 289, 2014 Miss. LEXIS 227 (Miss. 2014).

Evidence was legally sufficient to prove that defendant committed manslaughter

because the jury could have found that the State met every element based on the physical evidence and defendant's statements to investigators; although defendant later admitted fault in the victim's killing, he initially claimed that the victim had shot himself, and the physical evidence suggested that the rifle could have been pointed directly at the victim's head. *Stringer v. State*, 131 So. 3d 1182, 2014 Miss. LEXIS 101 (Miss. 2014).

Where an eyewitness stated that defendant stabbed a victim, a murder weapon was found, and a doctor who performed the autopsy stated that it would have been nearly impossible for the victim to have inflicted such a wound upon herself, there was sufficient evidence to support a manslaughter conviction under Miss. Code Ann. §§ 97-3-35, 97-3-47. There was no need to give a circumstantial evidence instruction based on the direct testimony of the eyewitness. *Brown v. State*, 970 So. 2d 1300, 2007 Miss. App. LEXIS 826 (Miss. Ct. App. 2007).

17. Relationship to voluntary manslaughter.

Where a decedent was killed in a collision with an employer's employee, and the widow brought a wrongful death suit, the collision was excluded from coverage under the employer's commercial automobile insurance policy because (1) the employee's manslaughter conviction collaterally estopped defendants from re-litigating the question of whether the employee intended to cause the decedent's death, and (2) the manslaughter conviction negated any finding that the decedent's death was an "accident." *Capital City Ins. Co. v. Hurst*, 632 F.3d 898, 2011 U.S. App. LEXIS 2160 (5th Cir. Miss. 2011).

18. Sentencing.

Because the trial court did not sentence defendant for vehicular manslaughter while intoxicated under Miss. Code Ann. § 63-11-30(5), but, instead, defendant received a 20-year sentence for manslaughter under Miss. Code Ann. § 97-3-47, the trial court's sentence of 20 years under Miss. Code Ann. § 97-3-25(1) was proper. *England v. State*, 195 So. 3d 830, 2016 Miss. App. LEXIS 14 (Miss. Ct. App.

2016), cert. dismissed, — So. 3d —, 2017 Miss. LEXIS 112 (Miss. 2017).

19. Evidence insufficient.

Evidence was insufficient to establish depraved-heart murder or culpable-negligence manslaughter because there was no evidence defendant or the victim had experienced any adverse effects when previously using NBOMe, a controlled sub-

stance, and defendant's singular act of selling or giving the victim two hits of NBOMe was insufficient to demonstrate either offense; a forensic pathologist testified that NBOMe was a relatively new drug, and there was no evidence its dangers were common knowledge. *O'Kelly v. State*, 267 So. 3d 282, 2018 Miss. App. LEXIS 418 (Miss. Ct. App. 2018).

RESEARCH REFERENCES

ALR.

Criminal responsibility of druggist for death or injury in consequence of mistake. 55 A.L.R.2d 714.

Necessity that trial court charge upon motive in homicide case. 71 A.L.R.2d 1025.

Admissibility, in homicide prosecution, of evidence as to tests made to ascertain distance from gun to victim when gun was fired. 86 A.L.R.2d 611.

Homicide: identification of victim as person named in indictment or information. 86 A.L.R.2d 722.

Who other than actor is liable for manslaughter. 95 A.L.R.2d 175.

Homicide: Failure to provide medical or surgical attention. 100 A.L.R.2d 483.

What amounts to negligence within meaning of statutes penalizing negligent homicide by operation of motor vehicle. 20 A.L.R.3d 473.

Homicide: Criminal liability for death resulting from unlawfully furnishing intoxicating liquor or drugs to another. 32 A.L.R.3d 589.

Homicide predicated on improper treatment of disease or injury. 45 A.L.R.3d 114.

Homicide by withholding food, clothing, or shelter. 61 A.L.R.3d 1207.

Degree of homicide as affected by accused's religious or occult belief in harmlessness of ceremonial ritualistic acts directly causing fatal injury. 78 A.L.R.3d 1132.

Propriety of predicating manslaughter conviction on violation of local ordinance or regulation, not dealing with motor vehicles. 85 A.L.R.3d 1072.

Criminal liability for death of another

as result of accused's attempt to kill self or assist another's suicide. 40 A.L.R.4th 702.

Homicide: physician's withdrawal of life supports from comatose patient. 47 A.L.R.4th 18.

Homicide: Liability where death immediately results from treatment or mistreatment of injury inflicted by defendant. 50 A.L.R.5th 467.

Adequacy of defense counsel's representation of criminal client – conduct occurring at time of trial regarding issues of diminished capacity, intoxication, and unconsciousness. 78 A.L.R.5th 197.

Adequacy of defense counsel's representation of criminal client – pretrial conduct or conduct at unspecified time regarding issues of diminished capacity, intoxication, and unconsciousness. 79 A.L.R.5th 419.

Establishment of Negligence Within Meaning of Statute Penalizing Negligent Homicide by Operation of Motor Vehicle – Speeding or Driving at Unsafe Speed. 84 A.L.R.6th 427.

Am. Jur.

40 Am. Jur. 2d, Homicide § 96.

2 Am. Jur. Trials, Investigating Particular Crimes §§ 40-57 (homicide).

7 Am. Jur. Trials, Homicide §§ 1 et seq.

13 Am. Jur. Trials, Vehicular homicide §§ 1 et seq.

CJS.

40 C.J.S., Highways §§ 327, 328.

40 C.J.S., Homicide §§ 126-129, 133.

Law Reviews.

Murder and Manslaughter in Mississippi: Unintentional Killings, 71 Miss. L.J. 1, Fall, 2001.

§ 97-3-49. Suicide; aiding.

A person who wilfully, or in any manner, advises, encourages, abets, or assists another person to take, or in taking, the latter's life, or in attempting to take the latter's life, is guilty of felony and, on conviction, shall be punished by imprisonment in the penitentiary not exceeding ten years, or by fine not exceeding one thousand dollars, and imprisonment in the county jail not exceeding one year.

HISTORY: Codes, Hutchinson's 1848, ch. 64, art. 12, Title 3 (7); 1857, ch. 64, art. 171; 1871, § 2634; 1880, § 2882; 1892, § 1299; 1906, § 1373; Hemingway's 1917, § 1109; 1930, § 1138; 1942, § 2375.

Cross References — Assisted suicide not an authorized health care decision, see § 41-41-227.

Imposition and collection of separate laboratory analysis fee in addition to any other assessments and costs imposed by statute on every individual convicted of a felony in a case where Crime Laboratory provided forensic science or laboratory services in connection with the case, see § 45-1-29.

Imposition of standard state assessment in addition to all court imposed fines or other penalties for any felony violation, see § 99-19-73.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Assisted-suicide instruction not warranted.

1. In general.

Where a defendant has committed an intentional tort, questions of whether the deceased was induced to take his life by an irresistible impulse and whether the intentional tort was a substantial factor in causing his suicide are ordinarily issues for the jury. State use of *Richardson v. Edgeworth*, 214 So. 2d 579, 1968 Miss. LEXIS 1316 (Miss. 1968).

Where the plaintiffs' evidence made a jury issue of whether as a result of the defendants' intentional torts in the illegal, improper, and perverted use of process for an ulterior motive or purpose, the decedent acted under an irresistible impulse and committed suicide, he would, had he lived, have a good cause of action against the defendants, and under the wrongful death statute his widow and children are

entitled to recover damages which decedent could have recovered. State use of *Richardson v. Edgeworth*, 214 So. 2d 579, 1968 Miss. LEXIS 1316 (Miss. 1968).

There is rebuttable presumption against suicide. *Jefferson Standard Life Ins. Co. v. Jefcoats*, 164 Miss. 659, 143 So. 842, 1932 Miss. LEXIS 221 (Miss. 1932).

2. Assisted-suicide instruction not warranted.

Defendant's conviction for murder in violation of Miss. Code Ann. § 97-3-19(1)(a) was proper because there was no evidence that warranted an assisted-suicide instruction. Defendant did not claim to have advised, encouraged, abetted, or assisted the victim to take or in the taking of her life; at most, defendant's statement revealed that the two talked about committing suicide together. *Williams v. State*, 53 So. 3d 761, 2009 Miss. App. LEXIS 947 (Miss. Ct. App. 2009), rev'd, 53 So. 3d 734, 2010 Miss. LEXIS 590 (Miss. 2010).

RESEARCH REFERENCES

ALR.

Liability for injury or death of minor or other incompetent inflicted upon himself by gun made available by defendant. 75 A.L.R.3d 825.

Liability of doctor, psychiatrist, or psychologist for failure to take steps to prevent patient's suicide. 17 A.L.R.4th 1128.

Criminal liability for death of another as result of accused's attempt to kill self or assist another's suicide. 40 A.L.R.4th 702.

Liability of attorney for suicide of client based on attorney's professional act or omission. 41 A.L.R.4th 351.

Am. Jur.

40A Am. Jur. 2d, Homicide §§ 603 et seq.

12 Am. Jur. Proof of Facts, Suicide, Proofs 1-3.

33 Am. Jur. Proof of Facts 2d 211, Privileged Use of Force in Self-Defense.

CJS.

40 C.J.S., Homicide §§ 233-235.

83 C.J.S., Suicide § 4.

§ 97-3-51. Interstate removal of child under age fourteen by noncustodial parent or relative.

(1) For the purposes of this section, the following terms shall have the meaning herein ascribed unless the context otherwise clearly requires:

(a) "Child" means a person under the age of fourteen (14) years at the time a violation of this section is alleged to have occurred.

(b) "Court order" means an order, decree or judgment of any court of this state which is competent to decide child custody matters.

(2) It shall be unlawful for any noncustodial parent or relative with intent to violate a court order awarding custody of a child to another to remove the child from this state or to hold the child out of state after the entry of a court order.

(3) Any person convicted of a violation of subsection (2) of this section shall be guilty of a felony and may be punished by a fine of not more than Two Thousand Dollars (\$2,000.00), or by imprisonment in the state penitentiary for a term not to exceed three (3) years, or by both such fine and imprisonment.

(4) The provisions of this section shall not be construed to repeal, modify or amend any other criminal statute of this state.

HISTORY: Codes, Hutchinson's 1848, ch. 64, art. 12, Title 3 (27, 29); 1857, ch. 64, arts. 186, 188; 1871, §§ 2649, 2651; 1880, §§ 2897, 2899; 1892, § 1171; 1906, § 1249; Hemingway's 1917, § 979; 1930, § 1007; 1942, § 2237; Former § 97-3-51, repealed, 1980, ch. 394; added, 1984, ch. 469; Laws, 1995, ch. 583, § 1, eff from and after July 1, 1995.

Cross References — Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see § 97-43-1 et seq.

Venue in kidnapping cases, see § 99-11-13.

Imposition of standard state assessment in addition to all court imposed fines or other penalties for any felony violation, see § 99-19-73.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Consent of child.
3. Indictment.

1. In general.

Interstate removal of a child is not a sex offense and carries no mandatory sentence. *Ferrell v. State*, 158 So. 3d 1204, 2015 Miss. App. LEXIS 65 (Miss. Ct. App. 2015).

2. Consent of child.

Even if an appellate court assumed that the State of Mississippi had to prove that defendant took a minor child against the child's will, as alleged in the indictment, it would have been the will of the legal

guardian and not the whim of the child that controlled. *Ferrell v. State*, 158 So. 3d 1204, 2015 Miss. App. LEXIS 65 (Miss. Ct. App. 2015).

3. Indictment.

Defendant's indictment for interstate removal was not defective because it failed to state to which state the child had been removed in that the State of Mississippi was not required to prove that the child was removed to any specific state, just that the child was removed from the State of Mississippi. Moreover, the indictment was not required allege that defendant took the child secretly as that was not an element of interstate removal. *Ferrell v. State*, 158 So. 3d 1204, 2015 Miss. App. LEXIS 65 (Miss. Ct. App. 2015).

RESEARCH REFERENCES

ALR.

False imprisonment as included offense with charge of kidnapping. 68 A.L.R.3d 828.

Kidnapping or related offense by taking or removing of child by or under authority of parent or one in loco parentis. 20 A.L.R.4th 823.

Validity of state statute providing for termination of parental rights. 22 A.L.R.4th 774.

Court-authorized permanent or temporary removal of child by parent to foreign country. 30 A.L.R.4th 548.

Coercion, compulsion, or duress as de-

fense to charge of kidnapping. 69 A.L.R.4th 1005.

Parties' misconduct as ground for declining jurisdiction under sec. 8 of the Uniform Child Custody Jurisdiction Act. 16 A.L.R.5th 650.

Seizure or detention for purpose of committing rape, robbery, or other offense as constituting separate crime of kidnapping. 39 A.L.R.5th 283.

Am. Jur.

1 Am. Jur. 2d, Abduction and Kidnapping §§ 35 et seq.

59 Am. Jur. 2d, Parent and Child § 99.

§ 97-3-52. Prohibition against selling, buying, offering to sell and offering to buy child or unborn child; penalties.

(1) Selling, buying, offering to sell and offering to buy a child or an unborn child is prohibited and, upon conviction, shall be punishable by a fine not to exceed Twenty Thousand Dollars (\$20,000.00), imprisonment in the custody of the Department of Corrections for a term not to exceed ten (10) years, or both.

(2) This section shall not be construed so as to prohibit any payment to an entity licensed for child placing or as otherwise authorized under Section 43-15-117.

HISTORY: Laws, 2009, ch. 450, § 13, eff from and after July 1, 2009.

§ 97-3-53. Kidnapping; punishment.

Any person who, without lawful authority and with or without intent to secretly confine, shall forcibly seize and confine any other person, or shall inveigle or kidnap any other person with intent to cause such person to be confined or imprisoned against his or her will, or without lawful authority shall forcibly seize, inveigle or kidnap any vulnerable person as defined in Section 43-47-5 or any child under the age of sixteen (16) years against the will of the parents or guardian or person having the lawful custody of the child, upon conviction, shall be imprisoned for life in the custody of the Department of Corrections if the punishment is so fixed by the jury in its verdict. If the jury fails to agree on fixing the penalty at imprisonment for life, the court shall fix the penalty at not less than one (1) year nor more than thirty (30) years in the custody of the Department of Corrections.

This section shall not be held to repeal, modify or amend any other criminal statute of this state.

HISTORY: Codes, 1942, § 2238; Laws, 1932, ch. 301; Laws, 1974, ch. 576, § 3; Laws, 2004, ch. 365, § 1; Laws, 2011, ch. 341, § 1, eff from and after July 1, 2011.

Cross References — Prohibition of person convicted of crimes affecting children or other violent crimes from being licensed as foster parent or a foster home, see § 43-15-6.

Abduction for purposes of marriage, see § 97-3-1.

Kidnapping, as provided in this section, defined as crime of violence, see § 97-3-2.

Murder in commission of kidnapping as capital murder, see § 97-3-19.

Enhancement of offenses listed in 99-19-401(2) if the instrumentality used in the commission of the 99-19-401(2) offense was initially obtained in the course of the commission of the crime(s) provided for in this section, see § 99-19-401.

JUDICIAL DECISIONS

ANALYSIS

I. UNDER CURRENT LAW.

1. In general.
2. Elements of offense.
3. Evidence.
4. Double jeopardy.
5. Sentencing; generally.
6. —Sentence by court.
7. Defenses.
- 8.-15. [Reserved for future use.]

II. UNDER FORMER § 97-3-51.

16. In general.
17. Indictment.
18. Jury question.
19. Evidence.

I. UNDER CURRENT LAW.

1. In general.

Mississippi Supreme Court had held that an acquit first instruction, like the one in this case, was not prohibited by Mississippi law, and thus there was no error in connection with defendant's trial for attempted kidnapping and aggravated assault. *Burgess v. State*, 210 So. 3d 569, 2016 Miss. App. LEXIS 314 (Miss. Ct. App. 2016), cert. denied, 209 So. 3d 431, 2017 Miss. LEXIS 59 (Miss. 2017).

Evidence was sufficient to support defendant's convictions for kidnapping because the detention and movement of the employees of a clinic and officers was not merely incidental to another and lesser

crime of aiding an escape, but rather, the seizure of the employees and officers at gunpoint was a necessary constituent of the crime; defendant detained the officers and employees at gunpoint so that he could effectuate both his and an inmate's escape *Logan v. State*, 192 So. 3d 1012, 2015 Miss. App. LEXIS 429 (Miss. Ct. App. 2015), cert. denied, 202 So. 3d 1267, 2016 Miss. LEXIS 238 (Miss. 2016).

There was sufficient evidence for the jury to convict defendant of capital murder in violation of Miss. Code Ann. § 97-3-19(2)(e) and kidnapping in violation of Miss. Code Ann. § 97-3-53 because the jury heard defendant's confession of putting the victim in a headlock and choking him, and the trial court noted that defendant's statement to the police placed him at the scene of the crime and also placed him at the victim's car while the victim was being transported; the verdict was not contrary to the overwhelming weight of the evidence because defendant confessed to choking the victim and helping his co-defendant secure a plastic bag over the victim's head. *McBeath v. State*, 66 So. 3d 663, 2010 Miss. App. LEXIS 666 (Miss. Ct. App. 2010), cert. denied, 69 So. 3d 9, 2011 Miss. LEXIS 373 (Miss. 2011).

Under Mississippi law, domestic violence, as defined in Miss. Code Ann. § 97-3-7(3), is not a lesser-included offense of kidnapping, a violation of Miss. Code Ann. § 97-3-53, because the two are independent crimes with distinct elements; the elements of domestic violence are not among the elements of kidnapping. *Busby v. State*, 956 So. 2d 1112, 2007 Miss. App. LEXIS 352 (Miss. Ct. App. 2007).

Defendant was properly convicted of kidnapping a child because the offense was complete, despite the fact that the victim did not take advantage of several opportunities to escape when defendant stopped the vehicle. *Potts v. State*, 955 So. 2d 913, 2007 Miss. App. LEXIS 256 (Miss. Ct. App. 2007).

Trial court properly accepted defendant's guilty plea to kidnapping, Miss. Code Ann. § 97-3-53; there was a factual basis for the acceptance, as defendant's act of forcing bank employees into a vault while defendant was robbing the bank constituted kidnapping. *Salter v. State*,

876 So. 2d 412, 2003 Miss. App. LEXIS 1183 (Miss. Ct. App. 2003), cert. denied, 878 So. 2d 66, 2004 Miss. LEXIS 854 (Miss. 2004).

Kidnapping statute, Miss. Code Ann. § 97-3-53, is not unconstitutionally vague because the use of other descriptive words in § 97-3-53, such as e.g. and inveigle, leave defendants well informed of the crimes of which they are accused. *Perkins v. State*, 863 So. 2d 47, 2003 Miss. LEXIS 657 (Miss. 2003).

The venue of a kidnapping and rape trial was proper in the county in which the kidnapping and violence leading to the rape commenced, and in which the defense counsel admitted that the first contact between the defendant and the victim, which was determined by the jury to have been a kidnapping, took place. *Erwin v. State*, 557 So. 2d 799, 1990 Miss. LEXIS 57 (Miss. 1990), but see *Strahan v. State*, 729 So. 2d 800, 1998 Miss. LEXIS 343 (Miss. 1998).

Under former provisions, when defendant was tried and convicted of rape, robbery, and kidnapping under improper multicount indictment charging separate offenses, conviction and sentence under kidnapping offense would be affirmed and remaining charges reversed where entire proof in record was relevant to and admissible under kidnapping charge. *Brock v. State*, 483 So. 2d 358, 1986 Miss. LEXIS 2402 (Miss. 1986), but see *McCarty v. State*, 554 So. 2d 909, 1989 Miss. LEXIS 499 (Miss. 1989).

Evidence of the physical facts, the place of the slaying, and confessions of defendant, were sufficient to establish the corpus delicti of the crime of kidnapping in violation of this section, so as to support a jury instruction following that statute in a prosecution for murder while engaged in the commission of the crime of kidnapping. *Wilcher v. State*, 448 So. 2d 927, 1984 Miss. LEXIS 1618 (Miss.), cert. denied, 469 U.S. 873, 105 S. Ct. 231, 83 L. Ed. 2d 160, 1984 U.S. LEXIS 369 (U.S. 1984).

In a prosecution for burglary, armed robbery, and kidnapping, the defendant's request for a directed verdict or a preemptory instruction on the ground that the evidence did not establish that he had

intended to secretly confine the victim was properly rejected where the evidence established that the entire incident consumed at least five or six hours and the defendant and his victim had been in two public places for only a short period of time, with the victim confined in his own automobile for the remainder of the time. *Woods v. State*, 393 So. 2d 1319, 1981 Miss. LEXIS 1904 (Miss. 1981).

Defendant's motion for a directed verdict in a kidnapping prosecution was improperly denied where the record did not disclose any evidence of secret confinement and where there was no credible evidence that the victim was unlawfully or forcibly restrained by defendant. *Hinson v. State*, 360 So. 2d 934, 1978 Miss. LEXIS 2315 (Miss. 1978).

A comma should have been placed in Code 1942 § 2238 after the words "or shall inveigle or kidnap another person (,)" so that the following clause "with intent to cause such person to be secretly confined or imprisoned against his or her will," is a part of the entire sentence and refers to "forceably seize and confine" as well as to the clause "or shall inveigle or kidnap any other person." *Aikerson v. State*, 274 So. 2d 124, 1973 Miss. LEXIS 1585 (Miss. 1973), overruled in part, *Conley v. State*, 790 So. 2d 773, 2001 Miss. LEXIS 100 (Miss. 2001).

This section [Code 1942, § 2238] is not solely or primarily concerned with the kidnapping of children but is broader and treats two other types of kidnapping. *Brooks v. State*, 236 So. 2d 751, 1970 Miss. LEXIS 1502 (Miss. 1970).

The state has the choice of indicting an alleged kidnapper under either Code 1942, § 2237 or § 2238. *Brooks v. State*, 236 So. 2d 751, 1970 Miss. LEXIS 1502 (Miss. 1970).

Recommendation of defendant to mercy of court in verdict finding defendant guilty of kidnapping child held not to vitiate verdict. *Allen v. State*, 166 Miss. 551, 148 So. 634, 1933 Miss. LEXIS 396 (Miss. 1933).

2. Elements of offense.

Evidence was sufficient to support defendant's conviction for kidnapping, although defendant maintained that he did

not intend to kidnap the victim by confining the victim to a small room in a mobile home, because kidnapping was not a specific intent crime. *Hager v. State*, 996 So. 2d 94, 2008 Miss. App. LEXIS 308 (Miss. Ct. App.), cert. denied, 999 So. 2d 374, 2008 Miss. LEXIS 630 (Miss. 2008).

Amount of force required to overtake another person's will to resist is directly proportional to the development of the other's will; therefore, defendant was properly convicted of kidnapping a child where he used deceit to lure him into a vehicle because the state proved all of the elements of kidnapping, as required by due process. *Potts v. State*, 955 So. 2d 913, 2007 Miss. App. LEXIS 256 (Miss. Ct. App. 2007).

There was sufficient evidence for a rational juror to find that the state proved beyond a reasonable doubt that defendant kidnapped his estranged wife where the wife testified that she was forcibly seized, confined, and held against her will. *Livingston v. State*, 943 So. 2d 66, 2006 Miss. App. LEXIS 417 (Miss. Ct. App.), cert. denied, 942 So. 2d 164, 2006 Miss. LEXIS 708 (Miss. 2006).

Trial court did not err in failing to grant defendant's motion for a directed verdict on the charge of kidnapping because the fact that a mother knew where several children were during the commission of an assault did not invalidate a kidnapping conviction; the children were restrained in a closet during the mother's assault, and the father was not aware of the children's whereabouts. *Perkins v. State*, 863 So. 2d 47, 2003 Miss. LEXIS 657 (Miss. 2003).

Kidnapping is not a specific intent crime; therefore, it is sufficient that the surrounding circumstances resulted in a way to effectively become kidnapping as opposed to the actual intent to kidnap. *Murphy v. State*, 868 So. 2d 1030, 2003 Miss. App. LEXIS 1161 (Miss. Ct. App. 2003), cert. denied, 868 So. 2d 345, 2004 Miss. LEXIS 297 (Miss. 2004).

When defendant forced his girlfriend into her kitchen, and then into a bedroom where he kept her confined for a considerable length of time, all the while holding a stun gun, which he had used to stun her, the evidence presented at trial was sufficient to sustain defendant's conviction;

the prosecution did not have to show asportation. *Russell v. State*, 832 So. 2d 551, 2002 Miss. App. LEXIS 251 (Miss. Ct. App.), cert. denied, 832 So. 2d 533, 2002 Miss. App. LEXIS 782 (Miss. Ct. App. 2002).

One may commit the crime of kidnapping either by secretly confining a victim or by confining or imprisoning another against his or her will regardless of whether the confinement is secret; the element of secrecy is not fundamental to a kidnapping charge. *Culbert v. State*, 800 So. 2d 546, 2001 Miss. App. LEXIS 467 (Miss. Ct. App. 2001).

The adverb "secretly" modifies the verb immediately following; thus, with this reading the term "secretly confined" and the term "imprisoned" each stand alone as terms of art possessed of separate meanings. *Conley v. State*, 790 So. 2d 773, 2001 Miss. LEXIS 100 (Miss. 2001).

Inveigling has no component of force, but only of coaxing; one does not forcibly inveigle; thus, one can be convicted of kidnapping based on coaxing a victim into a vehicle with the intent secretly to confine her against her will. *Myers v. State*, 770 So. 2d 542, 2000 Miss. App. LEXIS 504 (Miss. Ct. App. 2000).

In order to convict a person of kidnapping, it must be shown that he seized and confined the victim "with the intent to secretly confine or imprison." *Chevalier v. State*, 730 So. 2d 1111, 1998 Miss. LEXIS 620 (Miss. 1998), overruled in part, *Conley v. State*, 790 So. 2d 773, 2001 Miss. LEXIS 100 (Miss. 2001).

Asportation was not element of kidnapping. *Holly v. State*, 671 So. 2d 32, 1996 Miss. LEXIS 15 (Miss.), cert. denied, 518 U.S. 1025, 116 S. Ct. 2565, 135 L. Ed. 2d 1082, 1996 U.S. LEXIS 4179 (U.S. 1996).

In a prosecution for capital murder while engaged in the crime of kidnapping, an instruction as to the underlying felony of kidnapping was proper even though it did not include "asportation" as an element of the crime. *Carr v. State*, 655 So. 2d 824, 1995 Miss. LEXIS 56 (Miss. 1995), cert. denied, 516 U.S. 1077, 116 S. Ct. 783, 133 L. Ed. 2d 734, 1996 U.S. LEXIS 547 (U.S. 1996).

This section does not require the indictment to allege transportation of the vic-

tim. *Carr v. State*, 655 So. 2d 824, 1995 Miss. LEXIS 56 (Miss. 1995), cert. denied, 516 U.S. 1077, 116 S. Ct. 783, 133 L. Ed. 2d 734, 1996 U.S. LEXIS 547 (U.S. 1996).

Since kidnapping is not a specific intent crime, it is sufficient that the circumstances resulted in such a manner as to effect a kidnapping as opposed to an actual intent to kidnap, i.e., it is not necessary to establish the mental state of intent by direct evidence. Additionally, the fact that the confinement is minor is of no consequence so long as it is present. *Williams v. State*, 544 So. 2d 782, 1987 Miss. LEXIS 2843 (Miss. 1987).

An indictment was sufficient in charging the crime of kidnapping when it charged defendant with forcibly seizing and confining victim against his will and depriving him of his liberty, since this section does not require any allegation of transportation. *Brewer v. State*, 459 So. 2d 293, 1984 Miss. LEXIS 1987 (Miss. 1984).

Under this section, crime of kidnapping may be accomplished by trickery and deceit as well as by force and jury issue is presented on whether defendant by his trickery intended to cause others to be secretly confined against their will where by defendant's confession he stated he intentionally gave victims wrong directions to his home so as to get them into deserted place, with intent to rob them after he got them there. *Wilcher v. State*, 448 So. 2d 927, 1984 Miss. LEXIS 1618 (Miss.), cert. denied, 469 U.S. 873, 105 S. Ct. 231, 83 L. Ed. 2d 160, 1984 U.S. LEXIS 369 (U.S. 1984).

An indictment charging that defendant did wilfully, feloniously and without lawful authority forceably seize and confine an individual without her consent and against her will, contrary to the provisions of Code 1942 § 2238, and contrary to the statute in such cases made and provided and against the peace and dignity of the state, did not charge the crime of kidnapping under either Code 1942 §§ 2237 or 2238. *Aikerson v. State*, 274 So. 2d 124, 1973 Miss. LEXIS 1585 (Miss. 1973), overruled in part, *Conley v. State*, 790 So. 2d 773, 2001 Miss. LEXIS 100 (Miss. 2001).

In order for one to be guilty of the crime of kidnapping, the victim must be unlaw-

fully removed from a place where he has a right to be, to another place. *Aikerson v. State*, 274 So. 2d 124, 1973 Miss. LEXIS 1585 (Miss. 1973), overruled in part, *Conley v. State*, 790 So. 2d 773, 2001 Miss. LEXIS 100 (Miss. 2001).

3. Evidence.

Evidence was sufficient to support defendant's conviction of capital murder during the course of kidnapping because defendant got the victim to leave his mother's house, video footage showed that the victim was with defendant in Alabama, the victim never came back from Alabama, the victim's body was found off the route defendant traveled with him, the victim did not die of natural causes, and an inmate in custody with defendant testified that he overheard defendant tell two others that he had killed the victim. *Moberg v. State*, — So. 3d —, 2020 Miss. App. LEXIS 147 (Miss. Ct. App. May 5, 2020), cert. denied, — So. 3d —, 2020 Miss. LEXIS 402 (Miss. 2020).

Evidence was sufficient to support defendant's attempted kidnapping conviction because it showed that defendant entered the victim's bedroom, demanded she leave with him, struck her when she refused, and while she was unconscious defendant stole no items from the room. *Sullivan v. State*, 281 So. 3d 1146, 2019 Miss. App. LEXIS 267 (Miss. Ct. App. 2019).

Evidence was sufficient to support defendant's kidnapping conviction because the victim testified that when they arrived at the house, defendant stayed in the vehicle with him while another man knocked on the door, and when there was no answer the man returned to the vehicle and defendant went and knocked on the door. According to the victim someone was in the vehicle with him at all times and he was not able to leave, defendant had a gun, and the other man acted like he had a gun. *Kidd v. State*, 284 So. 3d 777, 2019 Miss. App. LEXIS 342 (Miss. Ct. App. 2019).

Evidence was sufficient to support defendant's kidnapping conviction because it showed that he aided and abetted the shooter in the victim's kidnapping, as defendant deliberately accompanied the

shooter the entire time the victim was held against his will, the shooter forcibly seized the victim from the crime scene and put him into the vehicle, the victim was confined against his will in the back seat between defendant and the shooter, the victim claimed he was held at gunpoint and feared for his life, and the victim continued to be held against his will at the house where defendant and the shooter examined the contents of the stolen shoe box. *Story v. State*, 296 So. 3d 104, 2019 Miss. App. LEXIS 539 (Miss. Ct. App. 2019), cert. denied, 293 So. 3d 833, 2020 Miss. LEXIS 223 (Miss. 2020).

Evidence that defendant prevented the victim from leaving her officer locked the door after leaving so no one would find the victim was sufficient to support defendant's kidnapping conviction. *May v. State*, 267 So. 3d 803, 2018 Miss. App. LEXIS 632 (Miss. Ct. App. 2018), cert. denied, 267 So. 3d 280, 2019 Miss. LEXIS 169 (Miss. 2019).

Evidence was sufficient to convict defendant of kidnapping the victim, his wife, because the jury was presented with testimony and evidence demonstrating that the kidnapping was a separate, independent crime from the attempted murder as defendant did not use the machete to hack or slash the victim until after he had removed her from the bed and dragged her, fighting and screaming, down the hall and into another room, outside the presence of a child. *Green v. State*, 269 So. 3d 75, 2018 Miss. LEXIS 413 (Miss. 2018).

In a case in which defendant, who was 15 years old when he shot and killed the victim, was indicted for deliberate design murder, but pled guilty to manslaughter and kidnapping, his second petition for post-conviction relief was properly denied as he was not actually and factually innocent of deliberate design murder, for which he was originally indicted; or kidnapping, as he agreed under oath that he and another juvenile planned in advance to kill the victim and that he killed the victim by shooting him in the back of the head. *Mason v. State*, 235 So. 3d 129, 2017 Miss. App. LEXIS 322 (Miss. Ct. App. 2017), cert. denied, — So. 3d —, 2018 Miss. LEXIS 48 (Miss. 2018).

Evidence was sufficient to support defendant's kidnapping conviction where

the victim testified that defendant and his accomplice were blocking her exit, the accomplice hit her, they were in the woods and she was not familiar with the area, and as soon as they backed away to fix their clothes the victim fled. *Graham v. State*, 185 So. 3d 992, 2016 Miss. LEXIS 86 (Miss. 2016).

Evidence was sufficient for the jury to find that defendant forcibly seized and confined the victim by enticing the victim to the parking lot of a casino with a promise of selling the victim cheap cigarettes, forced the victim into the victim's car at gunpoint, confined the victim in the car, and forced the victim to drive defendant to another town, as the surveillance footage and other testimony supported the victim's account. Defendant did not need to have intended to kidnap the victim. *Burrell v. State*, 183 So. 3d 19, 2015 Miss. LEXIS 531 (Miss. 2015).

There was sufficient evidence to convict defendant of kidnapping and the verdict was not against the overwhelming weight of the evidence because the victim testified that on the day of the incident, when she tried to leave the neighbor's home after realizing that no one was inside, defendant locked the door, grabbed her by her arm, and told her that she was not going anywhere; and the evidence that the doors to the neighbor's house would have been locked, as no one was home, and that the incident could not have occurred did not point in defendant's favor with such force that reasonable men could not have found without a reasonable doubt that he was guilty of kidnapping. *Sims v. State*, 127 So. 3d 307, 2013 Miss. App. LEXIS 861 (Miss. Ct. App. 2013).

Trial judge's decision that a photograph's content was not too remote in time to be relevant and that the danger of unfair prejudice did not substantially outweigh that probative value was not an abuse of discretion because it was within the trial judge's discretion to determine that the photograph of handcuffs in defendant's car was relevant, even though it was taken more than two months after the alleged attempted kidnapping; the presence of the handcuffs in defendant's car was offered to show that on his trips to "look for women," defendant was not look-

ing for consensual relationships, and the presence of handcuffs made it more probable that defendant grabbed the victim with the intent to kidnap her. *Tucker v. State*, 64 So. 3d 594, 2011 Miss. App. LEXIS 324 (Miss. Ct. App. 2011).

Trial court did not err in denying defendant's motion for a new trial because the verdict finding him guilty of armed robbery, kidnapping, and felon in possession of a weapon was not against the overwhelming weight of the evidence when the victim consistently identified defendant as her attacker. *Williams v. State*, 40 So. 3d 630, 2010 Miss. App. LEXIS 67 (Miss. Ct. App. 2010).

Defendant confessed to police that he choked the victim, duct taped a plastic bag around his head to suffocate the victim, placed the victim's body in the trunk of his car, and dumped the body in the woods; the evidence was sufficient to support defendant's conviction for kidnapping pursuant to Miss. Code Ann. § 97-3-53. The Supreme Court of Mississippi held that the trial court did not err by denying defendant's motion for a directed verdict. *Nelson v. State*, 10 So. 3d 898, 2009 Miss. LEXIS 198 (Miss. 2009).

Trial court did not err in denying defendant's motion for a new trial because the evidence supported defendant's convictions for touching a child for lustful purposes and kidnapping; the victim testified as to what transpired and identified both defendant and defendant's vehicle. *Nix v. State*, 8 So. 3d 141, 2009 Miss. LEXIS 74 (Miss. 2009).

Evidence as sufficient to support defendant's convictions of burglary, kidnapping, and sexual battery where the father of the two-year-old victim testified that he went to pick up his girlfriend from work and left his children secured in their home, that he encountered the 17-year-old defendant while en route and told him where he was going, that he discovered upon his return that his home had been broken into and that his daughter was missing, that he found defendant with his daughter in an abandoned structure nearby, and that, upon examination, the girl's genital area was red, bleeding, and scratched and where a physician who examined the victim testified that the girl's vagina was red,

swollen, and irritated but that there was no evidence of infection as the cause. Because the two-year-old victim was too short to have unlocked the door to the family home by herself and had never walked out of the home unassisted, the evidence permitted the jury to reasonably infer that defendant had broken into the family residence, removed the victim therefrom without her father's permission, and sexually assaulted her. *Moton v. State*, 999 So. 2d 1287, 2009 Miss. App. LEXIS 20 (Miss. Ct. App. 2009).

When the victim went to the post office at night to check her mail, a man placed a gun to her back, told her he needed money, drove to an ATM, withdrew money from her account, and then raped her; the victim identified defendant's voice as belonging to her assailant and she was absolutely certain that he was the man who attacked her. Defendant's fingerprints were found at the crime scene, he did not testify at trial, and the only defense witness did not provide a conclusive alibi; the evidence was sufficient to sustain defendant's conviction for kidnapping, rape, and armed robbery. *Burton v. State*, 970 So. 2d 229, 2007 Miss. App. LEXIS 807 (Miss. Ct. App. 2007).

Trial court did not err by denying defendant's motions for judgment notwithstanding the verdict and for a new trial after he was convicted of rape, kidnapping, and armed robbery because the evidence, viewed in the light most favorable to the prosecution, showed that: (1) defendant bound the victim and forcibly raped her, threatening her with a knife; (2) DNA testing from the rape kit showed the presence of semen but no sperm in the victim's vagina, consistent with a male donor not reaching ejaculation; (3) defendant forced the victim into her car; and (4) defendant forced the victim to make an ATM withdrawal and give him the cash. *Taggart v. State*, 957 So. 2d 981, 2007 Miss. LEXIS 330 (Miss. 2007).

Defendant, who was convicted of kidnapping, a violation of Miss. Code Ann. § 97-3-53, was not entitled to a jury instruction on domestic violence under Miss. Code Ann. § 97-3-7(3) as a lesser included offense because the two were independent crimes with distinct ele-

ments. *Busby v. State*, 956 So. 2d 1112, 2007 Miss. App. LEXIS 352 (Miss. Ct. App. 2007).

Owner testified that he locked the door-knob and shut the door after allowing defendant to enter his mobile home, and both the owner and a victim testified that defendant declined to sit down and that she stood facing them with her back to the door; according to the victim, defendant had her hand on the doorknob before three masked men rushed through the door, and she never saw any of the masked men point a gun at defendant. Also, immediately after the men left, defendant refused to help the victim untie the owner; thus, the evidence was sufficient, and defendant's convictions for burglary of a dwelling, robbery, kidnapping, and auto theft were not against the weight of the evidence. *Brown v. State*, 926 So. 2d 283, 2006 Miss. App. LEXIS 268 (Miss. Ct. App. 2006).

Evidence was sufficient to sustain defendant's convictions for aggravated assault, kidnapping, and unlawful possession of a firearm where, according to the victim's testimony, she was accosted by defendant who grabbed her, placed a gun to her head, and physically forced her into a van against her will; an eyewitness testified that he saw the victim jump out of the van and saw the van swing back in such a fashion so as to accomplish a "perfect hit" on the woman in flight. In addition, the State presented two witnesses attesting to the fact that defendant was in possession of a firearm, and it introduced the gun into evidence with additional proof that the gun was recovered when defendant was arrested. *Jones v. State*, 920 So. 2d 465, 2006 Miss. LEXIS 65 (Miss. 2006).

Defendant's conviction for attempted kidnapping in violation of Miss. Code Ann. § 97-3-53 and Miss. Code Ann. § 97-1-7 was proper where the evidence was sufficient to support the conviction. The evidence established that, among other things, defendant chased the victim down the street and grabbed her. *Carter v. State*, 932 So. 2d 850, 2006 Miss. App. LEXIS 77 (Miss. Ct. App.), cert. denied, 933 So. 2d 303, 2006 Miss. LEXIS 496 (Miss. 2006).

Where the victim attempted to escape the home where defendant was murdering his wife, and defendant chased her and caught her in the neighbor's yard, telling her that he had a gun and he would shoot her, the evidence was sufficient to support his conviction for kidnapping. *Green v. State*, 887 So. 2d 840, 2004 Miss. App. LEXIS 931 (Miss. Ct. App. 2004).

There was sufficient evidence to support defendant's kidnapping conviction under Miss. Code Ann. § 97-3-53; the two victims' testimony established the necessary elements of kidnapping: they were persuaded to enter defendant's vehicle on the promise of a ride home, but were taken against their will to another location. *Davis v. State*, 863 So. 2d 1000, 2004 Miss. App. LEXIS 12 (Miss. Ct. App. 2004).

Defendant had the criminal intent required to commit the crime of kidnapping where: (1) when defendant decided to drive away with the victim in the car, he knew he was taking her against her will, (2) criminal intent to kidnap was not absent merely because defendant would not have driven off with the victim if she could have opened the door, and (3) defendant knew he was taking the victim away against her will when he drove the car away. *Murphy v. State*, 868 So. 2d 1030, 2003 Miss. App. LEXIS 1161 (Miss. Ct. App. 2003), cert. denied, 868 So. 2d 345, 2004 Miss. LEXIS 297 (Miss. 2004).

There was sufficient evidence to support defendant's conviction for kidnapping because there was blood found inside of the victim's car, the victim was found in a ditch along a road where defendant proceeded, defendant was seen at a convenience store where the victim's car was found, and defendant presented a bloody dollar bill to the cashier for change. *Crosby v. State*, 856 So. 2d 523, 2003 Miss. App. LEXIS 403 (Miss. Ct. App.), cert. denied, 860 So. 2d 1223, 2003 Miss. LEXIS 814 (Miss. 2003).

Defendant claimed he intended to steal a car, and told the victim to get out, but, due to the failure of the door to open, he drove away with her still inside the car; his kidnapping conviction was affirmed, as the State had not been required to prove defendant had the specific intent to kidnap the woman, only that the sur-

rounding circumstances effectively resulted in a kidnapping. *Murphy v. State*, 2003 Miss. App. LEXIS 683 (Miss. Ct. App. Aug. 5, 2003), op. withdrawn, sub. op., 868 So. 2d 1030, 2003 Miss. App. LEXIS 1161 (Miss. Ct. App. 2003).

Evidence was sufficient to support a conviction for kidnapping where (1) a witness saw the defendant drag the victim into the woods, (2) it was undisputed fact that the victim was high on drugs and drunk on alcohol on the night in question, which suggested that she might not have knowingly gone along with the defendant and his coperpetrators, that is, she was inveigled, (3) the defendant and his coperpetrators refused the victim's request to go back to a bar and retrieve her things, and (4) a struggle was suggested by the abused and mangled condition of the victim's body. *Williams v. Puckett*, 283 F.3d 272, 2002 U.S. App. LEXIS 2343 (5th Cir. Miss.), cert. denied, 537 U.S. 1010, 123 S. Ct. 504, 154 L. Ed. 2d 411, 2002 U.S. LEXIS 8217 (U.S. 2002).

Evidence was sufficient to sustain defendant's convictions for kidnapping because defendant forcibly entered the victim's home with a shotgun in his hands and several rounds of ammunition; he also had two knives, duct tape, and a cord in his pockets, and the victims testified that they were scared; one victim stated that the victim was not free to leave. *Smiley v. State*, 798 So. 2d 584, 2001 Miss. App. LEXIS 279 (Miss. Ct. App. 2001).

Asportation was sufficiently proved to sustain a charge of kidnapping with respect to the actions of defendant, who, after his escape from jail, entered an automobile agency, demanded transportation, accosted two employees with a pistol and forced one of them to move from one part of the building to the other and held him prisoner there, since, though the employee was not removed from the premises of his employment, the asportation and confinement were intended by defendant to make good his escape and were not merely incidental to another and lesser crime; in such circumstances, the fact of confinement or asportation is sufficient to support kidnapping without regard to distance moved or time of confinement. *Cuevas v. State*, 338 So. 2d 1236, 1976 Miss. LEXIS 1656 (Miss. 1976).

When one is forced at gunpoint to enter an automobile, and while confined therein is driven away against his will from a place where he has a right to be, en route and to a destination unknown to his friends and acquaintances, he is, within the meaning of § 2238, “secretly confined and imprisoned.” *Fox v. Kouba*, 288 So. 2d 842, 1974 Miss. LEXIS 1869 (Miss. 1974).

4. Double jeopardy.

The appellate court found merit to defendant’s argument that his separate convictions for capital murder and kidnapping violated his right against double jeopardy. Accordingly, the appellate court reversed and rendered the kidnapping conviction and vacated his thirty-year sentence for that conviction. *Gillum v. State*, — So. 3d —, 2020 Miss. App. LEXIS 525 (Miss. Ct. App. Sept. 8, 2020).

In a case in which defendant, who was 15 years old when he shot and killed the victim, was indicted for deliberate design murder, but pled guilty to manslaughter and kidnapping, his second petition for post-conviction relief was properly denied because his derivative double jeopardy claim that the sentence he received for kidnapping was, in reality, a multiple punishment for the offense of manslaughter was without merit as defendant was not actually or factually innocent of kidnapping, and there was a sufficient basis for his plea to that charge. *Mason v. State*, 235 So. 3d 129, 2017 Miss. App. LEXIS 322 (Miss. Ct. App. 2017), cert. denied, — So. 3d —, 2018 Miss. LEXIS 48 (Miss. 2018).

Double jeopardy did not bar defendant’s prosecution for murder, Miss. Code Ann. § 97-3-19(2)(e), and kidnapping, Miss. Code Ann. § 97-3-53, because murder and kidnapping had separate statutory elements, requiring different facts. *McBeath v. State*, 66 So. 3d 663, 2010 Miss. App. LEXIS 666 (Miss. Ct. App. 2010), cert. denied, 69 So. 3d 9, 2011 Miss. LEXIS 373 (Miss. 2011).

Supreme Court of Mississippi held that defendant’s prosecution for both capital murder in violation of Miss. Code Ann. § 97-3-19(2)(e) and kidnapping in violation of Miss. Code Ann. § 97-3-53 did not violate double jeopardy; the crimes of

capital murder and kidnapping each require proof of an element not necessary to the other. *Nelson v. State*, 10 So. 3d 898, 2009 Miss. LEXIS 198 (Miss. 2009).

Offenses of kidnapping under Miss. Code Ann. § 97-3-53 and armed robbery under Miss. Code Ann. § 97-3-79 were clearly separate and distinct, with each requiring proof of additional facts the other did not; kidnapping, for example, required proof of intent to cause such person to be secretly confined or imprisoned against their will, whereas armed robbery did not, and armed robbery required the taking of personal property of another, but kidnapping did not. Thus, the crimes were separate and distinct regardless of their temporal overlap or their arising from a common nucleus of operative facts, and defendant’s double jeopardy rights were not violated through being convicted of both kidnapping and armed robbery. *Moore v. State*, 938 So. 2d 1254, 2006 Miss. App. LEXIS 86 (Miss. Ct. App. 2006), cert. denied, 2006 Miss. LEXIS 750 (Miss. Oct. 5, 2006), cert. denied, 939 So. 2d 805, 2006 Miss. LEXIS 749 (Miss. 2006).

A defendant’s right to be shielded from double jeopardy was violated where the defendant was convicted and punished for both kidnapping under this section and capital murder while engaged in the crime of kidnapping under § 97-3-19(2)(e); since the defendant was indicted, tried and found guilty of capital murder under § 97-3-19(2)(e) with the kidnapping as the underlying felony, and thereafter exposed to trial for his life, the State was precluded from punishing him further for the kidnapping. *Meeks v. State*, 604 So. 2d 748, 1992 Miss. LEXIS 400 (Miss. 1992).

The prosecution of a defendant for robbery with a deadly weapon after a prior conviction for kidnapping arising from the same incident was not barred by double jeopardy since the crimes of armed robbery and kidnapping required different elements of proof. *Brock v. State*, 530 So. 2d 146, 1988 Miss. LEXIS 361 (Miss. 1988).

There is no legal impediment to the State’s mounting of three separate prosecutions for kidnapping under this section, forcible rape, and armed robbery,

even though the three offenses arise out of a common nucleus of operative fact; accordingly, where the defendant affirmatively requested that the proceeding against him on all three charges be consolidated for pre-trial and trial purposes, the trial court properly held that the defendant had consciously waived any objections he may have had to the multi-count indictment. *Ward v. State*, 461 So. 2d 724, 1984 Miss. LEXIS 2052 (Miss. 1984).

5. Sentencing; generally.

Miss. Code Ann. § 45-33-23 and the federal statutes are not in “conflict” such that the statute violated defendant’s constitutional rights; rather, the Legislature decided to expand the definitions found in the federal statutes to include, as a sex offense subject to classification and registration, the crime of kidnapping a minor under the age of sixteen, and the Legislature’s expansion of the sex-offender registration laws is permissible. *Thomas v. Miss. Dep’t of Corr.*, 248 So. 3d 786, 2018 Miss. LEXIS 129 (Miss. 2018).

Circuit court did not err in affirming the denial of defendant’s claim that he was being improperly classified as a sex offender and was entitled to trusty time or meritorious earned time because defendant’s conviction for kidnapping a minor under the age of sixteen made him ineligible for parole and ineligible for any reduction in his sentence. *Thomas v. Miss. Dep’t of Corr.*, 248 So. 3d 786, 2018 Miss. LEXIS 129 (Miss. 2018).

Defendant’s sentence to thirty years’ incarceration, with ten years suspended, for kidnapping was not excessive because the sentence was within statutorily prescribed limits. *Clark v. State*, 54 So. 3d 304, 2011 Miss. App. LEXIS 15 (Miss. Ct. App. 2011).

Trial court’s sentence of forty years imprisonment for kidnapping exceeded the statutory maximum because the jury did not impose a life sentence upon defendant; therefore, Miss. Code Ann. § 97-3-53 permitted the trial court to impose a sentence of neither less than one year nor more than thirty years, and defendant had to be resentenced in accordance with § 97-3-53. *McBeath v. State*, 66 So. 3d 663, 2010 Miss. App. LEXIS 666 (Miss. Ct. App.

2010), cert. denied, 69 So. 3d 9, 2011 Miss. LEXIS 373 (Miss. 2011).

Where defendant kidnapped and murdered a high school student, the judge imposed a forty-year kidnapping sentence based on a mortality table which indicated the expected life span for someone the victim’s age. The Supreme Court of Mississippi held that the judge erred by imposing a sentence that exceeded the statutory maximum set forth in Miss. Code Ann. § 97-3-53. *Nelson v. State*, 10 So. 3d 898, 2009 Miss. LEXIS 198 (Miss. 2009).

Trial court erred in sentencing defendant to 35 years each for six convictions for kidnapping because Miss. Code Ann. § 97-3-53 set the maximum punishment at 30 years. *Perkins v. State*, 863 So. 2d 47, 2003 Miss. LEXIS 657 (Miss. 2003).

While this section places a limit of 30 years on the sentence which may be imposed by the court for kidnapping if the jury fails to find that a life sentence should be imposed, § 97-3-65 does not impose a limitation for the penalty for rape although it, also, allows the jury to fix a penalty at life imprisonment; if the jury does not so fix the penalty under § 97-3-65, then it may be fixed for any term, less than life, as the court in its discretion may determine. *Erwin v. State*, 557 So. 2d 799, 1990 Miss. LEXIS 57 (Miss. 1990), but see *Strahan v. State*, 729 So. 2d 800, 1998 Miss. LEXIS 343 (Miss. 1998).

Sentence of 45 years imprisonment for kidnapping exceeds sentence authorized under this section and requires resentencing. *Smith v. State*, 477 So. 2d 259, 1985 Miss. LEXIS 2232 (Miss. 1985).

In a prosecution for burglary, armed robbery, and kidnapping in which the defendant had been sentenced to serve 15 years under the burglary verdict and a life sentence under each of the armed robbery and kidnapping verdicts after the jury had been unable to agree upon a penalty under the armed robbery and kidnapping charges, the case would be remanded to the trial court for resentencing where the trial court had failed to indicate whether the sentences were to run consecutively or concurrently and where, since the jury had been unable to arrive at a sentence for either of these convictions, the maximum

sentence permissible for the kidnapping conviction under this section was 30 years and the maximum sentence for the armed robbery conviction was only the number of years that reasonably would be calculated to be less than life for that particular accused. *Woods v. State*, 393 So. 2d 1319, 1981 Miss. LEXIS 1904 (Miss. 1981).

A defendant convicted of kidnapping was improperly sentenced to life imprisonment under this section where it was impossible to ascertain from the indictment whether defendant had been indicted under this section or § 97-3-51, which carried a maximum punishment of ten years imprisonment; when the facts which constitute a criminal offense may fall under either of two statutes, or when there is a substantial doubt as to which of the two is to be applied, the case will be referred to the statute which imposes the lesser punishment. *White v. State*, 374 So. 2d 225, 1979 Miss. LEXIS 2348 (Miss. 1979).

The legislature did not intend to inflict the death penalty for such minor offenses as seizing and holding another in a fist fight or seizing, hugging and kissing a woman without her consent. *Aikerson v. State*, 274 So. 2d 124, 1973 Miss. LEXIS 1585 (Miss. 1973), overruled in part, *Conley v. State*, 790 So. 2d 773, 2001 Miss. LEXIS 100 (Miss. 2001).

A capital case is any case where the permissible punishment prescribed by the legislature is death, even though such penalty may not be inflicted since the decision of the United States Supreme Court in *Furman v. Georgia*, 408 U.S. 238, 33 L. Ed. 2d 346, 92 S. Ct. 2726, reh den 409 U.S. 902, 34 L. Ed. 2d 163, 93 S. Ct. 89 and on remand 229 Ga 731, 194 SE2d 410. *Hudson v. McAdory*, 268 So. 2d 916, 1972 Miss. LEXIS 1216 (Miss. 1972).

6. —Sentence by court.

In a case in which defendant, who was 15 years old when he shot and killed the victim, was indicted for deliberate design murder, but pled guilty to manslaughter and kidnapping, his second petition for post-conviction relief was properly denied because, although defendant's total sentence of 50 years for manslaughter and kidnapping was lengthy, it was not a life

sentence or de facto life sentence that violated the Eighth Amendment, which forbade a sentencing scheme that mandated life in prison without possibility of parole for juvenile offenders. *Mason v. State*, 235 So. 3d 129, 2017 Miss. App. LEXIS 322 (Miss. Ct. App. 2017), cert. denied, — So. 3d —, 2018 Miss. LEXIS 48 (Miss. 2018).

Because defendant's sentence of thirty years without parole for the offense of kidnapping was within the statutory limits, it was not contrary to the law. Although defendant could have received a life sentence under the kidnapping statute, the State of Mississippi did not seek a life sentence, and defendant's sentence was subject to enhancement because the victim was older than sixty-five, defendant used a gun, and defendant was a habitual offender. *Burrell v. State*, 183 So. 3d 19, 2015 Miss. LEXIS 531 (Miss. 2015).

A trial court's sentencing of a defendant to life imprisonment after the defendant pled guilty to kidnapping constituted plain error, since a defendant convicted under this section may not be sentenced to life imprisonment unless the jury fixes the penalty at life. Since the defendant pled guilty to the charge of kidnapping, the issue of his sentence was not submitted to a jury, but rather to the trial judge, who had the authority to fix the penalty at not less than one year nor more than 30 years in the state penitentiary under the statute. *Grubb v. State*, 584 So. 2d 786, 1991 Miss. LEXIS 506 (Miss. 1991).

On convictions for kidnapping and rape pursuant to this section and § 97-3-65, where the jury was unable to agree on life imprisonment as the appropriate sentence, and the court was therefore required to impose some lesser sentence than life, each sentence was to be imposed without respect to the other so that the total of the sentences imposed could amount to more than the actuarial life expectancy of the defendant, even though the crimes grew out of a series of violent acts by one individual toward another individual in an unbroken chain of events. If this matter were treated differently, circumstances might arise where it would be impossible for the State to impose any meaningful sentence where more than one

crime was committed. *Erwin v. State*, 557 So. 2d 799, 1990 Miss. LEXIS 57 (Miss. 1990), but see *Strahan v. State*, 729 So. 2d 800, 1998 Miss. LEXIS 343 (Miss. 1998).

Where a jury merely finds a defendant guilty of kidnapping under this section [Code 1942, § 2238] and does not fix the punishment at death or life imprisonment, the trial court shall sentence the defendant to the penitentiary for a term of not less than one year or more than 30 years. *Brooks v. State*, 236 So. 2d 751, 1970 Miss. LEXIS 1502 (Miss. 1970).

Where jury merely found defendant guilty of kidnapping child, and did not fix punishment at death or life imprisonment, court's sentence to penitentiary held proper. *Allen v. State*, 166 Miss. 551, 148 So. 634, 1933 Miss. LEXIS 396 (Miss. 1933).

7. Defenses.

In defendant's capital murder case, he was not entitled to an instruction that duress was a defense to the underlying felony of kidnapping because defendant never indicated that the victim had threatened him or had done anything in particular to cause a well-founded fear of death or serious bodily injury. Moreover, on at least two occasions—once at the home and once at the cornfield—defendant actually possessed the gun; additionally, defendant could have attempted to renounce any further participation in the crime, and joined the other occupants at the back of the home. *Ruffin v. State*, 992 So. 2d 1165, 2008 Miss. LEXIS 518 (Miss. 2008).

8.-15. [Reserved for future use.]

II. UNDER FORMER § 97-3-51.

16. In general.

Defendant's convictions for three counts of manslaughter for his actions in 1964 were appropriate under former Miss. Code Ann. § 2238 (1942) because the record was replete with evidence that there was a kidnapping and because there was no statute of limitations on manslaughter in Mississippi. *Killen v. State*, 958 So. 2d 172, 2007 Miss. LEXIS 207 (Miss. 2007).

Since kidnapping is not a specific intent crime, it is sufficient that the circumstances resulted in such a manner as to

effect a kidnapping as opposed to an actual intent to kidnap, i.e., it is not necessary to establish the mental state of intent by direct evidence. Additionally, the fact that the confinement is minor is of no consequence so long as it is present. *Williams v. State*, 544 So. 2d 782, 1987 Miss. LEXIS 2843 (Miss. 1987).

Since the doctrine of collateral estoppel contemplates a prior adjudication of an issue by the trier of the facts, the doctrine did not require the court to decline a verdict of guilty of aggravated assault, returned along with a verdict of not guilty of attempted kidnapping, both charges arising from the same facts, since the 2 indictments had been consolidated and simultaneously submitted to the jury, and there had been no prior adjudication of any issue. *Johnson v. State*, 491 So. 2d 834, 1986 Miss. LEXIS 2510 (Miss. 1986).

A defendant previously convicted of kidnapping was not subjected to double jeopardy at his subsequent trial for rape of his kidnap victim since he had committed two separate offenses when he had raped his kidnap victim. The trial court properly admitted evidence and exhibits of the crime of rape at the kidnapping trial since evidence of other crimes is admissible to prove motive and a connection between the act proposed to be proved and the crime charged. *Hughes v. State*, 401 So. 2d 1100, 1981 Miss. LEXIS 1956 (Miss. 1981).

In order for one to be guilty of the crime of kidnapping, the victim must be unlawfully removed from a place where he has a right to be, to another place. *Aikerson v. State*, 274 So. 2d 124, 1973 Miss. LEXIS 1585 (Miss. 1973), overruled in part, *Conley v. State*, 790 So. 2d 773, 2001 Miss. LEXIS 100 (Miss. 2001).

Where a defendant intends to kidnap a child within the meaning of this section [Code 1942, § 2237], his ultimate motive in confining or depriving her of her liberty is immaterial. *McGuire v. State*, 231 Miss. 375, 95 So. 2d 537, 1957 Miss. LEXIS 522 (Miss. 1957).

Guardian cannot be convicted for seizing ward. *Hemphill v. State*, 127 Miss. 805, 90 So. 488, 1921 Miss. LEXIS 283 (Miss. 1921).

Father who by agreement surrenders minor child to wife, not guilty of kidnapp-

ping because he enticed child away from her. *State v. Powe*, 107 Miss. 770, 66 So. 207, 1914 Miss. LEXIS 142 (Miss. 1914).

17. Indictment.

A defendant convicted of kidnapping was improperly sentenced to life imprisonment under this section where it was impossible to ascertain from the indictment whether defendant had been indicted under this section or § 97-3-51, which carried a maximum punishment of ten years imprisonment; when the facts which constitute a criminal offense may fall under either of two statutes, or when there is a substantial doubt as to which of the two is to be applied, the case will be referred to the statute which imposes the lesser punishment. *White v. State*, 374 So. 2d 225, 1979 Miss. LEXIS 2348 (Miss. 1979).

An indictment charging that defendant did wilfully, feloniously and without lawful authority forceably seize and confine an individual without her consent and against her will, contrary to the provisions of Code 1942 § 2238, and contrary to the statute in such cases made and provided and against the peace and dignity of the state, did not charge the crime of kidnapping under either Code 1942 §§ 2237 or 2238. *Aikerson v. State*, 274 So. 2d 124, 1973 Miss. LEXIS 1585 (Miss. 1973), overruled in part, *Conley v. State*, 790 So. 2d 773, 2001 Miss. LEXIS 100 (Miss. 2001).

The state has the choice of indicting an alleged kidnapper under either Code 1942, § 2237 or § 2238. *Brooks v. State*, 236 So. 2d 751, 1970 Miss. LEXIS 1502 (Miss. 1970).

This section [Code 1942, § 2237] not only makes it a crime to forcibly seize and confine another, but it also makes it a crime to inveigle another and then kidnap such other person with the intent to cause him to be deprived of his liberty; and an indictment which charges that the victim was "forcibly inveigled" is sufficient. *Buckley v. State*, 223 So. 2d 524, 1969 Miss. LEXIS 1273 (Miss. 1969), limited, *Johnson v. State*, 477 So. 2d 196, 1985 Miss. LEXIS 2072 (Miss. 1985).

An indictment which in substance charged that the accused did unlawfully and feloniously make an assault upon the

victim and did forceably lay hold of her and unlawfully and forceably did seize, confine and kidnap her, without her consent, and against her will, with the intent to cause her to be deprived of her liberty was not duplicitous because the means of carrying out the crime of kidnapping charged involves an element which would constitute the crime of assault. *Bevel v. State*, 213 Miss. 208, 56 So. 2d 500, 1952 Miss. LEXIS 351 (Miss. 1952).

18. Jury question.

In a kidnapping prosecution, a defendant who contended that he took no part in the commission of the crime and was guilty of nothing more than a failure to prevent another from kidnapping, beating and robbing the victim, but who admitted that he was present at all times, and who, at the time of his arrest, was in possession of articles taken from the victim, was not entitled to a peremptory instruction, the question of his guilt being for the jury. *Hall v. State*, 220 So. 2d 279, 1969 Miss. LEXIS 1442 (Miss. 1969).

19. Evidence.

Evidence was sufficient to sustain conviction for attempted kidnapping where defendant had taken part in attempted kidnapping after failing to follow through with plan to rob grocery store, despite defendant's contention that he took no part in plan or effort to rob or kidnap grocery store customer. *Jenkins v. State*, 507 So. 2d 89, 1987 Miss. LEXIS 2505 (Miss. 1987).

Evidence that kidnapping defendant misled victim in asking victim to give defendant automobile ride to defendant's house and wound up on secluded country road, that defendant grabbed steering wheel and pulled automobile off road into secluded driveway barricaded by padlocked metal gate against victim's wishes, and that defendant struck victim on head and behind neck is sufficient for jury to find that victim was secretly confined against will, as required for conviction. *Haymond v. State*, 478 So. 2d 297, 1985 Miss. LEXIS 2269 (Miss. 1985).

In a prosecution for kidnaping, the evidence was sufficient to support the verdict of guilty where the victim testified that

the defendant had come to her home and, having induced her to enter her car by false representation, had forced her to drive to an unknown destination by his threat that he had a gun. *Ulmer v. State*, 406 So. 2d 828, 1981 Miss. LEXIS 2439 (Miss. 1981).

Undisputed showing that the defendant used some force and a great deal of persuasion and maneuvering to get a nine-year-old female child to go with him, and

persisted in his efforts to the extent of taking the child about two blocks in one direction from the place from where she had wanted to go, and then, when she had got away from him, he pursued her until she arrived at the door of the place where her mother was, was sufficient to sustain the charge of attempted kidnapping. *McGuire v. State*, 231 Miss. 375, 95 So. 2d 537, 1957 Miss. LEXIS 522 (Miss. 1957).

RESEARCH REFERENCES

ALR.

Seizure or detention for purpose of committing rape, robbery, or similar offense as constituting separate crime of kidnapping. 17 A.L.R.2d 1003.

Kidnapping by fraud or false pretenses. 95 A.L.R.2d 450.

Seizure or detention for purposes of committing rape, robbery, or similar offense as constituting separate crime of kidnapping. 43 A.L.R.3d 699.

Seizure of prison official by inmates as kidnapping. 59 A.L.R.3d 1306.

False imprisonment as included offense within charge of kidnapping. 68 A.L.R.3d 828.

Necessity and sufficiency of showing, in kidnapping prosecution, that detention was with intent to "secretly" confine victim. 98 A.L.R.3d 733.

Kidnapping or related offense by taking or removing of child by or under authority of parent or one in loco parentis. 20 A.L.R.4th 823.

Coercion, compulsion, or duress as defense to charge of kidnapping. 69 A.L.R.4th 1005.

Seizure or detention for purpose of committing rape, robbery, or other offense as constituting separate crime of kidnapping. 39 A.L.R.5th 283.

Presumption that kidnapped person has been transported in interstate or foreign commerce, under 18 USCS § 1201(b). 49 A.L.R. Fed. 936.

Am. Jur.

1 Am. Jur. 2d, Abduction and Kidnapping §§ 59-61.

2 Am. Jur. Trials, Investigating Particular Crimes § 67 (kidnapping).

4 Am. Jur. Proof of Facts 2d, Criminal Acts Committed under Duress, §§ 6 et seq. (proof of duress excusing commission of robbery and kidnapping).

CJS.

51 C.J.S., Kidnapping §§ 1-26.

Practice References.

Ronald L. Schoenberg, *Criminal Law Deskbook* (Matthew Bender).

§ 97-3-54. Human Trafficking Act; short title.

Sections 97-3-54 through 97-3-54.9 may be known and cited as the Mississippi Human Trafficking Act.

HISTORY: Laws, 2006, ch. 583, § 2; Laws, 2013, ch. 543, § 1, eff from and after July 1, 2013.

§ 97-3-54.1. Human Trafficking Act; prohibited conduct; penalty.

(1)(a) A person who coerces, recruits, entices, harbors, transports, pro-

vides or obtains by any means, or attempts to coerce, recruit, entice, harbor, transport, provide or obtain by any means, another person, intending or knowing that the person will be subjected to forced labor or services, or who benefits, whether financially or by receiving anything of value from participating in an enterprise that he knows or reasonably should have known has engaged in such acts, shall be guilty of the crime of human-trafficking.

(b) A person who knowingly purchases the forced labor or services of a trafficked person or who otherwise knowingly subjects, or attempts to subject, another person to forced labor or services or who benefits, whether financially or by receiving anything of value from participating in an enterprise that he knows or reasonably should have known has engaged in such acts, shall be guilty of the crime of procuring involuntary servitude.

(c) A person who knowingly subjects, or attempts to subject, or who recruits, entices, harbors, transports, provides or obtains by any means, or attempts to recruit, entice, harbor, transport, provide or obtain by any means, a minor, knowing that the minor will engage in commercial sexual activity, sexually explicit performance, or the production of sexually oriented material, or causes or attempts to cause a minor to engage in commercial sexual activity, sexually explicit performance, or the production of sexually oriented material, shall be guilty of procuring sexual servitude of a minor and shall be punished by commitment to the custody of the Department of Corrections for not less than twenty (20) years nor more than life in prison, or by a fine of not less than Fifty Thousand Dollars (\$50,000.00) nor more than Five Hundred Thousand Dollars (\$500,000.00), or both. It is not a defense in a prosecution under this section that a minor consented to engage in the commercial sexual activity, sexually explicit performance, or the production of sexually oriented material, or that the defendant reasonably believed that the minor was eighteen (18) years of age or older.

(2) If the victim is not a minor, a person who is convicted of an offense set forth in subsection (1)(a) or (b) of this section shall be committed to the custody of the Department of Corrections for not less than two (2) years nor more than twenty (20) years, or by a fine of not less than Ten Thousand Dollars (\$10,000.00) nor more than One Hundred Thousand Dollars (\$100,000.00), or both. If the victim of the offense is a minor, a person who is convicted of an offense set forth in subsection (1)(a) or (b) of this section shall be committed to the custody of the Department of Corrections for not less than twenty (20) years nor more than life in prison, or by a fine of not less than Twenty Thousand Dollars (\$20,000.00) nor more than One Hundred Thousand Dollars (\$100,000.00), or both.

(3) An enterprise may be prosecuted for an offense under this chapter if:

(a) An agent of the enterprise knowingly engages in conduct that constitutes an offense under this chapter while acting within the scope of employment and for the benefit of the entity.

(b) An employee of the enterprise engages in conduct that constitutes an offense under this chapter and the commission of the offense was part of a pattern of illegal activity for the benefit of the enterprise, which an agent

of the enterprise either knew was occurring or recklessly disregarded, and the agent failed to take effective action to stop the illegal activity.

(c) It is an affirmative defense to a prosecution of an enterprise that the enterprise had in place adequate procedures, including an effective complaint procedure, designed to prevent persons associated with the enterprise from engaging in the unlawful conduct and to promptly correct any violations of this chapter.

(d) The court may consider the severity of the enterprise's offense and order penalties, including: (i) a fine of not more than One Million Dollars (\$1,000,000.00); (ii) disgorgement of profit; and (iii) debarment from government contracts. Additionally, the court may order any of the relief provided in Section 97-3-54.7.

(4) In addition to the mandatory reporting provisions contained in Sections 43-21-353 and 97-5-51, any person who has reasonable cause to suspect that a minor under the age of eighteen (18) is a trafficked person shall immediately make a report of the suspected child abuse or neglect to the Department of Child Protection Services and to the Statewide Human Trafficking Coordinator. The Department of Child Protection Services or the Statewide Human Trafficking Coordinator, whichever is applicable, shall then immediately notify the law enforcement agency in the jurisdiction where the suspected child abuse, neglect or trafficking occurred as required in Section 43-21-353, and the department that received the report shall also commence an initial investigation into the suspected abuse or neglect as required in Section 43-21-353. The department that received such report shall provide an annual report to the Speaker of the Mississippi House of Representatives, the Lieutenant Governor, the Chairpersons of the House and Senate Judiciary Committees that includes the number of reports received, the number of cases screened in or out, the number of cases in which care and services were provided as a result of the report, and the type of care and services that were provided. A minor who has been identified as a victim of trafficking shall not be liable for criminal activity in violation of this section.

(5) It is an affirmative defense in a prosecution under this act that the defendant:

(a) Is a victim; and

(b) Committed the offense under a reasonable apprehension created by a person that, if the defendant did not commit the act, the person would inflict serious harm on the defendant, a member of the defendant's family, or a close associate.

HISTORY: Laws, 2006, ch. 583, § 3; Laws, 2013, ch. 543, § 2; Laws, 2016, ch. 362 § 3, eff from and after passage (approved Apr. 6, 2016); Laws, 2019, ch. 420, § 4, eff from and after July 1, 2019; Laws, 2019, ch. 459, § 1, eff from and after July 1, 2019.

Joint Legislative Committee Note — Section 4 of Chapter 420, Laws of 2019, effective July 1, 2019 (approved March 28, 2019), amended this section. Section 1 of Chapter 459, Laws of 2019, effective July 1, 2019 (approved April 16, 2019), also amended this section. As set out above, this section reflects the language of both

amendments pursuant to Section 1-1-109 which gives the Joint Legislative Committee on Compilation, Revision, and Publication of Legislation authority to integrate amendments so that all versions of the same code section enacted within the same legislative session may become effective. The Joint Committee on Compilation, Revision, and Publication of Legislation ratified the integration of these amendments as consistent with the legislative intent at the August 12, 2019, meeting of the Committee.

Editor's Notes — Section 97-3-54.4(a) provides that “this act,” referenced in this section, means the Mississippi Human Trafficking Act.

Amendment Notes — The first 2019 amendment (ch. 420), in (4), substituted “Department of Child Protection Services” for “Department of Human Services” twice, substituted “Sections 43-21-353 and 97-5-51” for “Section 97-5-51” in the first sentence, in the second sentence, inserted “or the Statewide Human Trafficking Coordinator, whichever is applicable,” inserted “or trafficking” and made a related change, and inserted “that received the report,” and added the next-to-last sentence.

The second 2019 amendment (ch. 459) substituted “twenty (20) years nor more than life in prison” for “five (5) nor more than thirty (30) years” in the first sentence of (1)(c) and the last sentence of (2); and substituted “Sections 43-21-353 and 97-5-51” for “Section 97-5-51” in the first sentence of (4).

Cross References — Human trafficking, as provided in this section, defined as crime of violence, see § 97-3-2.

§ 97-3-54.2. Human Trafficking Act; destruction, concealment, or confiscation of passport or other immigration document for purpose of preventing person's freedom of movement or ability to travel; penalties.

Anyone who knowingly destroys, conceals, removes, confiscates or possesses, or attempts to destroy, conceal, remove, confiscate or possess, any actual or purported passport or other immigration document, or any other actual or purported government identification document of any person to prevent or restrict, or attempt to prevent or restrict, without lawful authority, the person's liberty to move or travel in order to maintain the labor or services of that person, when the person is or has been a victim of a violation set out in Section 97-3-54.1, shall be punished by commitment to the custody of the Department of Corrections for not more than five (5) years.

HISTORY: Laws, 2006, ch. 583, § 4, eff from and after July 1, 2006.

§ 97-3-54.3. Human Trafficking Act; aiding, abetting, or conspiring to violate human trafficking provisions.

A person who knowingly aids, abets or conspires with one or more persons to violate the Mississippi Human Trafficking Act shall be considered a principal in the offense and shall be indicted and punished as such whether the principal has been previously convicted or not.

HISTORY: Laws, 2006, ch. 583, § 5; Laws, 2013, ch. 543, § 3, eff from and after July 1, 2013.

§ 97-3-54.4. Human Trafficking Act; definitions.

For the purposes of the Mississippi Human Trafficking Act the following

words and phrases shall have the meanings ascribed herein unless the context clearly requires otherwise:

(a) “Act” or “this act” means the Mississippi Human Trafficking Act.

(b) “Actor” means a person who violates any of the provisions of Sections 97-3-54 through 97-3-54.4.

(c) “Blackmail” means obtaining property or things of value of another by threatening to (i) inflict bodily injury on anyone; or (ii) commit any other criminal offense.

(d) “Coerce” or “coercion” means:

(i) Causing or threatening to cause bodily harm to any person, physically restraining or confining any person, or threatening to physically restrain or confine any person;

(ii) Exposing or threatening to expose any fact or information or disseminating or threatening to disseminate any fact or information that would tend to subject a person to criminal or immigration proceedings, hatred, contempt or ridicule;

(iii) Destroying, concealing, removing, confiscating or possessing any actual or purported passport or other immigration document, or any other actual or purported government identification document of any person;

(iv) Providing a controlled substance to a person for the purpose of compelling the person to engage in labor or sexual servitude against the person’s will;

(v) Causing or threatening to cause financial harm to any person or using financial control over any person;

(vi) Abusing or threatening to abuse a position of power, the law, or legal process;

(vii) Using blackmail;

(viii) Using an individual’s personal services as payment or satisfaction of a real or purported debt when: 1. the reasonable value of the services is not applied toward the liquidation of the debt; 2. the length of the services is not limited and the nature of the services is not defined; 3. the principal amount of the debt does not reasonably reflect the value of the items or services for which the debt is incurred; or 4. the individual is prevented from acquiring accurate and timely information about the disposition of the debt; or

(ix) Using any scheme, plan or pattern of conduct intended to cause any person to believe that, if the person did not perform the labor or services, that the person or another person would suffer serious harm or physical restraint.

(e) “Commercial sexual activity” means any sex act on account of which anything of value is given to, promised to, or received by any person.

(f) “Enterprise” means any individual, sole proprietorship, partnership, corporation, union or other legal entity, or any association or group of individuals associated in fact regardless of whether a legal entity has been formed pursuant to any state, federal or territorial law. It includes illicit as well as licit enterprises and governmental as well as other entities.

(g) “Financial harm” includes, but is not limited to, extortion as defined by Section 97-3-82, Mississippi Code of 1972, or violation of the usury law as defined by Title 75, Chapter 17, Mississippi Code of 1972.

(h) “Forced labor or services” means labor or services that are performed or provided by another person and are obtained or maintained through coercion.

(i) “Labor” means work of economic or financial value.

(j) “Maintain” means, in relation to labor or services, to secure continued performance thereof, regardless of any initial agreement on the part of the trafficked person to perform such labor or service.

(k) “Minor” means a person under the age of eighteen (18) years.

(l) “Obtain” means, in relation to labor or services, to secure performance thereof.

(m) “Pecuniary damages” means any of the following:

(i) The greater of the gross income or value to the defendant of the victim’s labor or services, including sexual services, not reduced by the expense the defendant incurred as a result of maintaining the victim, or the value of the victim’s labor or services calculated under the minimum wage and overtime provisions of the Fair Labor Standards Act, 29 USCS Section 201 et seq., whichever is higher;

(ii) If it is not possible or in the best interest of the victim to compute a value under subparagraph (i) of this paragraph (m), the equivalent of the value of the victim’s labor or services if the victim had provided labor or services that were subject to the minimum wage and overtime provisions of the Fair Labor Standards Act, 29 USCS 201 et seq.;

(iii) Costs and expenses incurred by the victim as a result of the offense for:

1. Medical services;
 2. Therapy or psychological counseling;
 3. Temporary housing;
 4. Transportation;
 5. Childcare;
 6. Physical and occupational therapy or rehabilitation;
 7. Funeral, interment, and burial services;
- reasonable attorney’s fees and other legal costs; and
8. Other expenses incurred by the victim.

(n) “Serious harm” means harm, whether physical or nonphysical, including psychological, economic or reputational, to an individual that would compel a reasonable person in similar circumstances as the individual to perform or continue to perform labor or services to avoid incurring the harm.

(o) “Services” means an ongoing relationship between a person and the actor in which the person performs activities under the supervision of or for the benefit of the actor or a third party and includes, without limitation, commercial sexual activity, sexually explicit performances, or the production of sexually explicit materials.

(p) “Sexually explicit performance” means a live or public act or show intended to arouse or satisfy the sexual desires or appeal to the prurient interests of patrons.

(q) “Trafficked person” means a person subjected to the practices prohibited by this act regardless of whether a perpetrator is identified, apprehended, prosecuted or convicted, and is a term used interchangeably with the terms “victim,” “victim of trafficking” and “trafficking victim.”

(r) “Venture” means any group of two (2) or more individuals associated in fact, whether or not a legal entity.

(s) “Sexually oriented material” shall have the meaning ascribed in Section 97-5-27, Mississippi Code of 1972.

HISTORY: Laws, 2006, ch. 583, § 6; Laws, 2013, ch. 543, § 4; Laws, 2016, ch. 362, § 4, eff from and after passage (approved Apr. 6, 2016).

§ 97-3-54.5. Human Trafficking Act; use of undercover operative in detection of offense permitted.

The fact that an undercover operative or law enforcement officer was involved in any manner in the detection and investigation of an offense under this act shall not constitute a defense to a prosecution under this act.

HISTORY: Laws, 2013, ch. 543, § 5, eff from and after July 1, 2013.

Editor’s Notes — Section 97-3-54.4(a) provides that “this act,” referenced in this section, means the Mississippi Human Trafficking Act.

§ 97-3-54.6. Human Trafficking Act; injunctive and other relief for victims of trafficking; confidentiality.

(1) Any circuit court may, after making due provision for the rights of trafficked persons, enjoin violations of the provisions of this act by issuing appropriate orders and judgments, including, but not limited to:

(a) Ordering any defendant to divest himself of any interest in any enterprise, including real property.

(b) Imposing reasonable restrictions upon the future activities or investments of any defendant, including, but not limited to, prohibiting any defendant from engaging in the same type of endeavor as the enterprise in which he was engaged in violation of the provisions of this act.

(c) Ordering the dissolution or reorganization of any enterprise.

(d) Ordering the suspension or revocation of a license or permit granted to any enterprise by any agency of the state.

(e) Ordering the forfeiture of the charter of a corporation organized under the laws of the state, or the revocation of a certificate authorizing a foreign corporation to conduct business within the state, upon finding that the board of directors or a managerial agent acting on behalf of the corporation in conducting the affairs of the corporation, has authorized or engaged in conduct in violation of this chapter and that, for the prevention

of future criminal activity, the public interest requires the charter of the corporation forfeited and the corporation dissolved or the certificate revoked.

(2) Notwithstanding any provisions to the contrary in Section 99-37-1 et seq., the court shall order restitution to the victim for any offense under this chapter. The order of restitution under this section shall direct the defendant to pay the victim, through the appropriate court mechanism, the full amount of the victim's pecuniary damages. For the purposes of determining restitution, the term "victim" means the individual harmed as a result of a crime under this chapter, including, in the case of a victim who is under eighteen (18) years of age, incompetent, incapacitated, or deceased, the legal guardian of the victim or a representative of the victim's estate, or another family member, or any other person appointed as suitable by the court, but in no event shall the defendant be named as such a representative or guardian. The court may order restitution even if the victim is absent from the jurisdiction or unavailable.

(3) Any person who is injured by reason of any violation of the provisions of this chapter shall have a cause of action against any person or enterprise convicted of engaging in activity in violation of this chapter for threefold the actual damages sustained and, when appropriate, punitive damages. The person shall also recover attorney's fees in the trial and appellate courts and reasonable costs of investigation and litigation.

(4) The application of one (1) civil remedy under any provision of this act shall not preclude the application of any other remedy, civil or criminal, under this act or any other provision of law. Civil remedies under this act are supplemental.

(5) At any time after a conviction under this act, the court in which the conviction was entered may, upon appropriate motion, vacate the conviction if the court finds the defendant's participation in the offense was the result of being a victim. Official documentation from a federal, state or local government agency as to the defendant's status as a victim at the time of the offense creates a presumption that the defendant's participation in the offense was a result of being a victim, but official documentation is not required to grant a motion under this subsection.

(6) In a prosecution or civil action for damages for an offense under this act in which there is evidence that the alleged victim was subjected to sexual servitude, reputation or opinion evidence of past sexual behavior of the alleged victim is not admissible, unless admitted in accordance with the Mississippi Rules of Evidence.

(7) In any investigation or prosecution for an offense under this act, the responsible law enforcement agency or prosecutor's office are required to take all reasonable efforts to keep the identity of the victim and the victim's family confidential by ensuring that the names and identifying information of those individuals are not disclosed to the public.

HISTORY: Laws, 2013, ch. 543, § 6, eff from and after July 1, 2013.

Editor's Notes — Section 97-3-54.4(a) provides that "this act," referenced in this section, means the Mississippi Human Trafficking Act.

§ 97-3-54.7. Human Trafficking Act; forfeiture of assets and disposition of proceeds.

(1) In addition to any other civil or criminal penalties provided by law, any property used in the commission of a violation of this act shall be forfeited as provided herein.

(a) The following property shall be subject to forfeiture if used or intended for use as an instrumentality in or used in furtherance of a violation of this act:

- (i) Conveyances, including aircraft, vehicles or vessels;
- (ii) Books, records, telecommunication equipment, or computers;
- (iii) Money or weapons;
- (iv) Everything of value furnished, or intended to be furnished, in exchange for an act in violation and all proceeds traceable to the exchange;
- (v) Negotiable instruments and securities;
- (vi) Any property, real or personal, directly or indirectly acquired or received in a violation or as an inducement to violate;
- (vii) Any property traceable to proceeds from a violation; and
- (viii) Any real property, including any right, title and interest in the whole of or any part of any lot or tract of land used in furtherance of a violation of this act.

(b)(i) No property used by any person as a common carrier in the transaction of business as a common carrier is subject to forfeiture under this section unless it appears that the owner or other person in charge of the property is a consenting party or privy to a violation of this act;

(ii) No property is subject to forfeiture under this section by reason of any act or omission proved by the owner thereof to have been committed or omitted without his knowledge or consent; if the confiscating authority has reason to believe that the property is a leased or rented property, then the confiscating authority shall notify the owner of the property within five (5) days of the confiscation or within five (5) days of forming reason to believe that the property is a leased or rented property;

(iii) Forfeiture of a property encumbered by a bona fide security interest is subject to the interest of the secured party if he neither had knowledge of nor consented to the act or omission.

(2) No property shall be forfeited under the provisions of this section, to the extent of the interest of an owner, by reason of any act or omission established by him to have been committed or omitted without his knowledge or consent.

(3) Seizure without process may be made if the seizure is incident to an arrest or a search under a search warrant or an inspection under an administrative inspection warrant.

(4)(a) When any property is seized under this section, proceedings shall be instituted within a reasonable period of time from the date of seizure or the subject property shall be immediately returned to the party from whom seized.

(b) A petition for forfeiture shall be filed by the Attorney General or a district attorney in the name of the State of Mississippi, the county, or the municipality, and may be filed in the county in which the seizure is made, the county in which the criminal prosecution is brought, or the county in which the owner of the seized property is found. Forfeiture proceedings may be brought in the circuit court or the county court if a county court exists in the county and the value of the seized property is within the jurisdictional limits of the county court as set forth in Section 9-9-21. A copy of the petition shall be served upon the following persons by service of process in the same manner as in civil cases:

(i) The owner of the property, if address is known;

(ii) Any secured party who has registered his lien or filed a financing statement as provided by law, if the identity of the secured party can be ascertained by the entity filing the petition by making a good faith effort to ascertain the identity of the secured party;

(iii) Any other bona fide lienholder or secured party or other person holding an interest in the property in the nature of a security interest of whom the seizing law enforcement agency has actual knowledge; and

(iv) Any person in possession of property subject to forfeiture at the time that it was seized.

(5) If the property is a motor vehicle susceptible of titling under the Mississippi Motor Vehicle Title Law and if there is any reasonable cause to believe that the vehicle has been titled, inquiry of the Department of Revenue shall be made as to what the records of the Department of Revenue show as to who is the record owner of the vehicle and who, if anyone, holds any lien or security interest that affects the vehicle.

(6) If the property is a motor vehicle and is not titled in the State of Mississippi, then an attempt shall be made to ascertain the name and address of the person in whose name the vehicle is licensed, and if the vehicle is licensed in a state which has in effect a certificate of title law, inquiry of the appropriate agency of that state shall be made as to what the records of the agency show as to who is the record owner of the vehicle and who, if anyone, holds any lien, security interest or other instrument in the nature of a security device that affects the vehicle.

(7) If the property is of a nature that a financing statement is required by the laws of this state to be filed to perfect a security interest affecting the property and if there is any reasonable cause to believe that a financing statement covering the security interest has been filed under the laws of this state, inquiry of the appropriate office designated in Section 75-9-501, shall be made as to what the records show as to who is the record owner of the property and who, if anyone, has filed a financing statement affecting the property.

(8) If the property is an aircraft or part thereof and if there is any reasonable cause to believe that an instrument in the nature of a security device affects the property, inquiry of the Mississippi Department of Transportation shall be made as to what the records of the Federal Aviation Administration show as to who is the record owner of the property and who, if anyone,

holds an instrument in the nature of a security device which affects the property.

(9) If the answer to an inquiry states that the record owner of the property is any person other than the person who was in possession of it when it was seized, or states that any person holds any lien, encumbrance, security interest, other interest in the nature of a security interest, mortgage or deed of trust that affects the property, the record owner and also any lienholder, secured party, other person who holds an interest in the property in the nature of a security interest, or holder of an encumbrance, mortgage or deed of trust that affects the property is to be named in the petition of forfeiture and is to be served with process in the same manner as in civil cases.

(10) If the owner of the property cannot be found and served with a copy of the petition of forfeiture, or if no person was in possession of the property subject to forfeiture at the time that it was seized and the owner of the property is unknown, there shall be filed with the clerk of the court in which the proceeding is pending an affidavit to such effect, whereupon the clerk of the court shall publish notice of the hearing addressed to "the Unknown Owner of _____," filling in the blank space with a reasonably detailed description of the property subject to forfeiture. Service by publication shall contain the other requisites prescribed in Section 11-33-41, and shall be served as provided in Section 11-33-37, for publication of notice for attachments at law.

(11) No proceedings instituted pursuant to the provisions of this section shall proceed to hearing unless the judge conducting the hearing is satisfied that this section has been complied with. Any answer received from an inquiry required by this section shall be introduced into evidence at the hearing.

(12)(a) An owner of a property that has been seized shall file an answer within thirty (30) days after the completion of service of process. If an answer is not filed, the court shall hear evidence that the property is subject to forfeiture and forfeit the property to the seizing law enforcement agency. If an answer is filed, a time for hearing on forfeiture shall be set within thirty (30) days of filing the answer or at the succeeding term of court if court would not be in session within thirty (30) days after filing the answer. The court may postpone the forfeiture hearing to a date past the time any criminal action is pending against the owner upon request of any party.

(b) If the owner of the property has filed an answer denying that the property is subject to forfeiture, then the burden is on the petitioner to prove that the property is subject to forfeiture. However, if an answer has not been filed by the owner of the property, the petition for forfeiture may be introduced into evidence and is prima facie evidence that the property is subject to forfeiture. The burden of proof placed upon the petitioner in regard to property forfeited under the provisions of this chapter shall be by a preponderance of the evidence.

(c) At the hearing any claimant of any right, title or interest in the property may prove his lien, encumbrance, security interest, other interest in the nature of a security interest, mortgage or deed of trust to be bona fide and created without knowledge or consent that the property was to be used so as to cause the property to be subject to forfeiture.

(d) If it is found that the property is subject to forfeiture, then the judge shall forfeit the property. However, if proof at the hearing discloses that the interest of any bona fide lienholder, secured party, other person holding an interest in the property in the nature of a security interest, or any holder of a bona fide encumbrance, mortgage or deed of trust is greater than or equal to the present value of the property, the court shall order the property released to him. If the interest is less than the present value of the property and if the proof shows that the property is subject to forfeiture, the court shall order the property forfeited.

(13) Unless otherwise provided herein, all personal property which is forfeited under this section shall be liquidated and, after deduction of court costs and the expense of liquidation, the proceeds shall be divided as follows:

(a) If only one (1) law enforcement agency participates in the underlying criminal case out of which the forfeiture arises, fifty percent (50%) of the proceeds shall be forwarded to the State Treasurer and deposited in the Relief for Victims of Human Trafficking Fund, and fifty percent (50%) shall be deposited and credited to the budget of the participating law enforcement agency.

(b) If more than one (1) law enforcement agency participates in the underlying criminal case out of which the forfeiture arises, fifty percent (50%) of the proceeds shall be forwarded to the State Treasurer and deposited in the Relief for Victims of Human Trafficking Fund, twenty-five percent (25%) of the proceeds shall be deposited and credited to the budget of the law enforcement agency whose officers initiated the criminal case and twenty-five percent (25%) shall be divided equitably between or among the other participating law enforcement agencies, and shall be deposited and credited to the budgets of the participating law enforcement agencies. In the event that the other participating law enforcement agencies cannot agree on the division of their twenty-five percent (25%), a petition shall be filed by any one of them in the court in which the civil forfeiture case is brought and the court shall make an equitable division.

(14) All money forfeited under this section shall be divided, deposited and credited in the same manner as provided in subsection (13).

(15) All real estate forfeited under the provisions of this section shall be sold to the highest and best bidder at a public auction for cash, the auction to be conducted by the chief law enforcement officer of the initiating law enforcement agency, or his designee, at such place, on such notice and in accordance with the same procedure, as far as practicable, as is required in the case of sales of land under execution at law. The proceeds of the sale shall first be applied to the cost and expense in administering and conducting the sale, then to the satisfaction of all mortgages, deeds of trust, liens and encumbrances of record on the property. The remaining proceeds shall be divided, forwarded and deposited in the same manner as provided in subsection (13).

(16)(a) Any county or municipal law enforcement agency may maintain, repair, use and operate for official purposes all property described in subsection (1)(a)(i) of this section that has been forfeited to the agency if it is

free from any interest of a bona fide lienholder, secured party or other party who holds an interest in the property in the nature of a security interest. The county or municipal law enforcement agency may purchase the interest of a bona fide lienholder, secured party or other party who holds an interest so that the property can be released for its use. If the property is a motor vehicle susceptible of titling under the Mississippi Motor Vehicle Title Law, the law enforcement agency shall be deemed to be the purchaser, and the certificate of title shall be issued to it as required by subsection (9) of this section.

(b)(i) If a vehicle is forfeited to or transferred to a sheriff's department, then the sheriff may transfer the vehicle to the county for official or governmental use as the board of supervisors may direct.

(ii) If a vehicle is forfeited to or transferred to a police department, then the police chief may transfer the vehicle to the municipality for official or governmental use as the governing authority of the municipality may direct.

(c) If a motor vehicle forfeited to a county or municipal law enforcement agency becomes obsolete or is no longer needed for official or governmental purposes, it may be disposed of in accordance with Section 19-7-5 or in the manner provided by law for disposing of municipal property.

(17) The forfeiture procedure set forth in this section is the sole remedy of any claimant, and no court shall have jurisdiction to interfere therewith by replevin, injunction, supersedeas or in any other manner.

HISTORY: Laws, 2013, ch. 543, § 7, eff from and after July 1, 2013.

Editor's Notes — Section 97-3-54.4(a) provides that "this act," referenced in this section, means the Mississippi Human Trafficking Act.

§ 97-3-54.8. Relief for Victims of Human Trafficking Fund.

(1) There is hereby created in the State Treasury a special fund to be known as the "Relief for Victims of Human Trafficking Fund." The fund shall be a continuing fund, not subject to fiscal-year limitations, and shall consist of:

- (a) Monies appropriated by the Legislature;
- (b) The interest accruing to the fund;
- (c) Donations or grant funds received; and
- (d) Monies received from such other sources as may be provided by law.

(2) The monies in the Relief for Victims of Human Trafficking Fund shall be used by the Mississippi Bureau of Investigation of the Department of Public Safety solely for the administration of programs designed to assist victims of human trafficking, to conduct training on human trafficking to law enforcement, court personnel, attorneys, and nongovernmental service providers, and to support the duties of the Statewide Human Trafficking Coordinator as set forth in this act and as otherwise provided by law.

(3) From and after July 1, 2016, the expenses of the Relief for Victims of Human Trafficking Fund program shall be defrayed by appropriation from the State General Fund and all user charges and fees authorized under this

section shall be deposited into the State General Fund as authorized by law and as determined by the State Fiscal Officer.

(4) From and after July 1, 2016, no state agency shall charge another state agency a fee, assessment, rent or other charge for services or resources received by authority of this section.

HISTORY: Laws, 2013, ch. 543, § 8; Laws, 2017, 1st Ex Sess, ch. 7, § 41, eff from and after passage (approved June 23, 2017); Laws, 2019, ch. 420, § 11, eff from and after July 1, 2019.

Editor's Notes — Section 97-3-54.4(a) provides that "this act," referenced in this section, means the Mississippi Human Trafficking Act.

Amendment Notes — The 2019 amendment, in (2), substituted "Mississippi Bureau of Investigation of the Department of Public Safety" for "Mississippi Attorney General's office," and added "and as otherwise provided by law" at the end.

§ 97-3-54.9. Statewide Human Trafficking Coordinator; duties.

(1) There is created the position of statewide human trafficking coordinator within the Mississippi Bureau of Investigation of the Department of Public Safety office. The duties of the coordinator shall be as follows:

- (a) Coordinate the implementation of this act;
- (b) Evaluate state efforts to combat human trafficking;
- (c) Collect data on human trafficking activity within the state on an ongoing basis, including types of activities reported, efforts to combat human trafficking, and impact on victims and on the state;
- (d) Exclude from publicly released portions of the data collected under subsection (1)(c) the identity of any victim and the victim's family;
- (e) Promote public awareness about human trafficking, remedies and services for victims, and national hotline information;
- (f) Create and maintain a website to publicize the coordinator's work;
- (g) Submit to the Legislature an annual report of its evaluation under subsection (1)(b) and any other annual report required by law, including any recommendations, and summary of data collected under subsection (1)(c) and any other data otherwise required by law to be collected by the coordinator;
- (h) Develop and implement rules and regulations pertaining to the use of the Relief for Victims of Human Trafficking Fund to support services for victims of human trafficking in Mississippi;
- (i) Assist in the creation and operations of local human trafficking task forces or working groups around the state, including serving on a task force or a multidisciplinary child protection team;
- (j) Conduct other activities, including, but not limited to, applying for grants to enhance investigation and prosecution of trafficking offenses or to improve victim services to combat human trafficking within this state which are appropriate; and
- (k) Perform any other duties specifically required by law for the coordinator.

(2) The coordinator shall be authorized to seek input and assistance from state agencies, nongovernmental agencies, service providers and other individuals in the performance of the foregoing duties.

(3) Each state agency, board and commission shall be required to fully cooperate with the coordinator in the performance of the duties of that position.

(4) Every investigation of an offense under this chapter shall be reported to the coordinator by the initiating law enforcement agency pursuant to guidelines established by the coordinator.

(5) Notwithstanding the provisions of Section 43-21-261, disclosure by any state agency, nongovernmental agency, service provider or local or state law enforcement agency of nonidentifying information regarding a minor victim to the coordinator for the purposes of evaluating and collecting data regarding trafficking offenses in the state is specifically authorized.

HISTORY: Laws, 2013, ch. 543, § 9, eff from and after July 1, 2013; Laws, 2019, ch. 420, § 12, eff from and after July 1, 2019.

Editor's Notes — Section 97-3-54.4(a) provides that “this act,” referenced in this section, means the Mississippi Human Trafficking Act.

Amendment Notes — The 2019 amendment, in (1), substituted “Mississippi Bureau of Investigation of the Department of Public Safety” for “Mississippi Attorney General’s office” in the introductory paragraph, rewrote (g), which read: “Submit to the Legislature an annual report of its evaluation under subsection (1)(b), including any recommendations, and summary of data collected under subsection (1)(c),” added “or a multidisciplinary child protection team” at the end of (i), and added (k) and made a related change.

§ 97-3-54.10. Victims of Human Trafficking and Commercial Sexual Exploitation Fund; authorization to establish program to fund certain victim service providers for victims of human trafficking or commercial sexual exploitation.

The Office of the Attorney General is authorized to establish a program to fund victim service providers that offer shelter, counseling, medical needs, transitional housing and other related services to victims of human trafficking and victims of commercial sexual exploitation at no charge to the victim. The program shall be funded from monies in the “Victims of Human Trafficking and Commercial Sexual Exploitation Fund.” The Office of the Attorney General, shall have the authority to promulgate the administrative rules that are necessary and proper to further carry out the purposes of Sections 97-3-54.10 through 97-3-54.13.

HISTORY: Laws, 2020, ch. 493, § 1, eff from and after passage (approved July 8, 2020).

§ 97-3-54.11. Victims of Human Trafficking and Commercial Sexual Exploitation Fund; creation, funding, distribution; convening of committee to develop strategic plan to coordinate state's response to victims; member terms.

(1) There is created in the State Treasury a special fund to be known as the "Victims of Human Trafficking and Commercial Sexual Exploitation Fund." The administration and regulation of the fund shall be vested in the Office of the Attorney General, and shall consist of:

- (a) Monies appropriated by the Legislature;
- (b) The interest accruing to the fund;
- (c) Monies received under the provisions of Section 99-19-75;
- (d) Monies received from the federal government;
- (e) Donations to the fund;
- (f) Assessments collected pursuant to Section 83-39-31;

(g) All other monies received by the state from every source for the support of shelters for victims of human trafficking and commercial sexual exploitation; and

(h) Monies received from such other sources as may be provided by law.

(2) The monies in the fund shall be distributed by the Office of the Attorney General, upon appropriation by the Legislature, to fund and assist human trafficking shelters, commercial sexual exploitation shelters and victim service providers under the provisions of Sections 97-3-54.10 through 97-3-54.13. Not more than ten percent (10%) of the monies from the fund may be used for administrative expenses and other expenses related to carrying out the provisions of Sections 97-3-54.10 through 97-3-54.13; however, the total amount used for administrative and related expenses during a state fiscal year shall not exceed One Hundred Thousand Dollars (\$100,000.00).

(3) Within six (6) months of July 9, 2020, the Office of the Attorney General shall convene a committee comprised of persons described in this subsection (3) to develop a strategic plan to coordinate the state's response to victims of human trafficking and commercial sexual exploitation, to include the administration and disbursement of funds for the support and assistance of service providers.

The committee members shall serve two (2) year terms. The committee shall consist of seven (7) members, who shall be appointed as follows:

- (i) One (1) person to be appointed by the Governor;
- (ii) One (1) person to be appointed by the Lieutenant Governor;
- (iii) One (1) person to be appointed by the Speaker of the House;
- (iv) One (1) person to be appointed by the Attorney General;
- (v) One (1) person to be appointed by the Commissioner of the Department of Public Safety;
- (vi) One (1) person to be appointed by the board of a victim services provider; and
- (vii) One (1) person to be appointed by the Commissioner of the Department of Child Protection Services.

(4) By January 5 of each year, the Office of the Attorney General shall provide an itemized financial report to the Legislature and the State Auditor of all expenditures, statistical data regarding services that has provided, and a report of all service activity with geographical description.

(5) Nothing in Sections 97-3-54.10 through 97-3-54.13 shall be construed to limit the ability of a human trafficking shelter, commercial sexual exploitation shelter or victim services provider from soliciting private donations or community support. Any funds raised by a shelter or program described in Sections 97-3-54.10 through 97-3-54.13 from private donations or community support shall not be subject to the requirements described in Sections 97-3-54.10 through 97-3-54.13.

HISTORY: Laws, 2020, ch. 493, § 2, eff from and after July 8, 2020.

§ 97-3-54.12. Victims of Human Trafficking and Commercial Sexual Exploitation Fund; requirements shelters must meet to qualify for funds; local contributions.

(1) To qualify for funds under the program authorized in Section 97-3-54.10, a shelter must meet all of the following requirements:

(a) Be incorporated in the state or recognized by the Secretary of State as a private or public nonprofit corporation. Such corporation must have a board of directors and/or an advisory committee that represents the racial, ethnic and socio-economic diversity of the area to be served, including, if possible, at least one (1) person who is or has been a victim of human trafficking and commercial sexual exploitation; and

(b) Have designed and developed a program to provide all of the following services to victims of human trafficking and commercial sexual exploitation and their children, if applicable:

(i) Shelter on a twenty-four (24) hours a day, seven (7) days a week basis;

(ii) A twenty-four (24) hours, seven (7) days a week crisis line for calls;

(iii) Temporary housing and food facilities;

(iv) Referrals to existing services in the community and follow-up on the outcome of the referrals, including, but not limited to, referrals for medical care, legal assistance and alcohol and drug treatment;

(v) Information regarding reeducation, trauma-informed therapy, job counseling, and training programs, housing referrals and other available social services; and

(vi) An available licensed therapist on a twenty-four (24) hours a day basis.

(c) Have established procedures for twenty-four-hour a day, seven (7) days a week admission of victims of human trafficking or commercial sexual exploitation who may seek admission to these shelters on a voluntary basis.

(d) In addition to the above requirements, all shelters and victim service providers, receiving funding under Sections 97-3-54.10 through

97-3-54.13 shall comply with minimum guidelines for services developed by the Office of the Attorney General, including, but not limited to:

- (i) Provision of victim-centered, trauma-informed and culturally and linguistically appropriate care;
- (ii) Utilization of evidence-based interventions;
- (iii) Adequate safety and security for staff and clients;
- (iv) Mandatory training for staff and volunteers;
- (v) Adherence to ethical and professional standards;
- (vi) Strict adherence to confidentiality;
- (vii) Nondiscrimination;
- (viii) Collaboration with other nongovernmental and governmental agencies; and
- (ix) Maintenance of any required licensure and certification of staff and facility as required by the Department of Mental Health, the Department of Health, the Department of Child Protection Services or any other regulatory body.

(2) No human trafficking or commercial sexual exploitation shelter shall qualify for funds under Sections 97-3-54.10 through 97-3-54.13 if it discriminates in its admissions or provision of services on the basis of race, religion, color, age, disability, marital status, national origin or ancestry.

(3) Any human trafficking shelter, commercial sexual exploitation shelter or victim service provider receiving funds under Sections 97-3-54.10 through 97-3-54.13 must show receipt of local funds in an amount not less than fifteen percent (15%). The local contribution may include in-kind contributions.

(4) A human trafficking shelter, commercial sexual exploitation shelter or victim service provider receiving funds under Sections 97-3-54.10 through 97-3-54.13 shall not be prohibited from accepting gifts, trusts, bequests, grants, endowments, federal funds, other special source funds or transfers of property of any kind for the support of that shelter program.

(5) Each human trafficking shelter, commercial sexual exploitation shelter or victim service provider receiving funds under Sections 97-3-54.10 through 97-3-54.13 shall:

- (a) Perform background checks and maintain copies of such for each employee or volunteer; and
- (b) Require employees and volunteers to maintain the confidentiality of any information that would identify individuals served by the shelter or victim service provider.

HISTORY: Laws, 2020, ch. 493, § 3, eff from and after July 8, 2020.

§ 97-3-54.13. Victims of Human Trafficking and Commercial Sexual Exploitation Fund; confidentiality of information identifying victims; disclosure of physical location of shelter to public or private agency.

(1) Any employee, contractor, volunteer or agent of a human trafficking or commercial sexual exploitation shelter receiving funds under Sections 97-3-

54.10 through 97-3-54.13, or of any other entity in possession of information which would tend to identify a victim of human trafficking and commercial sexual exploitation, shall comply and be held liable as provided in Section 93-21-125.

(2) A resident, employee, contractor, volunteer or agent of a human trafficking shelter, commercial sexual exploitation shelter or victim services provider receiving funds under Sections 97-3-54.10 through 97-3-54.13 shall not be required to disclose the street address or physical location of that shelter to any public or private agency. In all cases where the provision of a physical address is required, a post office box address for the human trafficking and commercial sexual exploitation shelter shall be deemed sufficient.

HISTORY: Laws, 2020, ch. 493, § 4, eff from and after passage (approved July 8, 2020).

§ 97-3-55. Libel; penalty.

Any person who shall be convicted of writing or publishing any libel, shall be fined in such sum or imprisoned in the county jail for such term as the court, in its discretion, may adjudge, having regard to the nature and enormity of the offense, or be punished by both such fine and imprisonment.

HISTORY: Codes, Hutchinson's 1848, ch. 65, art. 2 (61); 1857, ch 64, art. 199; 1871, § 2706; 1880, § 2195; 1892, § 1197; 1906, § 1275; Hemingway's 1917, § 1007; 1930, § 1036; 1942, § 2268.

Cross References — Constitutional provision that truth may be given in evidence, see Miss Const Art. 3, § 13.

Libel and slander, see § 95-1-1 et seq.

Posting or publishing another for not fighting a duel, see § 97-39-7.

Requisites of indictment in libel cases, see § 99-7-33.

JUDICIAL DECISIONS

1. In general.

Where the Mississippi criminal libel statute dealt merely with punishment and did not define the crime of libel, and where there had been no judicial definition of the crime since the United States Supreme Court declared that the First Amendment

is applicable to the states by virtue of the Fourteenth Amendment, the elements of the crime were so uncertain and indefinite, that it would not be enforced as a penal offense. *Boydston v. State*, 249 So. 2d 411, 1971 Miss. LEXIS 1165 (Miss. 1971).

RESEARCH REFERENCES

ALR.

Validity of criminal defamation statutes. 68 A.L.R.4th 1014.

Libel and slander: Charging one with breach or nonperformance of contract. 45 A.L.R.5th 739.

Defamation: Publication of letter to edi-

tor in newspaper as actionable. 54 A.L.R.5th 443.

Am. Jur.

50 Am. Jur. 2d, Libel and Slander §§ 501, 502.

CJS.

53 C.J.S., Libel and Slander
Injurious Falsehood §§ 16 et seq.

Practice References.

Ronald L. Schoenberg, Criminal Law
Deskbook (Matthew Bender).

§ 97-3-57. Libel; truth as defense.

In every criminal prosecution for libel it shall be lawful for the defendant, upon the trial, to give in evidence the truth of the matter written or published, and if it shall appear to the jury that the matter charged as libelous is true, and was published with good motives and for justifiable ends, the defendant shall be acquitted.

HISTORY: Codes, Hutchinson's 1848, ch. 64, art. 2 (60); 1857, ch. 64, art. 200; 1871, § 2707; 1880, § 2916; 1892, § 1198; 1906, § 1276; Hemingway's 1917, § 1008; 1930, § 1037; 1942, § 2269.

Cross References — Constitutional provision that truth may be given in evidence, see Miss Const Art. 3, § 13.

Libel and slander, see § 95-1-1 et seq.

Posting or publishing another for not fighting a duel, see § 97-39-7.

Requisites of indictment in libel cases, see § 99-7-33.

JUDICIAL DECISIONS**1. In general.**

False communication addressed to general public, imputing criminal offense or moral delinquency to a public officer in discharge of his duty, not privileged

though made in good faith and on probable cause; motive being immaterial. *Oakes v. State*, 98 Miss. 80, 54 So. 79, 1910 Miss. LEXIS 103 (Miss. 1910).

RESEARCH REFERENCES**ALR.**

Joinder in defamation action, of denial and plea of truth of statement. 21 A.L.R.2d 813.

Validity of criminal defamation statutes. 68 A.L.R.4th 1014.

Libel and slander: Charging one with breach or nonperformance of contract. 45 A.L.R.5th 739.

Defamation: Publication of letter to editor in newspaper as actionable. 54 A.L.R.5th 443.

Am. Jur.

50 Am. Jur. 2d, Libel and Slander §§ 518 et seq.

CJS.

53 C.J.S., Libel and Slander: Injurious Falsehood §§ 16 et seq.

Law Reviews.

Comment, Ferguson v. Watkins: The Vortex Within Mississippi Defamation Law. 55 Miss. L. J. 619, September, 1985.

Practice References.

Ronald L. Schoenberg, Criminal Law Deskbook (Matthew Bender).

§ 97-3-59. Mayhem.

Every person who, from premeditated design or with intent to kill or commit any felony, shall mutilate, disfigure, disable or destroy the tongue, eye,

lip, nose, or any other limb or member of any person, shall be guilty of mayhem, and, on conviction thereof, shall be punished by imprisonment in the penitentiary not more than seven years or in the county jail not less than six months.

HISTORY: Codes, Hutchinson's 1848, ch. 64, art. 12, Title 3 (26); 1857, ch. 64, art. 203; 1871, § 2710; 1880, § 2920; 1892, § 1210; 1906, § 1288; Hemingway's 1917, § 1020; 1930, § 1051; 1942, § 2283.

Cross References — Assault and battery, see § 97-3-7.

JUDICIAL DECISIONS

1. In general.

In prosecution for aggravated assault, defendant is entitled to a lesser included offense jury instruction for mayhem as long as there is some proof that shows him to be innocent of aggravated assault, but at same time only guilty of mayhem. *Hoops v. State*, 681 So. 2d 521, 1996 Miss. LEXIS 433 (Miss. 1996).

Defendant was not entitled to instruction on mayhem, as lesser included offense of aggravated assault, since same proof that established aggravated assault also established mayhem. *Hoops v. State*, 681 So. 2d 521, 1996 Miss. LEXIS 433 (Miss. 1996).

Where the defendant was on trial

charged with violation of this section [Code 1942, § 2283], an instruction for the prosecution which used the words "deliberate design" rather than the statutory words, "premeditated design", did not constitute error for deliberate is a synonym for premeditated. *Emily v. State*, 191 So. 2d 925, 1966 Miss. LEXIS 1234 (Miss. 1966).

Evidence justified the jury in finding that defendant's action in striking the victim in the face with a broken Coke bottle, cutting his nose and destroying one eye, was an act done from a premeditated design to mutilate and disfigure his victim. *Emily v. State*, 191 So. 2d 925, 1966 Miss. LEXIS 1234 (Miss. 1966).

RESEARCH REFERENCES

ALR.

Consent as defense to charge of mayhem. 86 A.L.R.2d 268.

Am. Jur.

53 Am. Jur. 2d, Mayhem and Related Offenses §§ 1 et seq.

CJS.

56 C.J.S., Mayhem §§ 1-3.

§ 97-3-61. Poisoning with intent to kill or injure.

Every person who shall mingle any poison with any food, drink, or medicine with intent to kill or injure any human being, or who shall wilfully poison any well, spring, or reservoir of water, shall, upon conviction, be punished by imprisonment in the penitentiary not exceeding ten years, or in the county jail not exceeding one year, or by fine not exceeding one thousand dollars, or both.

HISTORY: Codes, Hutchinson's 1848, ch. 64, art. 12, Title 3 (35); 1857, ch. 64, art. 214; 1871, § 2670; 1880, § 2937; 1892, § 1255; 1906, § 1331; Hemingway's 1917, § 1064; 1930, § 1095; 1942, § 2328.

Cross References — Poisoning, as provided in this section, defined as crime of violence, see § 97-3-2.

Poisoning person with intent to kill where death does not ensue, see § 97-3-63.

Poisoning animals, see § 97-41-17.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Indictment.

1. In general.

Under this section [Code 1942, § 2328] the corpus delicti is the mingling of the poison with the food, drink or medicine. *Stanley v. State*, 82 Miss. 498, 34 So. 360, 1903 Miss. LEXIS 171 (Miss. 1903).

It is essential under this section [Code 1942, § 2328] to charge that the poison was mingled with the intent maliciously to kill. *Taylor v. State*, 74 Miss. 544, 21 So. 129, 1896 Miss. LEXIS 150 (Miss. 1896).

2. Indictment.

Any duplicity in the indictment, as

charging two offenses in the same count, was cured by the judgment of conviction. *Randle v. State*, 105 Miss. 561, 62 So. 428, 1913 Miss. LEXIS 229 (Miss. 1913).

Indictment charging mingling of carbolic acid with whiskey with intent to kill and injure a certain person, not demurrable as charging two distinct offenses. *State v. Clark*, 97 Miss. 806, 52 So. 691, 1910 Miss. LEXIS 261 (Miss. 1910).

Unnecessary for indictment to charge to whom poison belonged or substance with which mixed, or that it was in possession of person for whom intended, or that such person was about or intended to drink same; corpus delicti consists of mingling poison with food, drink or medicine. *State v. Clark*, 97 Miss. 806, 52 So. 691, 1910 Miss. LEXIS 261 (Miss. 1910).

RESEARCH REFERENCES

Am. Jur.

40A Am. Jur. 2d, Homicide § 434.

30 Am. Jur. Proof of Facts 2d 1, Foreign Substance in Food or Beverage.

31 Am. Jur. Proof of Facts 2d 81, Food Poisoning.

2 Am. Jur. Trials, Investigating Particular Crimes §§ 54-56 (homicide by poisoning).

§ 97-3-63. Poisoning with intent to kill; where death does not ensue.

Every person who shall be convicted of having administered, or having caused or procured to be administered, any poison to any human being with intent to kill such human being, whereof death shall not ensue, shall be punished by imprisonment in the penitentiary for a term not less than ten years.

HISTORY: Codes, Hutchinson's 1848, ch. 64, art. 12, Title 3 (34); 1857, ch 64, art. 213, 1871; § 2669; 1880, § 2936; 1892, § 1254; 1906, § 1330; Hemingway's 1917, § 1063; 1930, § 1094; 1942, § 2327.

Cross References — Poisoning food or drink, generally, see § 97-3-61.
Poisoning animals, see § 97-41-17.

JUDICIAL DECISIONS

1. In general.

Any duplicity in an indictment for violating this provision, as charging two offenses in the same count, is cured by a judgment of conviction. *Randle v. State*, 105 Miss. 561, 62 So. 428, 1913 Miss. LEXIS 229 (Miss. 1913).

Under a former statute making actual taking of the poison an element of the crime, word "taken" was held to mean any method by which the system is made to absorb poison designedly administered. *State v. Stuart*, 88 Miss. 406, 40 So. 1010, 1906 Miss. LEXIS 155 (Miss. 1906).

RESEARCH REFERENCES

Am. Jur.

40A Am. Jur. 2d, Homicide §§ 585 et seq.

2 Am. Jur. Trials, Investigating Particular Crimes §§ 54-56 (homicide by poisoning).

CJS.

40 C.J.S., Homicide §§ 139-141, 146, 147.

§ 97-3-65. Statutory rape; enhanced penalty for forcible sexual intercourse or statutory rape by administering certain substances; criminal sexual assault protection order.

(1) The crime of statutory rape is committed when:

(a) Any person seventeen (17) years of age or older has sexual intercourse with a child who:

- (i) Is at least fourteen (14) but under sixteen (16) years of age;
- (ii) Is thirty-six (36) or more months younger than the person; and
- (iii) Is not the person's spouse; or

(b) A person of any age has sexual intercourse with a child who:

- (i) Is under the age of fourteen (14) years;
- (ii) Is twenty-four (24) or more months younger than the person; and
- (iii) Is not the person's spouse.

(2) Neither the victim's consent nor the victim's lack of chastity is a defense to a charge of statutory rape.

(3) Upon conviction for statutory rape, the defendant shall be sentenced as follows:

(a) If eighteen (18) years of age or older, but under twenty-one (21) years of age, and convicted under subsection (1)(a) of this section, to imprisonment for not more than five (5) years in the State Penitentiary or a fine of not more than Five Thousand Dollars (\$5,000.00), or both;

(b) If twenty-one (21) years of age or older and convicted under subsection (1)(a) of this section, to imprisonment of not more than thirty (30) years in the State Penitentiary or a fine of not more than Ten Thousand Dollars (\$10,000.00), or both, for the first offense, and not more than forty (40) years in the State Penitentiary for each subsequent offense;

(c) If eighteen (18) years of age or older and convicted under subsection (1)(b) of this section, to imprisonment for life in the State Penitentiary or

such lesser term of imprisonment as the court may determine, but not less than twenty (20) years;

(d) If thirteen (13) years of age or older but under eighteen (18) years of age and convicted under subsection (1)(a) or (1)(b) of this section, such imprisonment, fine or other sentence as the court, in its discretion, may determine.

(4)(a) Every person who shall have forcible sexual intercourse with any person, or who shall have sexual intercourse not constituting forcible sexual intercourse or statutory rape with any person without that person's consent by administering to such person any substance or liquid which shall produce such stupor or such imbecility of mind or weakness of body as to prevent effectual resistance, upon conviction, shall be imprisoned for life in the State Penitentiary if the jury by its verdict so prescribes; and in cases where the jury fails to fix the penalty at life imprisonment, the court shall fix the penalty at imprisonment in the State Penitentiary for any term as the court, in its discretion, may determine.

(b) This subsection (4) shall apply whether the perpetrator is married to the victim or not.

(5) In all cases where a victim is under the age of sixteen (16) years, it shall not be necessary to prove penetration where it is shown the genitals, anus or perineum of the child have been lacerated or torn in the attempt to have sexual intercourse with the child.

(6)(a) Upon conviction under this section, the court may issue a criminal sexual assault protection order prohibiting the offender from any contact with the victim, without regard to the relationship between the victim and offender. The court may include in a criminal sexual assault protection order any relief available under Section 93-21-15. The term of a criminal sexual assault protection order shall be for a time period determined by the court, but all orders shall, at a minimum, remain in effect for a period of two (2) years after the expiration of any sentence of imprisonment and subsequent period of community supervision, conditional release, probation, or parole. Upon issuance of a criminal sexual assault protection order, the clerk of the issuing court shall enter the order in the Mississippi Protection Order Registry within twenty-four (24) hours of issuance, with no exceptions for weekends or holidays as provided in Section 93-21-25, and a copy must be provided to both the victim and offender.

(b) Criminal sexual assault protection orders shall be issued on the standardized form developed by the Office of the Attorney General.

(c) It is a misdemeanor to knowingly violate any condition of a criminal sexual assault protection order. Upon conviction for a violation, the defendant shall be punished by a fine of not more than Five Hundred Dollars (\$500.00) or by imprisonment in the county jail for not more than six (6) months, or both. Any sentence imposed for the violation of a criminal sexual assault protection order shall run consecutively to any other sentences imposed on the offender. The court shall also be empowered to extend the criminal sexual assault protection order for a period of one (1) year for each

violation. The incarceration of a person at the time of the violation is not a bar to prosecution under this section. Nothing in this subsection shall be construed to prohibit the imposition of any other penalties or disciplinary action otherwise allowed by law or policy.

(7) For the purposes of this section, “sexual intercourse” shall mean a joining of the sexual organs of a male and female human being in which the penis of the male is inserted into the vagina of the female or the penetration of the sexual organs of a male or female human being in which the penis or an object is inserted into the genitals, anus or perineum of a male or female.

HISTORY: Codes, Hutchinson’s 1848, ch. 64, art. 12, Title 3 (22); 1857, ch. 64, art. 218; 1871, § 2672; 1880, § 2942; 1892, § 1281; 1906, § 1358; Hemingway’s 1917, § 1092; 1930, § 1122; 1942, § 2358; Laws, 1908, ch. 171; Laws, 1974, ch. 576, § 8; Laws, 1977, ch. 458, § 7; Laws, 1985, ch. 389, § 3; Laws, 1993, ch. 497, § 1; Laws, 1998, ch. 549, § 2; Laws, 2007, ch. 335, § 1; Laws, 2017, ch. 414, § 1, eff from and after passage (approved Apr. 6, 2017).

Joint Legislative Committee Note — Pursuant to Section 1-1-109, the Joint Legislative Committee on Compilation, Revision and Publication of Legislation corrected a typographical error. The paragraph designation “(1)(c)” was changed to (2) and the remaining paragraphs were renumbered accordingly. In (3)(d) the word “paragraphs” was changed to “paragraph.” The Joint Committee ratified the correction at its June 3, 2003, meeting.

Editor’s Notes — Laws of 1998, ch. 549, § 8, provides as follows:

“SECTION 8. The Department of Human Services is hereby directed to establish an informational campaign in order to disseminate to the public appropriate information concerning the statutory rape laws, subject to the approval of the office of the Attorney General as to the substantive content of the information to be disseminated.”

Cross References — Notification of Department of Education that certificated person has been convicted of sex offense, see § 37-3-51.

Prohibition of person convicted of crimes affecting children or other violent crimes from being licensed as foster parent or a foster home, see § 43-15-6.

Effect of conviction of certain crimes as disqualification to hold office in labor union or to participate in labor management functions, see § 71-1-49.

Abduction of females, see § 97-3-1.

Rape, as provided in this section, defined as crime of violence, see § 97-3-2.

Murder in the commission of rape as constituting capital murder, see § 97-3-19.

Sexual battery, see §§ 97-3-95 through 97-3-103.

Enticing children for prostitution or marriage, see § 97-5-5.

Violation of person of female child, see § 97-5-23.

Mandatory reporting of offense under this section relating to rape when committed by an adult against a minor under the age of sixteen, see § 97-5-51.

Seduction of female child, see § 97-29-55.

Carnal knowledge of step or adopted child or child of cohabitating partner, see § 97-5-41.

Limitations of prosecutions generally, see § 99-1-5.

Requirement that an indictment for capital murder state specifically the section of the code defining the offense alleged to have been committed, see § 99-17-20.

Additional monetary assessment for violation of this section when committed against a minor to be deposited in Mississippi Children’s Trust Fund, see § 99-19-75.

Separate sentencing procedure to determine punishment in capital cases, see §§ 99-19-101 et seq.

Testing for HIV and AIDS of any person convicted under this section, see §§ 99-19-

201 and 99-19-203.

Imposition of standard state assessment in addition to all court imposed fines or other penalties for any misdemeanor violation, see § 99-19-73.

JUDICIAL DECISIONS

ANALYSIS

I. IN GENERAL.

1. In general.
2. Jurisdiction.
3. Elements of offense.
4. Consent.
5. Constitutionality.
6. Indictment.
7. Sentence.
8. Plea of guilty.
9. Instructions.
10. Setting aside conviction.
11. Effective assistance of counsel.

II. EVIDENTIARY MATTERS.

12. In general.
13. Belongings of victim.
14. Chastity of victim.
15. Competency; child's testimony.
16. Consent of victim.
17. Victims statement to third party.
18. Photographs.
19. Confession of accused.
20. Conduct of accused; previous or criminal.
21. Sufficiency of evidence; generally.
22. —Corroborating evidence.
23. —Uncorroborating evidence.

III. UNDER FORMER § 97-3-67.

24. In general.
25. Evidence; generally.
26. —Chastity of victim.
27. Corroboration.

IV. UNDER FORMER § 97-5-21.

28. In general.
29. Indictment.
30. Evidence.

I. IN GENERAL.

1. In general.

Circuit court did not err in denying defendant's petition for relief from registrations as a sex offender because defendant did not meet an exemption to the

registration requirement; defendant's crime of statutory rape constituted a registrable offense, subject to the registration requirements. *Williams v. State*, 161 So. 3d 1124, 2015 Miss. App. LEXIS 197 (Miss. Ct. App. 2015).

Defendant's prosecution for statutory rape, under Miss. Code Ann. § 97-3-65, was not barred by the two-year statute of limitations in Miss. Code Ann. § 99-1-5 because, although statutory rape was not expressly included in the statute, it was within the definition of rape under Miss. Code Ann. § 97-3-68, for purposes of the exceptions to the general two-year statute of limitations. *Hernandez v. State*, 137 So. 3d 889, 2013 Miss. App. LEXIS 793 (Miss. Ct. App. 2013), cert. denied, 139 So. 3d 74, 2014 Miss. LEXIS 239 (Miss. 2014).

Sexual intercourse between an underage child and an adult clearly is a crime of violence for purposes of the habitual offender statute, as sexual intercourse cannot occur without the exertion of some degree of physical force, even if it entails no pain or bodily harm and leaves no mark. *Taylor v. State*, 122 So. 3d 707, 2013 Miss. LEXIS 395 (Miss. 2013).

Miss. Code Ann. § 97-3-65(3)(a), at the time defendant was indicted, was the code section for rape, not statutory rape which was Miss. Code Ann. § 97-3-65(2)(a), and it was not until defendant was sentenced that the section numbers changed; the indictment was correct and made the nature and cause of the charges against him clear as required. *Davis v. State*, 29 So. 3d 788, 2009 Miss. App. LEXIS 397 (Miss. Ct. App. 2009), cert. denied, 29 So. 3d 774, 2010 Miss. LEXIS 137 (Miss. 2010).

Pursuant to Miss. Code Ann. § 13-5-73, jurors in a capital case should be sworn to well and truly try the issue between the state and the prisoner, and a true verdict should be given according to the evidence and law, and because the crime of forcible rape was a capital crime under Miss. Code Ann. § 97-3-65(4)(a), defendant was entitled to have the capital oath adminis-

tered to the jurors, but the trial judge failed to administer that oath; however, the capital oath given in the middle of the trial, together with the petit oath given at the beginning of defendant's trial, which were substantially the same, were sufficient to instruct the jury of their duty. *Golden v. State*, 968 So. 2d 378, 2007 Miss. LEXIS 530 (Miss. 2007), cert. dismissed, 977 So. 2d 343, 2008 Miss. LEXIS 111 (Miss. 2008).

Resistance is not required for rape; absence of resistance on account of fear caused by the assailant does not bar an attack from being rape. *Madere v. State*, 794 So. 2d 200, 2001 Miss. LEXIS 235 (Miss. 2001).

Age is critical element of crimes of capital and statutory rape; capital rape requires rape of a child under age 14 by one over age 18, while statutory rape requires carnal knowledge of unmarried person of previously chaste character younger than himself or herself and over 14 and under 18 years of age. *Collins v. State*, 691 So. 2d 918, 1997 Miss. LEXIS 6 (Miss.), cert. denied, 522 U.S. 877, 118 S. Ct. 198, 139 L. Ed. 2d 135, 1997 U.S. LEXIS 5567 (U.S. 1997).

While age serves as line of demarcation for purposes of potential penalty for capital rape, age is defining characteristic of statutory rape, be it forcible or not. *Collins v. State*, 691 So. 2d 918, 1997 Miss. LEXIS 6 (Miss.), cert. denied, 522 U.S. 877, 118 S. Ct. 198, 139 L. Ed. 2d 135, 1997 U.S. LEXIS 5567 (U.S. 1997).

Capital rape statute has same purpose as does statutory rape statute, which is protection of children of a specified age; at heart of statutes is core concern that children should not be exploited for sexual purposes regardless of their "consent," because they simply cannot appreciate significance or consequences of their actions. *Collins v. State*, 691 So. 2d 918, 1997 Miss. LEXIS 6 (Miss.), cert. denied, 522 U.S. 877, 118 S. Ct. 198, 139 L. Ed. 2d 135, 1997 U.S. LEXIS 5567 (U.S. 1997).

In a prosecution for forcible rape of a female adult, the failure to administer to the jury the special oath in capital cases required by § 13-5-73 was not error where the jury received the oath of petit jurors prescribed by § 13-5-71 which is substan-

tially equivalent to the special oath, the defendant refused any attempt by the trial judge to cure the omission, the defendant was not taxed by the jury with the maximum sentence of life imprisonment, and a special venire was neither requested nor empaneled in the trial of the case, but rather the jury was selected and accepted from the regular panel for the week. *Wilburn v. State*, 608 So. 2d 702, 1992 Miss. LEXIS 677 (Miss. 1992).

A conviction for rape under this section, once final, established the assailant's fault in tort in a civil action for assault and battery brought by the victim. *Jordan v. McKenna*, 573 So. 2d 1371, 1990 Miss. LEXIS 804 (Miss. 1990).

The venue of a kidnapping and rape trial was proper in the county in which the kidnapping and violence leading to the rape commenced, and in which the defense counsel admitted that the first contact between the defendant and the victim, which was determined by the jury to have been a kidnapping, took place. *Erwin v. State*, 557 So. 2d 799, 1990 Miss. LEXIS 57 (Miss. 1990), but see *Strahan v. State*, 729 So. 2d 800, 1998 Miss. LEXIS 343 (Miss. 1998).

In subsection (2) of this section, reference to "the jury" is synonymous to "the trier of facts." Thus, where a defendant waived trial by jury and requested a bench trial with the trial judge sitting as jury and judge, the trial judge had the authority to sentence the defendant to life imprisonment, after sitting as a jury, since the judge was the "trier of facts" and substituted for the jury, which ordinarily is the "trier of facts" in a criminal case. *Evans v. State*, 547 So. 2d 38, 1989 Miss. LEXIS 331 (Miss. 1989).

Jurisdiction for prosecution of 15 year old for rape, offense potentially punishable by life sentence, is in circuit court, to exclusion of youth court, notwithstanding defendant's claim of interrogation in violation of Youth Court Act (§ 43-21-311). *Winters v. State*, 473 So. 2d 452, 1985 Miss. LEXIS 2178 (Miss. 1985).

Where the defendant in a rape prosecution gave the victim a pill which produced dizziness and a stupor that rendered the victim unable to resist the defendant's assault, the administering of the pill to

the victim was an essential element of the crime alleged, and where the administration of the pill occurred in Forrest County, while the actual rape took place in Lamar County, the venue was properly laid in Forrest County. *McKorkle v. State*, 305 So. 2d 361, 1974 Miss. LEXIS 1485 (Miss. 1974).

One whose confession and testimony indicate the commission of rape is properly denied a release on bond in habeas corpus proceedings. *Reed v. Gilfoy*, 246 Miss. 46, 148 So. 2d 714, 1963 Miss. LEXIS 416 (Miss. 1963).

Where rape or attempted rape is charged to have been forcible and against female's will and proof supports such charge, age of female need not be proved. *Tillman v. State*, 158 Miss. 802, 131 So. 265, 1930 Miss. LEXIS 111 (Miss. 1930).

2. Jurisdiction.

Circuit court, rather than the youth court, had original jurisdiction of defendant's statutory rape trial under Miss. Code Ann. § 43-21-151(1)(a), even though he was 16 years old at the time of the crime, since under the sentencing requirements of Miss. Code Ann. § 97-3-65(3)(c), statutory rape under § 97-3-65(1)(b) carried a possible sentence of life imprisonment for an adult. *Jennings v. State*, 127 So. 3d 263, 2013 Miss. App. LEXIS 25 (Miss. Ct. App.), rev'd, 127 So. 3d 185, 2013 Miss. LEXIS 645 (Miss. 2013).

3. Elements of offense.

In a statutory rape prosecution, it was not error to bar defense counsel from asking a witness about a desire to drop the charges because (1) this did not tend to make facts constituting the crime more or less probable, and (2) this did not show bias, prejudice, or interest by tending to make facts the witness testified to less probable. *Cage v. State*, 149 So. 3d 1038, 2014 Miss. LEXIS 536 (Miss. 2014).

Victim's testimony established the element of penetration to support defendant's conviction for statutory rape, and defendant's trial counsel repeatedly used the term "sexual intercourse" as involving penetration. *Hunt v. State*, 81 So. 3d 1141, 2011 Miss. App. LEXIS 202 (Miss. Ct. App. 2011), cert. denied, 82 So. 3d 620, 2012 Miss. LEXIS 135 (Miss. 2012).

Court properly denied defendant's motion for a directed verdict because the crime of statutory rape did not encompass the crime of gratification of lust. The crime of gratification of lust did not require any proof of sexual intercourse or proof of a laceration/tearing of the child's genitalia, and as such, statutory rape required proof of an additional element not required by gratification of lust. *Branch v. State*, 998 So. 2d 411, 2008 Miss. LEXIS 545 (Miss. 2008).

In a statutory rape case under Miss. Code Ann. § 97-3-65(1)(b), where a child victim testified that she was penetrated by defendant's penis during a sexual act, the state established that sexual intercourse occurred; moreover, defendant admitted to having sex with the victim, and medical evidence of penetration was not required. *Roles v. State*, 952 So. 2d 1043, 2007 Miss. App. LEXIS 180 (Miss. Ct. App. 2007).

Defendant challenged the sufficiency of his conviction for statutory rape, contending that the evidence was insufficient to show one element, sexual intercourse; however, the 15-year-old alleged victim testified that defendant penetrated her vagina with his penis, and the victim was not sufficiently discredited to warrant overturning the conviction. *Miley v. State*, 935 So. 2d 998, 2006 Miss. LEXIS 410 (Miss. 2006).

Evidence was legally insufficient to show the sexual intercourse element of statutory rape as it did not show, as required by statute, that defendant inserted defendant's male sexual organ into the victim's vagina, and, thus, defendant's conviction on two counts of statutory rape could not be upheld on appeal. *Pittman v. State*, 836 So. 2d 779, 2002 Miss. App. LEXIS 316 (Miss. Ct. App. 2002), cert. denied, 835 So. 2d 952, 2003 Miss. LEXIS 737 (Miss. 2003).

"Mistake of age" is not defense to crime of capital rape. *Collins v. State*, 691 So. 2d 918, 1997 Miss. LEXIS 6 (Miss.), cert. denied, 522 U.S. 877, 118 S. Ct. 198, 139 L. Ed. 2d 135, 1997 U.S. LEXIS 5567 (U.S. 1997).

Statutory rape is not lesser included offense of capital rape; capital rape requires rape of child under age of 14, but

statutory rape requires that child be over 14 but under age of 18. *Collins v. State*, 691 So. 2d 918, 1997 Miss. LEXIS 6 (Miss.), cert. denied, 522 U.S. 877, 118 S. Ct. 198, 139 L. Ed. 2d 135, 1997 U.S. LEXIS 5567 (U.S. 1997).

Age of accused is *sine qua non* of crime of capital rape which requires proof by state at trial. *Fisher v. State*, 690 So. 2d 268, 1996 Miss. LEXIS 490 (Miss. 1996).

The elements required to prove attempted capital rape are: (1) a design and endeavor to rape one less than 14 years old by one at least 18 years old, (2) an overt act toward the commission of rape, and (3) failure to complete the rape or prevention of completion. *Henderson v. State*, 660 So. 2d 220, 1995 Miss. LEXIS 390 (Miss. 1995).

It is possible in some circumstances to commit forcible rape without committing child fondling, and thus child fondling under § 97-5-23 is not a necessarily included offense of forcible rape under subsection (2) of this section as it read prior to amendment in 1985. *Hailey v. State*, 537 So. 2d 411, 1988 Miss. LEXIS 632 (Miss. 1988).

A defendant's grabbing of the victim by the throat, threatening to beat her up if she did not remove her clothes, and announcing his intent to rape her, constituted an "overt act" for attempted rape. *Pruitt v. State*, 528 So. 2d 828, 1988 Miss. LEXIS 339 (Miss. 1988).

Failure of prosecution to introduce evidence of force does not render evidence insufficient to support rape conviction where defense offered is not consent on part of victim but rather alibi, alibi defense is discredited, and proof shows beyond reasonable doubt that victim surrendered because of fear arising out of reasonable apprehension of great bodily harm. *Stewart v. State*, 466 So. 2d 906, 1985 Miss. LEXIS 2005 (Miss. 1985).

Lewd suggestion to victim coupled with physically grabbing victim and attempting to carry her away only to have her break free comes near enough to accomplishment of rape as to constitute crime of attempted rape. *Harden v. State*, 465 So. 2d 321, 1985 Miss. LEXIS 1959 (Miss. 1985).

Where the defendant in a rape prosecution gave the victim a pill which produced

dizziness and a stupor that rendered the victim unable to resist the defendant's assault, the administering of the pill to the victim was an essential element of the crime alleged, and where the administration of the pill occurred in Forrest County, while the actual rape took place in Lamar County, the venue was properly laid in Forrest County. *McKorkle v. State*, 305 So. 2d 361, 1974 Miss. LEXIS 1485 (Miss. 1974).

A necessary element of the crime of rape is that some penetration of the female's private parts by the sexual organ of the assailant must occur and this is true in every case except where the female is under twelve years of age and even then it must be shown that her private parts had been lacerated or torn in attempt to have carnal knowledge of her. *Lang v. State*, 230 Miss. 147, 87 So. 2d 265, 1956 Miss. LEXIS 645 (Miss.), cert. denied, 352 U.S. 936, 77 S. Ct. 236, 1 L. Ed. 2d 167, 1956 U.S. LEXIS 165 (U.S. 1956).

Under this section [Code 1942, § 2358] the previous chaste character of a female is not an essential element of rape. *Thames v. State*, 221 Miss. 573, 73 So. 2d 134, 1954 Miss. LEXIS 565 (Miss. 1954).

In prosecution for rape under this section [Code 1942, § 2358], act must be committed against victim's will; initial force is not enough, but resistance must continue to end. *Moss v. State*, 208 Miss. 531, 45 So. 2d 125, 1950 Miss. LEXIS 271 (Miss. 1950).

Characterization in argument by state's attorney of defendant and his witness as "jackals" and "thugs" is not prejudicially erroneous in view of crime with which defendant was charged and admission on part of defendant and witness of commission of several grave felonies, including burglary. *Moss v. State*, 208 Miss. 531, 45 So. 2d 125, 1950 Miss. LEXIS 271 (Miss. 1950).

4. Consent.

Counsel could not be considered ineffective in failing to interview defendant's aunt regarding a 13-year old rape victim's statement to the aunt that she had consensual sex with defendant in exchange for \$50 because consent was not a defense to rape in any form when the victim was

under the age of sixteen. *Ducksworth v. State*, 67 So. 3d 1, 2011 Miss. App. LEXIS 175 (Miss. Ct. App. 2011).

Where the victim is under the age of consent, it is not material whether the rape was accomplished by force or violence and against the will of the child; consent is not a defense to the charge. *Winston v. State*, 754 So. 2d 1154, 1999 Miss. LEXIS 368 (Miss. 1999).

Rape victim's testimony that defendant had a dark object in his hand, which she thought was a knife, and that defendant told her to be quiet or he would cut her throat could have supported jury finding that victim acted out of reasonable apprehension of great bodily harm, as required for jury instruction indicating that physical resistance on part of victim is unnecessary if victim acted out of reasonable apprehension of great bodily harm. *Hull v. State*, 687 So. 2d 708, 1996 Miss. LEXIS 687 (Miss. 1996).

There was no merit to defendant's unsupported arguments that lack of consent and use of force were not proven; suggestion that act was not rape where victim responded to defendant's actions while believing him to be her husband and that penetration occurred before she realized he was not was rejected. *Pinson v. State*, 518 So. 2d 1220, 1988 Miss. LEXIS 37 (Miss. 1988).

Consent was not an issue where the male defendant, who was over 18 years of age, was charged with unlawful carnal knowledge of a female under the age of 12 years. *McBride v. State*, 492 So. 2d 581, 1986 Miss. LEXIS 2539 (Miss. 1986).

It is immaterial whether the rape of an eight-year-old child was accomplished by force or violence, or against the will of the victim; for a child of such tender years is obviously under the age of consent. *Winston County Community Hospital v. Hathorn*, 242 So. 2d 865, 1970 Miss. LEXIS 1393 (Miss. 1970).

If woman, though she resists at first, eventually gives in and consents to intercourse, it is not rape, provided that the consent be willing and free of the initial coercion. *Rodgers v. State*, 204 Miss. 891, 36 So. 2d 155, 1948 Miss. LEXIS 418 (Miss. 1948).

Absence of resistance on account of fear caused by assailant does not prevent at-

tack being rape. *Milton v. State*, 142 Miss. 364, 107 So. 423, 1926 Miss. LEXIS 83 (Miss. 1926).

It is not rape to have sexual intercourse with a woman over the age of consent whose resistance is passive and objection silent unless she be overcome by drugs or other means. *Anderson v. State*, 82 Miss. 784, 35 So. 202, 1903 Miss. LEXIS 198 (Miss. 1903).

5. Constitutionality.

There was no equal protection violation when appellant received a 15-year sentence for statutory rape; appellant conceded that the statute applied equally to male and female defendants. *McKenzie v. State*, 946 So. 2d 392, 2006 Miss. App. LEXIS 388 (Miss. Ct. App. 2006).

Where defendant was tried in a second case for statutory rape, sexual battery, and fondling, double jeopardy was not violated; while the victims were the same, the factual bases supporting the charges in the current indictment were totally different from the factual bases undergirding the charges in the first case. *Moses v. State*, 885 So. 2d 730, 2004 Miss. App. LEXIS 912 (Miss. Ct. App. 2004).

People of ordinary intelligence have the ability to understand what behavior "forcible sexual intercourse" is designed to discourage; the word "forcible" is no more vague or overly broad than "forcibly ravish;" Miss. Code Ann. § 97-3-65(3)(a). *Madere v. State*, 794 So. 2d 200, 2001 Miss. LEXIS 235 (Miss. 2001).

A defendant's constitutional right to privacy was not violated by the State's taking the defendant to the health department for treatment of gonorrhea where the defendant was charged with capital rape of a child who was found to have gonorrhea, since the State's interest in operating a prison and providing for the health of inmates outweighed the privacy interests of the defendant. *Ormond v. State*, 599 So. 2d 951, 1992 Miss. LEXIS 153 (Miss. 1992).

A defendant's Sixth Amendment right to a public trial was not violated by the exclusion of the public from his rape trial during the victim's testimony where the trial judge held an evidentiary hearing and made findings sufficient to exclude

members of the public during the victim's testimony, and where the court officials, the defendant, legal counsel and the jury were never excluded from the courtroom. *Lee v. State*, 529 So. 2d 181, 1988 Miss. LEXIS 366 (Miss. 1988).

This section, which proscribes rape of a female, does not deny equal protection of the laws to males since it is the victim, not the accused, who must be a female under the wording of this statute; furthermore, by the very nature of the crime, it is the male who must make the criminal assault in order to sustain a conviction and there is no rational basis to attempt to apply this statute to any female accused. *Dixon v. State*, 519 So. 2d 1226, 1988 Miss. LEXIS 152 (Miss. 1988).

There was no merit to defendant's unsupported arguments that lack of consent and use of force were not proven; suggestion that act was not rape where victim responded to defendant's actions while believing him to be her husband and that penetration occurred before she realized he was not was rejected. *Pinson v. State*, 518 So. 2d 1220, 1988 Miss. LEXIS 37 (Miss. 1988).

Rape statute (this section) does not, by providing 2 punishments for crime of rape depending upon age of victim, violate equal protection clause of Fourteenth Amendment of Constitution of United States. *Winters v. State*, 473 So. 2d 452, 1985 Miss. LEXIS 2178 (Miss. 1985).

Sentencing provision of rape statute (this section) which subjects defendant who seeks jury trial to hazard of life imprisonment does not violate constitution. *Cunningham v. State*, 467 So. 2d 902, 1985 Miss. LEXIS 1936 (Miss. 1985).

Criminal statute (this section) which establishes crime for rape of female but fails to make it crime to rape male does not violate equal protection clause. *Harper v. State*, 463 So. 2d 1036, 1985 Miss. LEXIS 1857 (Miss. 1985).

Evidence was sufficient in a prosecution for carnal knowledge of a 6-year-old girl to sustain defendant's conviction, where, although there was no direct evidence of penetration, the defendant had been seen on top of the child in the very act of committing the rape, and the examining doctor's testimony showed penetration to

the extent of causing traumatic injury to the child's major and minor labias; moreover, this section is not unconstitutional on the basis that it carries the death penalty, nor does it unconstitutionally discriminate against males. *Jackson v. State*, 452 So. 2d 438, 1984 Miss. LEXIS 1687 (Miss. 1984).

This section, governing sentencing procedures in rape cases, does not violate due process or equal protection of the law, even though no provision is made for the jury to consider mitigating circumstances in fixing a defendant's sentence; the rule requiring a bifurcated trial is applicable only to cases involving capital offenses. *White v. State*, 375 So. 2d 220, 1979 Miss. LEXIS 2271 (Miss. 1979).

Code 1942, § 2358, under which the defendant was sentenced for the crime of rape, was not unconstitutional as cruel and unusual in imposing a sentence of life imprisonment for the crime. *Wilson v. State*, 264 So. 2d 828, 1972 Miss. LEXIS 1371 (Miss. 1972).

6. Indictment.

Circuit court properly denied appellant's motion for postconviction relief because the indictment was not defective; the indictment contained the elements of the crime of statutory rape, and the circuit court found that the indictment placed appellant on notice of his charges. *Roberson v. State*, 281 So. 3d 343, 2019 Miss. App. LEXIS 78 (Miss. Ct. App. 2019).

Because both original indictment and the amended forms put defendant on notice that he was charged with statutory rape of a 14-year-old, the amendment did not materially alter the offense and the defense was not prejudiced. *Young v. State*, 271 So. 3d 650, 2018 Miss. App. LEXIS 591 (Miss. Ct. App. 2018), cert. dismissed, 272 So. 3d 132, 2019 Miss. LEXIS 237 (Miss. 2019).

This section was the proper statute for defendant to be indicted for rape under, as it addressed forcible sexual intercourse. *Rollings v. State*, 192 So. 3d 1133, 2016 Miss. App. LEXIS 343 (Miss. Ct. App. 2016).

Indictment was sufficient because, despite a clerical error charging defendant with statutory rape, rather than forcible

rape, the indictment in the body of the charge provided adequate notice that defendant was being charged with forcible rape. Furthermore, the same day defendant entered a guilty plea to forcible rape, an agreed order was entered amending the indictment to correct clerical errors. *Ruffin v. State*, 176 So. 3d 153, 2015 Miss. App. LEXIS 512 (Miss. Ct. App.), sub. op., 188 So. 3d 1240, 2015 Miss. App. LEXIS 688 (Miss. Ct. App. 2015).

Statutory rape charge of an indictment was not defective because the indictment included defendant's birth date, the victim's birth date, and the date of the offense; defendant's confusion was related to an error in his guilty-plea petition, and that error was corrected before the circuit court accepted his guilty plea and sentenced him. *Jennings v. State*, 107 So. 3d 185, 2013 Miss. App. LEXIS 48 (Miss. Ct. App. 2013).

In a case in which defendant's second indictment charged that defendant unlawfully engaged in sexual intercourse with a child, who was at least 14 years of age but under 16 years of age at the time of the incident and that charge corresponded with Miss. Code Ann. § 97-3-65(1)(a)(i), but the second indictment listed the charging statute as Miss. Code Ann. § 97-3-65(1)(b)(i), which prohibited the statutory rape of a child under 14 years of age, defendant argued unsuccessfully that the State improperly amended his second indictment by changing the subsection number of the charging statute. The substance of defendant's second indictment clearly charged him with the proper crime and gave him sufficient notice of the charge against him; therefore, the amendment of the indictment was simply one of form and, thus, allowable. *Payton v. State*, 41 So. 3d 713, 2009 Miss. App. LEXIS 848 (Miss. Ct. App. 2009), cert. denied, 42 So. 3d 24, 2010 Miss. LEXIS 422 (Miss. 2010), cert. denied, 562 U.S. 1226, 131 S. Ct. 1482, 179 L. Ed. 2d 318, 2011 U.S. LEXIS 1348 (U.S. 2011).

Defendant's conviction for forcible rape was upheld where the indictment gave a clear and concise statement of the elements of the crime with which defendant was charged; the fact that defendant was indicted for violation of Miss. Code Ann.

§ 97-3-65(3)(a), which provided the penalty for statutory rape, rather than subsection (4)(a) which listed the elements of forcible rape, was of no consequence. *Robinson v. State*, 966 So. 2d 209, 2007 Miss. App. LEXIS 690 (Miss. Ct. App. 2007), cert. dismissed, 15 So. 3d 426, 2009 Miss. LEXIS 401 (Miss. 2009).

Defendant was charged with two completed acts of rape under Miss. Code Ann. § 97-3-65(4)(a), and the reference to Miss. Code Ann. § 97-3-71, which dealt with attempted rape, was merely a scrivener's error in the indictment, and any reference to Miss. Code Ann. § 97-3-71 in defendant's indictment was of no moment as the substance of the indictment clearly charged defendant with forcible rape under Miss. Code Ann. § 97-3-65; thus, defendant was not entitled to have the jury fix his sentence upon conviction pursuant to the language of Miss. Code Ann. § 97-3-71, and Miss. Code Ann. § 97-3-65(4)(a) clearly allowed the trial court to fix the penalty in the event that the jury failed to do so. *Golden v. State*, 968 So. 2d 378, 2007 Miss. LEXIS 530 (Miss. 2007), cert. dismissed, 977 So. 2d 343, 2008 Miss. LEXIS 111 (Miss. 2008).

Although rape required forcible sexual intercourse, and sexual battery required sexual penetration without consent, the indictment specifically put defendant on notice that he was charged with forcibly inserting his sexual organ inside the victim's rectum; his defense to that charge was not that it happened and was consensual, but that it did not happen, and therefore his defense to the original indictment was equally applicable to amended indictment, which changed a charge from rape to sexual battery. *Goodin v. State*, 977 So. 2d 353, 2007 Miss. App. LEXIS 298 (Miss. Ct. App. 2007), aff'd in part and rev'd in part, 977 So. 2d 338, 2008 Miss. LEXIS 143 (Miss. 2008).

Indictment clearly stated that defendant was being charged with statutory rape in direct violation of Miss. Code Ann. § 97-3-65(1)(a), and the indictment also clearly stated that defendant had sexual intercourse with the victim through a date after her 14 birthday; thus, the indictment was not fatally flawed because it cited Miss. Code Ann. § 97-3-65(1)(a) and

used the language in that statute, not the language in Miss. Code Ann. § 97-3-65(1)(b), which required the victim to be under 14 years of age. *Poynor v. State*, 962 So. 2d 68, 2007 Miss. App. LEXIS 292 (Miss. Ct. App.), cert. denied, 962 So. 2d 38, 2007 Miss. LEXIS 416 (Miss. 2007).

Defendant's argument that the indictment's citation to Miss. Code Ann. § 97-3-65(3) rather than § 97-3-65(4) did not mandate reversal of his conviction because citation to a specific statute was not required to afford adequate notice to defendant. *Magee v. State*, 966 So. 2d 173, 2007 Miss. App. LEXIS 120 (Miss. Ct. App.), cert. denied, 966 So. 2d 172, 2007 Miss. LEXIS 567 (Miss. 2007).

Indictment was not so flawed as to warrant reversal because: (1) the indictment clearly stated that defendant was being charged with statutory rape in direct violation of Miss. Code Ann. § 97-3-65(1)(a); and (2) the indictment clearly stated that defendant had sexual intercourse with a victim through December of 2004, which was after her 14th birthday, which constituted the offense of statutory rape under Miss. Code Ann. § 97-3-65(1)(a). *Poynor v. State*, 2006 Miss. App. LEXIS 857 (Miss. Ct. App. Nov. 21, 2006).

Defendant's contention that he was serving an illegal sentence was based on the fact that the caption of the rape indictment read, "Indictment for the offense of: RAPE Miss. Code Ann. § 97-3-65(2) (statutory rape)," and listed Miss. Code Ann. § 97-3-65(3)(a) (forcible rape), in the body of the indictment. However, so long as from a fair reading of the indictment, taken as a whole, the nature of the charge against the accused was clear, the indictment was legally sufficient; further, all non-jurisdictional defects in an indictment were waived where defendant entered a guilty plea. *Ward v. State*, — So. 2d —, App LEXIS 816 (Miss. Ct. App. Nov. 8, 2005).

Though the indictment failed to specify the subsection of Miss. Code Ann. § 97-3-65 under which that defendant was charged, the second count of the indictment described forcible rape, which at the time of defendant's crime was codified at Miss. Code Ann. § 97-3-65(2). (Now Miss. Code Ann. § 97-3-65 (3)(a)). Defendant's

interpretation of the indictment, that it charged him with statutory rape under Miss. Code Ann. § 97-3-65(1)(a), was without merit. *Robinson v. State*, 920 So. 2d 1009, 2003 Miss. App. LEXIS 229 (Miss. Ct. App. 2003), limited, *Hill v. State*, 60 So. 3d 824, 2011 Miss. App. LEXIS 260 (Miss. Ct. App. 2011).

Indictment to which defendant pled properly identified the victim, a 15-year-old high school student, and did not need to include any mention of the chaste character of the victim; it also properly stated that the crime had occurred in the prosecuting county; thus, the indictment alleging statutory rape was proper. *McKenzie v. State*, 856 So. 2d 344, 2003 Miss. App. LEXIS 132 (Miss. Ct. App. 2003), cert. denied, 864 So. 2d 282, 2004 Miss. LEXIS 7 (Miss. 2004), cert. denied, 947 So. 2d 960, 2007 Miss. LEXIS 57 (Miss. 2007).

An indictment charging the defendant with rape under this section was proper, even though the indictment used the language "a female person under the age of 14," while the statute states, in pertinent part, "a child under the age of 14." The indictment's language was wholly included within the statutory language, since a female person under the age of 14 is a child under the age of 14; the indictment need not use the precise words of the statute. Furthermore, the defendant was not prejudiced in the preparation of his defense or exposed to double jeopardy by the indictment's language. *Allman v. State*, 571 So. 2d 244, 1990 Miss. LEXIS 705 (Miss. 1990).

Surplus language contained in an indictment for rape under subsection (1) of this section did not prejudice the defendant and was not improper where the indictment used the language "unlawfully, willfully and feloniously rape, ravish and carnally know," even though the statute uses the language "rape by carnally and unlawfully knowing." The term "unlawfully" appeared in both the indictment and the statute, the term "feloniously" means unlawfully with the intent to commit a felony-grade crime, "willfully" simply means voluntarily, and "ravish" means rape. *Allman v. State*, 571 So. 2d 244, 1990 Miss. LEXIS 705 (Miss. 1990).

An indictment charging 2 rapes and one attempted rape committed by the defen-

dant upon the same victim at different times was proper. The charges were properly joined under one indictment since they were part of a common scheme or plan, pursuant to the language of § 99-7-2(1)(b), in that they were connected by the identity of the victim and by the identity of the kind of act committed by the defendant. Furthermore, all of the evidence proving each count was fully admissible to prove each of the other counts and, therefore, if the State had tried the defendant at 3 separate trials, testimony as to the 2 other acts of rape would have been admissible at each of the 3 trials. *Allman v. State*, 571 So. 2d 244, 1990 Miss. LEXIS 705 (Miss. 1990).

An indictment was sufficient to notify the defendant that he had been charged with rape where it alleged that he made a lewd suggestion combined with a physical act (the placing of a towel over the victim's face), which was an overt act sufficient for the ultimate commission of a rape. *Alexander v. State*, 520 So. 2d 127, 1988 Miss. LEXIS 53 (Miss. 1988).

Trial court did not err in not granting defendant's motion for directed verdict where indictment did not contain specific date, but instead alleged that rape was committed on or about certain day, and jury instruction was similar; while notice of specific date is often essential to preparation of defense, especially where alibi is relied on, and it is even more important in jury instructions, there was no error where defendant had raised no credible claim of unfair surprise or prejudice, nor sought continuance or any other remedy. *Wilson v. State*, 515 So. 2d 1181, 1987 Miss. LEXIS 2926 (Miss. 1987).

Under former provisions, when defendant was tried and convicted of rape, robbery, and kidnapping under improper multicount indictment charging separate offenses, conviction and sentence under kidnapping offense would be affirmed and remaining charges reversed where entire proof in record was relevant to and admissible under kidnapping charge. *Brock v. State*, 483 So. 2d 358, 1986 Miss. LEXIS 2402 (Miss. 1986), but see *McCarty v. State*, 554 So. 2d 909, 1989 Miss. LEXIS 499 (Miss. 1989).

Defendant's claim that he was improperly prosecuted for attempted rape as de-

fined by this section, when the indictment allegedly charged him with assault with intent to rape as defined by § 97-3-71, was properly denied, where the indictment accurately tracked this section in that it omitted any mention of "previous chaste character" and affirmatively asserted "carnally know," which was language not present in § 97-3-71, and where defendant waived his claim at trial by requesting which statute was applicable, and then failing to object to being tried under this section. *Harden v. State*, 465 So. 2d 321, 1985 Miss. LEXIS 1959 (Miss. 1985).

Indictment charging making of lewd suggestion by defendant to victim and violent making of attack or assault upon victim properly charges attempted rape under this section, rather than assault with intent to rape under § 97-3-71, where indictment accurately tracks this section by omitting mention of "previous chaste character" and affirmatively asserts "carnally know," and where, at trial, at specific request of defendant, defendant is informed that prosecution is under this section and defendant makes no objection to being tried under that statute. *Harden v. State*, 465 So. 2d 321, 1985 Miss. LEXIS 1959 (Miss. 1985).

There is no legal impediment to the State's mounting of three separate prosecutions for forcible rape under this section, kidnapping, and armed robbery, even though the three offenses arise out of a common nucleus of operative fact; accordingly, where the defendant affirmatively requested that the proceeding against him on all three charges be consolidated for pretrial and trial purposes, the trial court properly held that the defendant had consciously waived any objection he may have had to the multi-count indictment. *Ward v. State*, 461 So. 2d 724, 1984 Miss. LEXIS 2052 (Miss. 1984).

The trial court properly overruled a defense motion to quash an indictment which had recited the language of the statute where the indictment was sufficient to inform the defendant of the charge against him. *Hickombottom v. State*, 409 So. 2d 1337, 1982 Miss. LEXIS 1870 (Miss. 1982).

An indictment charging the defendant with one act of rape was not rendered

invalid by the testimony of the victim at trial that she had been raped twice where the two acts of rape had occurred on the one occasion that the defendant had been in the victim's home, the time between the two acts had not been more than ten or fifteen minutes, and both acts had been so intermixed and so connected that they had formed an indivisible criminal transaction. *Smith v. State*, 405 So. 2d 95, 1981 Miss. LEXIS 2236 (Miss. 1981).

The statutory requirement that a crime punishable by death be specifically cited in the indictment was substantially complied with in a rape prosecution, even though the indictment failed to include the words "as amended," after referring to the section and subsection of the rape statute. *Rhymes v. State*, 356 So. 2d 1165, 1978 Miss. LEXIS 2470 (Miss. 1978).

Willfulness is not an essential element of the crime of rape of a female child under the age of 12 years. *Upshaw v. State*, 350 So. 2d 1358, 1977 Miss. LEXIS 2249 (Miss. 1977).

In prosecution for rape where the grand jury heard competent evidence, including the testimony of the prosecutrix, an indictment will not be quashed because a deputy sheriff testified as to evidence found in illegal search. *Johnson v. State*, 213 Miss. 808, 58 So. 2d 6, 1952 Miss. LEXIS 429 (Miss. 1952).

An indictment under this section [Code 1942, § 2328] is not void because it fails to charge that the rape was maliciously committed, since this section [Code 1942, § 2328] contains no such requirement. *Fry v. State*, 194 Miss. 603, 13 So. 2d 621, 1943 Miss. LEXIS 100 (Miss. 1943).

Indictment held sufficient to charge statutory attempt to rape, constituting felony, not misdemeanor. *Barnes v. State*, 164 Miss. 126, 143 So. 475 (Miss. 1932).

Indictment alleging attempt to commit rape forcibly and against will of injured female held to sufficiently charge offense. *Tillman v. State*, 158 Miss. 802, 131 So. 265, 1930 Miss. LEXIS 111 (Miss. 1930).

7. Sentence.

Trial court did not exceed its authority in sentencing defendant to life without parole for rape because the sentence was mandated given defendant's prior convic-

tions and habitual-offender classification. *Keyes v. State*, — So. 3d —, 2018 Miss. App. LEXIS 606 (Miss. Ct. App. Dec. 4, 2018), cert. dismissed, 276 So. 3d 660, 2019 Miss. LEXIS 278 (Miss. 2019).

Lockett v. State, 582 So. 2d 428 (Miss. 1991), *Friday v. State*, 462 So. 2d 336 (Miss. 1985), and *Lee v. State*, 322 So. 2d 751 (Miss. 1975) are hereby expressly overruled. *Bester v. State*, 188 So. 3d 526, 2016 Miss. LEXIS 153 (Miss.), cert. denied, — U.S. —, 137 S. Ct. 135, 196 L. Ed. 2d 105, 2016 U.S. LEXIS 5029 (U.S. 2016).

It is pernicious, i.e., harmful, for the supreme court to continue to exceed its constitutional authority by judicially amending the statute and limiting a judge's sentencing authority as established by the Legislature; sentencing is solely within the Legislature's purview, and for a conviction of forcible rape, the Legislature has chosen to give a trial judge the authority to sentence a defendant to any term he or she deems appropriate, if a jury fails to fix the term at life. *Bester v. State*, 188 So. 3d 526, 2016 Miss. LEXIS 153 (Miss.), cert. denied, — U.S. —, 137 S. Ct. 135, 196 L. Ed. 2d 105, 2016 U.S. LEXIS 5029 (U.S. 2016).

Plain language of the statute authorizes a trial judge to sentence a defendant to imprisonment for any term as the court, in its discretion, may determine; "any term" includes life imprisonment. *Bester v. State*, 188 So. 3d 526, 2016 Miss. LEXIS 153 (Miss.), cert. denied, — U.S. —, 137 S. Ct. 135, 196 L. Ed. 2d 105, 2016 U.S. LEXIS 5029 (U.S. 2016).

It was proper to deny petitioner post-conviction relief because the trial court had statutory authority to sentence petitioner to life imprisonment, absent a recommendation from the jury. *Bester v. State*, 188 So. 3d 526, 2016 Miss. LEXIS 153 (Miss.), cert. denied, — U.S. —, 137 S. Ct. 135, 196 L. Ed. 2d 105, 2016 U.S. LEXIS 5029 (U.S. 2016).

Trial judge's two comments that defendant's case was a "capital case" did not taint the jury because "capital case" included crimes punishable by life imprisonment, Miss Code Ann. § 1-3-4, and defendant was indicted on two counts of statutory rape, a crime for which life im-

prisonment was possible, Miss. Code Ann. § 97-3-65(2)(c); the trial judge never said defendant's case was a capital-murder case or a death-penalty case. *Harrison v. State*, 49 So. 3d 80, 2010 Miss. LEXIS 635 (Miss. 2010).

Defendant's 30-year prison sentence for the statutory rape of his 11-year-old daughter was not disproportionate because under Miss. Code Ann. § 97-3-65(3)(c), the statutory rape of a child by an adult carried with it a maximum penalty of life imprisonment, as well as a minimum sentence of 20 years in prison, irrespective of whether it was one's first offense. *Powell v. State*, 49 So. 3d 166, 2010 Miss. App. LEXIS 650 (Miss. Ct. App. 2010).

Imposition of a 30-year sentence, pursuant to Miss. Code Ann. § 97-3-65(3)(c), after defendant was convicted of statutory rape was not grossly disproportionate, despite the fact it was defendant's first offense, because the sentence was within the statutory limits; the rape victim was defendant's eleven-year-old daughter. *Powell v. State*, 2010 Miss. App. LEXIS 314 (Miss. Ct. App. June 22, 2010), *op. withdrawn*, sub. *op.*, 49 So. 3d 166, 2010 Miss. App. LEXIS 650 (Miss. Ct. App. 2010).

In a case in which a pro se inmate's post-conviction relief (PCR) petition was barred by the three-year statute of limitations, he argued unsuccessfully that the *Towner* decision was an intervening decision that if applied would cause a different result in his case, more specifically a lesser sentence. Not only was the *Towner* decision limited to the uniqueness of the particular case, but the inmate's sentence of thirty years' imprisonment with ten years suspended was well below the maximum sentence of life imprisonment he faced under the statutory rape statute. *Robinson v. State*, 19 So. 3d 140, 2009 Miss. App. LEXIS 649 (Miss. Ct. App. 2009), *cert. dismissed*, 107 So. 3d 998, 2013 Miss. LEXIS 79 (Miss. 2013).

Defendant's conviction for capital rape was proper because his indictment was not deficient since, although capital rape was not an element of the crime of which he was charged, that fact was of no consequence since the labeling of each count as

"capital rape" was mere surplusage. Additionally, it could hardly have been stated that capital rape was a false statement since defendant's maximum possible punishment for a violation of Miss. Code Ann. § 97-3-65(1)(b) was imprisonment for life. *Gordon v. State*, 977 So. 2d 420, 2008 Miss. App. LEXIS 169 (Miss. Ct. App. 2008).

Sentence of 20 years ordered by the trial court pursuant to Miss. Code Ann. § 97-3-65(3)(c) after appellant pleaded guilty to statutory rape was not only within the term provided for by statute, it was the minimum for which the trial court could have sentenced appellant. *Holmes v. State*, 973 So. 2d 1048, 2008 Miss. App. LEXIS 68 (Miss. Ct. App. 2008).

Defendant's sentences of 30 years and 25 years in prison for his convictions of rape and burglary of a dwelling, to be served consecutively, did not constitute cruel and unusual punishment because the trial court imposed sentences within the statutory limits for the crimes, and a threshold comparison of defendant's sentence with his crimes did not raise an inference of gross disproportionality that would trigger the *Solem* proportionality analysis. *Magee v. State*, 966 So. 2d 173, 2007 Miss. App. LEXIS 120 (Miss. Ct. App.), *cert. denied*, 966 So. 2d 172, 2007 Miss. LEXIS 567 (Miss. 2007).

Youth court lacked jurisdiction over defendant, a minor, because he was charged with statutory rape, Miss. Code Ann. § 97-3-65, which if committed by an adult, carried the possibility of sentencing to life imprisonment; the actual sentence defendant might receive because of his age was irrelevant, and thus the youth court was without jurisdiction to proceed. *In the Interest of D.S.*, 943 So. 2d 1280, 2006 Miss. LEXIS 686 (Miss. 2006).

Appellate court affirmed the dismissal of an inmate's petition for post-conviction relief because, *inter alia*, the inmate's sentence was not more harsh than others across the state as defendant's sentence of 20 years was the minimum sentence he could receive under Miss. Code Ann. § 97-3-65(3)(c). *Smith v. State*, 935 So. 2d 412, 2006 Miss. App. LEXIS 522 (Miss. Ct. App. 2006).

Circuit court had the authority to impose a life sentence for defendant's convic-

tion of capital rape because the legislature used words indicating judicial discretion would be the determination for crimes of statutory rape in Miss. Code Ann. § 97-3-65 (2)(c). *Foley v. State*, 914 So. 2d 677, 2005 Miss. LEXIS 586 (Miss. 2005).

In a statutory rape case, defendant's Eighth Amendment rights were not violated by the imposition of a 40-year sentence for three convictions because the sentence imposed was within the range provided in Miss. Code Ann. § 97-3-65(2). *Price v. State*, 898 So. 2d 641, 2005 Miss. LEXIS 127 (Miss. 2005).

Miss. Code Ann. § 97-3-65(2)(c) establishes the sentencing range for a person 18 years or older who is convicted of statutory rape; statute provides a minimum penalty of 20 years imprisonment and a maximum penalty of life imprisonment. Hence, defendant's sentence of three concurrent 30-year prison terms was well within the sentencing range established by Miss. Code Ann. § 97-3-65(2)(c) after defendant was convicted of three counts of statutory rape of a 13-year-old girl. *Boggan v. State*, 894 So. 2d 581, 2004 Miss. App. LEXIS 722 (Miss. Ct. App. 2004), cert. denied, 896 So. 2d 373, 2005 Miss. LEXIS 162 (Miss. 2005).

Although of the 50 states, only Louisiana requires a mandatory life sentence for capital sexual battery, many states impose a broad range of extensive punishment for sexual battery involving a child under a particular age; for example: (1) in Texas, the penalty ranges from five years to 99 years, Tex. Penal Code Ann. § 12.32(a), (2) in Mississippi, a sentence ranges from 20 years to life imprisonment, Miss. Code Ann. § 97-3-65(3)(c), and (3) in Rhode Island, a sentence ranges from 20 years to life imprisonment, R.I. Gen. Laws § 11-37-8.2. Accordingly, the treatment of the crime of capital sexual battery in other jurisdictions is not so out of line as to render the Florida legislature's selected punishment of mandatory life imprisonment without the possibility of parole unconstitutional. *Jones v. State*, 861 So. 2d 1261, 2003 Fla. App. LEXIS 19218 (Fla. Dist. Ct. App. 4th Dist. 2003).

Although defendant alleged that defendant's sentence for statutory rape was tantamount to a life sentence because of

defendant's age, the defendant's sentence was within the statutory guidelines and not as long as it could have been under the sentencing statute; thus, although defendant might be subject to what defendant perceived as a life sentence, the appellate court found that the sentence was appropriate. *McKenzie v. State*, 856 So. 2d 344, 2003 Miss. App. LEXIS 132 (Miss. Ct. App. 2003), cert. denied, 864 So. 2d 282, 2004 Miss. LEXIS 7 (Miss. 2004), cert. denied, 947 So. 2d 960, 2007 Miss. LEXIS 57 (Miss. 2007).

Sentence of 36 years for rape of a child under the age of 14 following remand from the appellate court for resentencing on defendant's original 50-year sentence after an amendment to Miss. Code Ann. § 97-3-65 reduced the maximum sentence from death or life imprisonment to 20 years to life was proper; defendant's argument that the sentence was the equivalent of life and was therefore not a lesser punishment within the meaning of Miss. Code Ann. § 99-13-33 was without merit. *Johnson v. State*, 824 So. 2d 638, 2002 Miss. App. LEXIS 456 (Miss. Ct. App. 2002).

In a prosecution for capital rape arising from an ongoing sexual relationship between the 37 year old defendant and a 13 year old friend of his daughter, the defendant's sentence of life imprisonment was vacated and the cause was remanded for resentencing where it appeared that the trial court sentenced the defendant to a life term because he mistakenly thought that such sentence was his only option. *Tompkins v. State*, 759 So. 2d 471, 2000 Miss. App. LEXIS 117 (Miss. Ct. App. 2000).

The court remanded a case to the lower court for imposition of a life sentence where the original lesser sentence ordered by the trial court was not authorized by the statute, notwithstanding that the defendant did not raise the illegality of his sentence on appeal. *Winston v. State*, 726 So. 2d 197, 1998 Miss. App. LEXIS 996 (Miss. Ct. App. 1998), aff'd in part and rev'd in part, 754 So. 2d 1154, 1999 Miss. LEXIS 368 (Miss. 1999).

Capital rape statute which requires imposition of death sentence or life imprisonment did not violate separation of pow-

ers doctrine since power to determine appropriate punishment for criminal acts lies in legislative branch. *Fisher v. State*, 690 So. 2d 268, 1996 Miss. LEXIS 490 (Miss. 1996).

Sentence of life imprisonment for crime of capital rape was appropriate for defendant convicted of raping 6-year-old child, despite act that defendant had been offered 5-year sentence during plea negotiations prior to trial; court was not involved in plea negotiations, did not impose heavier sentence merely because defendant exercised his constitutional right to jury trial, and merely followed statutory sentencing dictates. *Johnson v. State*, 666 So. 2d 784, 1995 Miss. LEXIS 616 (Miss. 1995).

While § 97-3-53 places a limit of 30 years on the sentence which may be imposed by the court for kidnapping if the jury fails to find that a life sentence should be imposed, this section does not impose a limitation for the penalty for rape although it, also, allows the jury to fix a penalty at life imprisonment; if the jury does not so fix the penalty under this section, then it may be fixed for any term, less than life, as the court in its discretion may determine. *Erwin v. State*, 557 So. 2d 799, 1990 Miss. LEXIS 57 (Miss. 1990), but see *Strahan v. State*, 729 So. 2d 800, 1998 Miss. LEXIS 343 (Miss. 1998).

On convictions for kidnapping and rape pursuant to § 97-3-53 and this section, where the jury was unable to agree on life imprisonment as the appropriate sentence, and the court was therefore required to impose some lesser sentence than life, each sentence was to be imposed without respect to the other so that the total of the sentences imposed could amount to more than the actuarial life expectancy of the defendant, even though the crimes grew out of a series of violent acts by one individual toward another individual in an unbroken chain of events. If this matter were treated differently, circumstances might arise where it would be impossible for the State to impose any meaningful sentence where more than one crime was committed. *Erwin v. State*, 557 So. 2d 799, 1990 Miss. LEXIS 57 (Miss. 1990), but see *Strahan v. State*, 729 So. 2d 800, 1998 Miss. LEXIS 343 (Miss. 1998).

The maximum punishment upon conviction for rape under this section was life imprisonment where there was no proof that the defendant met any of the conditions set forth in § 99-19-101 for imposition of the death penalty. *Leatherwood v. State*, 548 So. 2d 389, 1989 Miss. LEXIS 358 (Miss. 1989).

Sentence of life imprisonment was required by § 99-19-81 because defendant had previously been convicted of 2 separate felonies arising out of separate incidents at different times and had been sentenced to separate terms of one year or more, and maximum term of imprisonment for the crime of rape was life imprisonment. *Johnson v. State*, 511 So. 2d 1360, 1987 Miss. LEXIS 2667 (Miss. 1987).

In sentencing defendant convicted of rape to term of imprisonment to run concurrently with separate judgment of imprisonment for another rape in another county, second sentencing court is not required to consider sentence previously imposed. *Harper v. State*, 463 So. 2d 1036, 1985 Miss. LEXIS 1857 (Miss. 1985).

The legislature has prescribed that the sentence for rape is life imprisonment if the jury so agrees, and if the jury does not agree, then the court affixes the penalty at imprisonment in the state penitentiary for such term as the court in its discretion may determine, but less than life. *Warren v. State*, 456 So. 2d 735, 1984 Miss. LEXIS 1867 (Miss. 1984).

A sentence of 40 years imposed by the trial court upon a 23-year-old defendant did not constitute a life sentence where, even if the defendant served the entire term, he would be released at approximately 63 years of age, well below his life expectancy. *Hickombottom v. State*, 409 So. 2d 1337, 1982 Miss. LEXIS 1870 (Miss. 1982).

A defendant previously convicted of kidnapping was not subjected to double jeopardy at his subsequent trial for rape of his kidnap victim since he had committed two separate offenses when he had raped his kidnap victim. The trial court properly admitted evidence and exhibits of the crime of rape at the kidnaping trial since evidence of other crimes is admissible to prove motive and a connection between the act proposed to be proved and the

crime charged. *Hughes v. State*, 401 So. 2d 1100, 1981 Miss. LEXIS 1956 (Miss. 1981).

This section, governing sentencing procedures in rape cases, does not violate due process or equal protection of the law, even though no provision is made for the jury to consider mitigating circumstances in fixing a defendant's sentence; the rule requiring a bifurcated trial is applicable only to cases involving capital offenses. *White v. State*, 375 So. 2d 220, 1979 Miss. LEXIS 2271 (Miss. 1979).

Under this section, the imposition of a life sentence is within the sole province of the jury, and the trial judge could not impose a life sentence on the defendant absent a jury recommendation. *Lee v. State*, 322 So. 2d 751, 1975 Miss. LEXIS 1547 (Miss. 1975), overruled in part, *Bester v. State*, 188 So. 3d 526, 2016 Miss. LEXIS 153 (Miss. 2016).

Defendant was not entitled to resentencing under the terms of this section as amended in 1974 where his conviction became final prior to the date on which the amendment became effective. *Davis v. State*, 308 So. 2d 87, 1975 Miss. LEXIS 1841 (Miss. 1975).

A capital case is any case where the permissible punishment prescribed by the legislature is death, even though such penalty may not be inflicted since the decision of the United States Supreme Court in *Furman v. Georgia*, 408 U.S. 238, 33 L. Ed. 2d 346, 92 S. Ct. 2726, reh den 409 U.S. 902, 34 L. Ed. 2d 163, 93 S. Ct. 89 and on remand 229 Ga 731, 194 SE2d 410. *Hudson v. McAdory*, 268 So. 2d 916, 1972 Miss. LEXIS 1216 (Miss. 1972).

Code 1942, § 2358, under which the defendant was sentenced for the crime of rape, was not unconstitutional as cruel and unusual in imposing a sentence of life imprisonment for the crime. *Wilson v. State*, 264 So. 2d 828, 1972 Miss. LEXIS 1371 (Miss. 1972).

8. Plea of guilty.

Nothing in the record, nor in appellant's post-conviction relief (PCR) motion, suggested that his guilty plea to statutory rape under Miss. Code Ann. § 97-3-65 was not knowingly and voluntarily entered, or that the plea was otherwise in-

valid. Therefore, the trial court did not err in dismissing appellant's PCR motion as a successive writ. *Boyd v. State*, 175 So. 3d 59, 2015 Miss. App. LEXIS 152 (Miss. Ct. App.), cert. dismissed, — So. 3d —, 2015 Miss. LEXIS 492 (Miss. 2015).

Where a twenty-one-year-old defendant entered a plea of guilty to charges of statutory rape pursuant to Miss. Code Ann. § 97-3-65(1), the trial court correctly admonished defendant that his sentence would be not more than thirty years imprisonment. The appellate court rejected his claim that the plea was not voluntary. *Carpenter v. State*, 899 So. 2d 916, 2005 Miss. App. LEXIS 115 (Miss. Ct. App.), cert. denied, 898 So. 2d 679, 2005 Miss. LEXIS 274 (Miss. 2005).

The new statutory rape law, Miss. Code Ann. § 97-3-65, went into effect before defendant's sexual encounter with the victim, a 15-year-old student, so the county had the authority to indict defendant and to accept defendant's guilty plea and the county did not have to allege that the victim was chaste. *McKenzie v. State*, 856 So. 2d 344, 2003 Miss. App. LEXIS 132 (Miss. Ct. App. 2003), cert. denied, 864 So. 2d 282, 2004 Miss. LEXIS 7 (Miss. 2004), cert. denied, 947 So. 2d 960, 2007 Miss. LEXIS 57 (Miss. 2007).

Defendant told the trial judge that defendant understood the charges and sentences available under the statutory rape law and that defendant pled guilty with full knowledge; thus, defendant's guilty plea was voluntarily, knowingly, and intelligently made. *McKenzie v. State*, 856 So. 2d 344, 2003 Miss. App. LEXIS 132 (Miss. Ct. App. 2003), cert. denied, 864 So. 2d 282, 2004 Miss. LEXIS 7 (Miss. 2004), cert. denied, 947 So. 2d 960, 2007 Miss. LEXIS 57 (Miss. 2007).

While the plea agreement did not specifically state that it included loss of the right against self-incrimination, the equivalent clearly was stated in the plea agreement; defendant's guilty plea to statutory rape under Miss. Code Ann. § 97-3-65 was therefore made voluntarily, knowingly, and intelligently. *McKenzie v. State*, 856 So. 2d 344, 2003 Miss. App. LEXIS 132 (Miss. Ct. App. 2003), cert. denied, 864 So. 2d 282, 2004 Miss. LEXIS 7 (Miss. 2004), cert. denied, 947 So. 2d 960, 2007 Miss. LEXIS 57 (Miss. 2007).

A defendant was erroneously sentenced to life imprisonment after entering a plea of guilty to forcible rape under subsection (2) of this section, since a defendant under this statute may not be sentenced to life imprisonment unless the jury fixes a penalty at life imprisonment. In cases where the jury does not fix the penalty at life imprisonment, the judge must sentence the defendant to a definite term reasonably expected to be less than life. *Lockett v. State*, 582 So. 2d 428, 1991 Miss. LEXIS 394 (Miss. 1991), overruled in part, *Rowland v. State*, 42 So. 3d 503, 2010 Miss. LEXIS 386 (Miss. 2010), overruled in part, *Bester v. State*, 188 So. 3d 526, 2016 Miss. LEXIS 153 (Miss. 2016).

Assault with intent to rape under former § 2361 is sufficiently a lesser included constituent offense of forcible rape such that a plea-bargain-induced guilty plea thereto under an indictment charging forcible rape will withstand subsequent post-conviction attack. *Grayer v. State*, 519 So. 2d 438, 1988 Miss. LEXIS 52 (Miss. 1988).

Trial court did not err in accepting accused's plea of guilty and fixing his punishment at life imprisonment without impaneling a jury, and no constitutional right of the accused was violated thereby. *Bullock v. Harpole*, 233 Miss. 486, 102 So. 2d 687, 1958 Miss. LEXIS 406 (Miss. 1958).

In a prosecution for rape the trial court did not err in not allowing the defendant to change plea of not guilty entered prior to the trial to a plea of guilty in the presence of the jury in open court at the trial and there was no error committed by the court in submitting the case to the jury on its merits in order that the jury could intelligently determine what penalties should be inflicted. *Buchanan v. State*, 225 Miss. 399, 83 So. 2d 627, 1955 Miss. LEXIS 597 (Miss. 1955).

9. Instructions.

Trial court did not commit plain error when it gave an instruction on attempted rape because the instruction included the intent to commit the offense of rape, stated the overt acts toward the commission of rape, and dictated that defendant was prevented from consummating the

crime of rape; thus, the instruction properly recited the law on attempted rape, and it defined attempt. *Scott v. State*, 231 So. 3d 1024, 2016 Miss. App. LEXIS 404 (Miss. Ct. App. 2016), *aff'd*, 231 So. 3d 995, 2017 Miss. LEXIS 440 (Miss. 2017).

Law was clear that physical resistance was not required for a rape conviction when the victim failed to resist out of reasonable fear of great bodily harm, and thus defendant's requested jury instruction did not give the jury an opportunity to find that the victim failed to resist because of a reasonable apprehension of great bodily harm; on the contrary, defendant's requested jury instruction required the jury to find that the victim used all reasonable available physical resistance on her part to the use of force in order to find defendant guilty of rape, and thus the trial court did not err in refusing to grant a jury instruction that would have incorrectly stated the law. *Goodin v. State*, 977 So. 2d 353, 2007 Miss. App. LEXIS 298 (Miss. Ct. App. 2007), *aff'd* in part and *rev'd* in part, 977 So. 2d 338, 2008 Miss. LEXIS 143 (Miss. 2008).

In a statutory rape case, the trial court did not err in refusing to grant defendant's jury instruction because the indictment, as well as the state's jury instruction, clearly addressed whether defendant had sexual intercourse with the victim through a date after her 14 birthday. *Poynor v. State*, 962 So. 2d 68, 2007 Miss. App. LEXIS 292 (Miss. Ct. App.), *cert. denied*, 962 So. 2d 38, 2007 Miss. LEXIS 416 (Miss. 2007).

Circuit had not erred in not giving defendant's proposed instructions on circumstantial evidence because the circuit court found the child victim's medical report constituted actual or direct evidence. Additionally, the child was clearly an eyewitness to the abuse committed upon her person. *Foley v. State*, 914 So. 2d 677, 2005 Miss. LEXIS 586 (Miss. 2005).

In a prosecution for statutory rape, the defendant was entitled to have the jury instructed with regard to the lesser related offense of lustful touching of a child where (1) the indictment charged that the defendant committed either statutory rape or the lesser crime of lustful touching of a child, and (2) there was a question of

fact with regard to the issue of penetration. *Richardson v. State*, 767 So. 2d 195, 2000 Miss. LEXIS 209 (Miss. 2000).

Requested instruction that rape victim is under duty to use all reasonable physical resistance available under circumstances to prevent rape was not required, where court instructed jury as to amount of resistance victim needed to offer if she was not under threat of serious bodily injury; court instructed jury that victim must use "all reasonable physical resistance available to her under the circumstances then and there existing to prevent the sexual intercourse." *Hull v. State*, 687 So. 2d 708, 1996 Miss. LEXIS 687 (Miss. 1996).

Giving instruction on intoxication as defense to crime was proper, even though intoxication was not asserted as a defense, where defendant testified he was both drunk and high at time alleged offense occurred, where from that testimony jury could reasonably infer that defendant was not aware of his actions and did not have requisite intent to commit crime, and especially where jury was fully and fairly instructed by other instructions and, when read as a whole, instructions were proper as to state's burden of proof and elements of applicable crimes. *Peterson v. State*, 671 So. 2d 647, 1996 Miss. LEXIS 54 (Miss. 1996).

A trial court committed reversible error in failing to adequately instruct the jury on the elements of attempted capital rape where the instructions did not mention the element of failure to complete the rape or prevention of completion. *Henderson v. State*, 660 So. 2d 220, 1995 Miss. LEXIS 390 (Miss. 1995).

In a rape prosecution arising from the rape of the defendant's 13-year-old daughter, "flight" instructions were properly given, in spite of the defendant's argument that he explained his flight by testifying that he was "shocked," "confused," and "frightened" after being confronted by his wife about his daughter's allegation, where the defendant's uncorroborated explanation was contradicted by the wife who testified that the defendant admitted to her via telephone that he had sex with the daughter. *Evans v. State*, 579 So. 2d 1246, 1991 Miss. LEXIS 255 (Miss. 1991).

In a prosecution for rape, the evidence was sufficient to support an instruction on the charge of aggravated assault where the victim testified that the defendant had repeatedly punched her in the face and head during his attack on her, she further testified that she had spent about 4 days in the hospital and that she was told to see a neurologist because of a damaged nerve in her head, the emergency room physician testified that the victim had suffered significant facial trauma and that both of her eyes were swollen shut, the victim had fresh blood in both nostrils and significant bruising and bleeding into the skin of her face, and photographs of the victim taken after the attack illustrated the nature of her injuries. The evidence was also sufficient to support an instruction on the lesser included offense of simple assault where the defendant transported the victim to the hospital after the attack. *Taylor v. State*, 577 So. 2d 381, 1991 Miss. LEXIS 120 (Miss. 1991).

In a rape prosecution, the trial court did not err in refusing an instruction which stated that the State was required to present evidence "to produce a moral certainty of guilt"; the phrase "to a moral certainty" is confusing and misleading since the State's burden is to prove the defendant's guilt "beyond a reasonable doubt." *Allman v. State*, 571 So. 2d 244, 1990 Miss. LEXIS 705 (Miss. 1990).

In deciding whether lesser included offense instructions are to be given, trial courts must be mindful of the disparity in maximum punishments. However, even where there is a great disparity in maximum punishments between the offenses, the trial judge cannot indiscriminately give a lesser included offense instruction, nor can the trial judge give such an instruction on the basis of pure speculation; there must be some evidence regarding the lesser included offense. Thus, a rape defendant was entitled to instructions on the lesser included offenses of simple and aggravated assault where the defendant's side of the story warranted the instructions, particularly since the maximum penalty for simple assault carries a 6-month jail term in the county jail and a \$500 fine and the maximum penalty for aggravated assault carries a 20-year

prison term in the penitentiary, while, if convicted for rape, the defendant would be faced with the possibility of serving a prison term for the remainder of his life. *Boyd v. State*, 557 So. 2d 1178, 1989 Miss. LEXIS 461 (Miss. 1989).

Trial court did not err in not granting defendant's motion for directed verdict where indictment did not contain specific date, but instead alleged that rape was committed on or about certain day, and jury instruction was similar; while notice of specific date is often essential to preparation of defense, especially where alibi is relied on, and it is even more important in jury instructions, there was no error where defendant had raised no credible claim of unfair surprise or prejudice, nor sought continuance or any other remedy. *Wilson v. State*, 515 So. 2d 1181, 1987 Miss. LEXIS 2926 (Miss. 1987).

When an accused is charged with having carnal knowledge of a female under the age of 12 years, the State's proof need not show penetration, but only that the private parts of the female have been lacerated or torn in the attempt to have sexual intercourse with her. *Williams v. State*, 427 So. 2d 100, 1983 Miss. LEXIS 2436 (Miss. 1983), but see *Mitchell v. State*, 539 So. 2d 1366, 1989 Miss. LEXIS 141 (Miss. 1989), overruled in part, *Derouen v. State*, 994 So. 2d 748, 2008 Miss. LEXIS 587 (Miss. 2008).

An instruction which told the jury that if the accused was not guilty of rape of girl under 12 years old, then the jury was under a duty to find him guilty of attempted rape, amounted to an impermissible peremptory instruction for the state. *Winters v. State*, 244 Miss. 704, 146 So. 2d 350, 1962 Miss. LEXIS 500 (Miss. 1962).

The trial court properly refused to instruct the jury that in view of the seriousness of the charge against the accused it was required to scrutinize the testimony of the prosecutrix with due care and that if there was any doubt as to the truthfulness of her testimony, such doubts were to be resolved in favor of the accused. *Goode v. State*, 245 Miss. 391, 146 So. 2d 74, 1962 Miss. LEXIS 559 (Miss. 1962).

The court did not err in charging that if the accused unlawfully and forcibly ravished the prosecuting witness without her

consent, the jury might return a verdict finding the defendant guilty as charged, in which case it would be the duty of the court to sentence the accused to death in the gas chamber, or find the accused guilty as charged and fix his punishment at life imprisonment, or find the accused guilty as charged but disagree as to the punishment, in which case the court would sentence the accused to the state penitentiary for life. *Drake v. State*, 228 Miss. 589, 89 So. 2d 593, 1956 Miss. LEXIS 550 (Miss. 1956).

Instruction in rape prosecution that when a female submits to sexual intercourse through fear of personal violence and to avoid infliction of great personal injury on herself, such carnal knowledge is rape correctly defines the law. *Rodgers v. State*, 204 Miss. 891, 36 So. 2d 155, 1948 Miss. LEXIS 418 (Miss. 1948).

Instruction that if jury believed beyond a reasonable doubt that defendant unlawfully, forcibly, and feloniously assaulted prosecutrix, a female over age of 12 years, and put her in fear of great personal violence, and violently, forcibly and feloniously and against her will, ravaged and carnally knew her, at time and place and in manner and form as charged in indictment, it was jury's duty to find defendant guilty, does not refer the jury to the indictment to ascertain the elements of the crime as they sufficiently appear in instruction. *Rodgers v. State*, 204 Miss. 891, 36 So. 2d 155, 1948 Miss. LEXIS 418 (Miss. 1948).

Refusal of instruction that burden was on state to prove accused attempted rape as charged held not error because covered by instruction given at accused's request. *Barnes v. State*, 164 Miss. 126, 143 So. 475 (Miss. 1932).

Instruction to convict of attempt to rape if jury believed from evidence beyond reasonable doubt defendant committed act specified in instruction, held not erroneous as confusing. *Barnes v. State*, 164 Miss. 126, 143 So. 475 (Miss. 1932).

Instruction that a female child less than twelve years of age cannot consent to sexual intercourse, and if a man has intercourse with such child voluntarily so far as he is concerned then he would be guilty of rape, regardless of whether the

female consented or not, is erroneous. *Simmons v. State*, 105 Miss. 48, 61 So. 826, 1913 Miss. LEXIS 180 (Miss. 1913).

Instruction in prosecution for statutory rape, that the crime may be proved by circumstances, and it is not necessary to have an eye-witness to the deed, held erroneous. *Simmons v. State*, 105 Miss. 48, 61 So. 826, 1913 Miss. LEXIS 180 (Miss. 1913).

10. Setting aside conviction.

Conviction of forcible rape was reversed where omnibus hearing was held day before trial instead of at least 3 days prior to trial as required by Rule 4.09[Repealed], Uniform Criminal Rules of Circuit Court Practice; state did not begin providing defense with witnesses' statements until omnibus hearing, despite filing of discovery motion by defendant pursuant to Rule 4.06[Repealed], Uniform Criminal Rules of Circuit Court Practice, several weeks before omnibus hearing; therefore, failure to grant defendant's request for continuance, coupled with violations of Rule 4.06 and 4.09, necessitated reversal of conviction. *Inman v. State*, 515 So. 2d 1150, 1987 Miss. LEXIS 2896 (Miss. 1987).

Unfounded implication that defendant impregnated his 11 year old daughter required granting of request for mistrial; allowing defendant to show he was not responsible for pregnancy and resulting abortion was not sufficient to prevent granting mistrial. *Murriel v. State*, 515 So. 2d 952, 1987 Miss. LEXIS 2902 (Miss. 1987).

Trial court did not err when it failed to grant mistrial based upon prosecutor's remarks during opening and closing arguments where: prosecutor's reference to defendant as "animalistic" was corrected when defendant's counsel objected and trial judge told jury to disregard remark; comment of prosecutor that conviction of defendant was only thing that would put victim's spirit to rest was not error because jury members were already aware of victim's death and that charge against defendant was rape, and there was nothing to suggest that such remark concerning victim's spiritual repose was itself grounds for reversal. *McFee v. State*, 511 So. 2d 130, 1987 Miss. LEXIS 2630 (Miss. 1987).

State's revelation on its voir dire examination of the jury that the victim of forcible rape, accused's stepdaughter who was 13 years of age at the time, had subsequently undergone an abortion constituted prejudicial misconduct which could not be cured by admonition or instruction and necessitated a mistrial, and where a mistrial was not declared, the rape conviction was reversed. *Stokes v. State*, 484 So. 2d 1022, 1986 Miss. LEXIS 2412 (Miss. 1986).

It is error to refuse continuance to rape defendant where appointed counsel for defendant is excused just prior to trial on basis of possible conflict of interest and newly appointed attorney informs judge of need for additional time to prepare; however refusal to grant continuance is not ground for setting aside conviction where defendant is not prejudiced by error in that every witness needed by defendant does in fact appear and testify, there is ample evidence on main issue in case, and defendant fails to show how continuance would have made difference in result. *Plummer v. State*, 472 So. 2d 358, 1985 Miss. LEXIS 2099 (Miss. 1985).

In a prosecution for rape of a 12-year-old female which proceeded to trial as a rape not justifying the death penalty, and in which the jury found defendant guilty as charged, the only sentence under such verdict which could be imposed was a life sentence by the trial judge; therefore, the trial judge was not required to send the jury back to the jury room for the purpose of returning a verdict of life imprisonment, and he did not commit error in the procedure followed by him. *Williams v. State*, 427 So. 2d 100, 1983 Miss. LEXIS 2436 (Miss. 1983), but see *Mitchell v. State*, 539 So. 2d 1366, 1989 Miss. LEXIS 141 (Miss. 1989), overruled in part, *Derouen v. State*, 994 So. 2d 748, 2008 Miss. LEXIS 587 (Miss. 2008).

A rape conviction would be reversed and a new trial ordered, where the trial judge's oral statement to the jury that it could include a recommendation of mercy as part of its verdict could have been interpreted as an indication by the trial judge that the jury's recommendation would have a bearing on the defendant's punishment, and where such statement may

have caused two jurors to change their verdicts to guilty. *Martin v. State*, 415 So. 2d 706, 1982 Miss. LEXIS 2037 (Miss. 1982).

New trial was required where the trial court refused to permit defense counsel to call prosecutrix as an adverse witness for purpose of laying predicate for introduction of impeachment testimony to the effect that on afternoon following the alleged commission of the offense, prosecutrix was laughing about the matter, and in his closing argument, district attorney had made statements, amounting to comment on the failure of the accused to testify. *Chatman v. State*, 244 Miss. 659, 145 So. 2d 707, 1962 Miss. LEXIS 492 (Miss. 1962).

A judgment convicting a Negro of the rape of a white woman was required to be reversed where it was shown by witnesses that, to their knowledge, Negroes had never served on juries in the county where accused was tried, and although there were some Negro qualified electors in the county, and some names of Negroes had been placed in the jury box where they could be drawn as jurors, there were in the year in which the crime was committed and the defendant was tried and convicted, no names of Negroes in the jury box. *Gordon v. State*, 243 Miss. 750, 140 So. 2d 88, 1962 Miss. LEXIS 403 (Miss. 1962).

While a conviction for rape may rest on the uncorroborated testimony of the person alleged to have been raped, it should always be scrutinized with caution; and where there is much in the facts and circumstances in the evidence to discredit her testimony, another jury should be permitted to pass thereon. *Richardson v. State*, 196 Miss. 560, 17 So. 2d 799, 1944 Miss. LEXIS 234 (Miss. 1944); *Rodgers v. State*, 204 Miss. 891, 36 So. 2d 155, 1948 Miss. LEXIS 418 (Miss. 1948); *Johnson v. State*, 213 Miss. 808, 58 So. 2d 6, 1952 Miss. LEXIS 429 (Miss. 1952).

New trial granted, when testimony unreasonable and contradicted, and defendant may not have had fair trial. *Davis v. State*, 132 Miss. 448, 96 So. 307, 1923 Miss. LEXIS 53 (Miss. 1923).

Where unreasonable story of prosecutrix is contradicted by credible witnesses,

new trial should be granted. *Holifield v. State*, 132 Miss. 446, 96 So. 306, 1923 Miss. LEXIS 51 (Miss. 1923).

Conviction must be reversed where against the weight of evidence. *Joslin v. State*, 129 Miss. 181, 91 So. 903, 1922 Miss. LEXIS 35 (Miss. 1922).

11. Effective assistance of counsel.

Where appellant, a forty-four-year-old male, was caught having sexual intercourse with a fourteen-year-old female, he entered a plea of guilty to statutory rape under Miss. Code Ann. § 97-3-65(1)(b). He was not entitled to post-conviction relief based on his claim of ineffective assistance of counsel; because there was ample evidence to convict him of statutory rape, there was no reasonable probability that the outcome of the case would have been different but for counsel's alleged errors. *Maggitt v. State*, 26 So. 3d 363, 2009 Miss. App. LEXIS 250 (Miss. Ct. App. 2009), cert. denied, 24 So. 3d 1038, 2010 Miss. LEXIS 38 (Miss. 2010).

Where defendant admitted that he committed the offense of statutory rape and entered a plea of guilty to the charge, the appellate court rejected his claim of ineffective assistance of counsel. There was no suggestion that defendant received inaccurate information on his parole eligibility in deciding to enter a plea of guilty; defendant also failed to prove that he was prejudiced by counsel's failure to investigate the facts of the case, or present any evidence in mitigation. *Carpenter v. State*, 899 So. 2d 916, 2005 Miss. App. LEXIS 115 (Miss. Ct. App.), cert. denied, 898 So. 2d 679, 2005 Miss. LEXIS 274 (Miss. 2005).

Defendant failed to prove assistance of counsel was ineffective as (1) defendant did not show that defense attorney had a conflict of interest; (2) the State had ample proof without resorting to using defendant's statements had there been a trial, so that defense attorney did not need to file a motion to suppress defendant's statements; (3) defense attorney gave sound legal advice to defendant about pleading guilty; and (4) defendant was not coerced into pleading guilty. *McKenzie v. State*, 856 So. 2d 344, 2003 Miss. App. LEXIS 132 (Miss. Ct. App. 2003), cert.

denied, 864 So. 2d 282, 2004 Miss. LEXIS 7 (Miss. 2004), cert. denied, 947 So. 2d 960, 2007 Miss. LEXIS 57 (Miss. 2007).

II. EVIDENTIARY MATTERS.

12. In general.

Weight of the evidence supported defendant's conviction for statutory rape, Miss. Code Ann. § 97-3-65(1)(a), even though the medical evidence presented was minimal, because the fourteen-year-old victim, who was defendant's biological daughter, stated defendant did not ejaculate "as he was interrupted during the act," the victim told a nurse that she had been having intercourse with defendant on numerous occasions for about a year, and the victim's mother, also defendant's wife, gave an eyewitness account of the rape. *Pittman v. State*, 109 So. 3d 599, 2013 Miss. App. LEXIS 63 (Miss. Ct. App. 2013).

Although defendant alleged that he was not allowed to demonstrate bias or prejudice, the trial court did not abuse its discretion in determining that the mother's motive of money was a collateral matter that would not help the jury decide whether the statutory rape or fondling occurred; thus, pursuant to Miss. R. Evid. 103(a), the trial court did not err in excluding that evidence. *Poynor v. State*, 962 So. 2d 68, 2007 Miss. App. LEXIS 292 (Miss. Ct. App.), cert. denied, 962 So. 2d 38, 2007 Miss. LEXIS 416 (Miss. 2007).

Circuit judge did not err in refusing to allow defendant's attorneys to question his former wife about the man to whom she was now married, because the circuit court found that that testimony had no relevance where defense counsel had made a number of ambiguous statements about the relevancy of the line of questioning to aid in the establishment that other men or youth could have caused the child victim's injuries. *Foley v. State*, 914 So. 2d 677, 2005 Miss. LEXIS 586 (Miss. 2005).

Where defendant was convicted of felonious sexual intercourse with a child under the age of 14, felonious sexual penetration with a child less than 18, and possession of materials depicting children under the age of 18 engaging in sexually explicit conduct, the circuit had not erred in not granting his pretrial motion to

suppress evidence obtained by a search warrant based on the statements of the child victim, because she specifically stated that defendant had showed her pictures of nude people on his computer screen doing things she described as "gross." She used language to describe acts performed on her and by her in relation to defendant in such sexually explicit terms that veracity could easily be inferred. *Foley v. State*, 914 So. 2d 677, 2005 Miss. LEXIS 586 (Miss. 2005).

The decision to admit expert testimony describing the child's behavior as common with that of a sexually abused child was well within the trial judge's discretion, and there was no abuse of discretion where the expert testimony was offered as substantive evidence of abuse and was not describing a syndrome. *Crawford v. State*, 754 So. 2d 1211, 2000 Miss. LEXIS 8 (Miss. 2000).

It was not harmless error to exclude evidence reflecting on credibility of alleged rape victim, in prosecution for rape. *Skaggs v. State*, 676 So. 2d 897, 1996 Miss. LEXIS 317 (Miss. 1996).

Question to rape victim as to whether she had ever charged or made allegations against anyone regarding rape or sexual advances was improper and fell under evidentiary rule prohibiting introduction of evidence of victim's past sexual behavior unless question was whether victim had made any false allegations of past sexual offense. *Peterson v. State*, 671 So. 2d 647, 1996 Miss. LEXIS 54 (Miss. 1996).

Proposed testimony by third party that rape victim had made allegation of previous sexual offense was inadmissible as collateral evidence to impeach victim; defense was not allowed to prove that victim had made allegation that she had previously been victim of sexual offense based on prohibition against evidence of victim's past sexual behavior, and testimony was not that victim had made false allegation of previous sexual offense. *Peterson v. State*, 671 So. 2d 647, 1996 Miss. LEXIS 54 (Miss. 1996).

In a rape prosecution, the trial court properly denied an instruction which stated that the defendant could not be convicted upon the uncorroborated testimony of the prosecutrix since it was an

incorrect statement of the law in that it instructed the jury that corroboration of the victim's testimony was necessary. *Allman v. State*, 571 So. 2d 244, 1990 Miss. LEXIS 705 (Miss. 1990).

A practicing physician who was not qualified as a psychiatrist or a psychologist did not have the professional competence in the field of child sexual abuse to give an opinion that a child "had been sexually traumatized" where the physician had no specialized training in the field of child sexual abuse, and testified only that "I examine a good many young girls in my practice" and "I have had a tremendous amount of experience in child sexual abuse". Additionally, the prosecution made no effort to show that behavioral science has developed to the point where even the most knowledgeable experts in the field may give opinions that sexual abuse has occurred, with the required level of reliability. *Goodson v. State*, 566 So. 2d 1142, 1990 Miss. LEXIS 413 (Miss. 1990).

It is doubtful that a trial court may admit expert opinion testimony that a child alleged to have been the victim of sexual abuse is telling the truth. *Goodson v. State*, 566 So. 2d 1142, 1990 Miss. LEXIS 413 (Miss. 1990).

In rape prosecution, allegation in state's opening argument concerning defendant having oral sex with victim was not ground for mistrial, since testimony as to oral sex was part of the *res gestae*. *White v. State*, 498 So. 2d 368, 1986 Miss. LEXIS 2851 (Miss. 1986).

Trial judge was not in manifest error in admitting defendant's statements in evidence at rape trial, where the overwhelming weight of the evidence on the record showed that the prosecution by clear and convincing evidence proved not only that defendant had received his *Miranda* warnings, but that he had waived his rights intelligently, knowingly, and voluntarily. *White v. State*, 495 So. 2d 1346, 1986 Miss. LEXIS 2698 (Miss. 1986).

Testimony of witnesses at rape trial concerning defendant's statement indicating that he had had sex with victim was not precluded by hearsay rule, since the statement, which was made a very short time after the incident before defendant

was arrested and while he was not in custody of police officers, amounted to a statement against interest. *McBride v. State*, 492 So. 2d 581, 1986 Miss. LEXIS 2539 (Miss. 1986).

When rape prosecutrix states name of attacker and statement appears to be spontaneous and without indication of manufacture it should be received in evidence as exception to hearsay rule. *Cunningham v. State*, 467 So. 2d 902, 1985 Miss. LEXIS 1936 (Miss. 1985).

Under this statute, which provides that any person under 18 years of age may not suffer the death penalty for rape of a female child under the age of 12 years, the trial court did not err in permitting introduction of biographical data obtained from defendant relating to his age; routine questions asked in booking a suspect, relating to his name, age, and place of residence, are not proscribed by *Miranda*. *Upshaw v. State*, 350 So. 2d 1358, 1977 Miss. LEXIS 2249 (Miss. 1977).

In a trial for rape, it was not error to permit a doctor to testify as to injuries to the infant victim's sexual organs. *Winston County Community Hospital v. Hathorn*, 242 So. 2d 865, 1970 Miss. LEXIS 1393 (Miss. 1970).

Where only the victim testified as to the identity of the accused, there was no error in the admission of the evidence as to armed robbery which occurred at the same time when, and the same place where, the crime of rape was committed. Besides, the taking of a rifle and some money might well indicate that the accused's object in doing so was to effectuate his escape from detection of the crime of rape. *Wilson v. State*, 243 Miss. 859, 140 So. 2d 275, 1962 Miss. LEXIS 413 (Miss. 1962).

Where a highway patrolman, who had ample information that the crime of rape had been committed and knew that a warrant had been issued, after being stopped by a hitchhiker, whose description fitted the description of the rapist, arrested and searched the hitchhiker, the arrest, being lawful, the search incident thereto was likewise lawful, and the evidence obtained thereby was admissible. *Shay v. State*, 229 Miss. 186, 90 So. 2d 209, 1956 Miss. LEXIS 599 (Miss. 1956).

In a prosecution for rape introduction of evidence by the state that the prosecutrix was nervous, crying and upset about four hours after the commission of the offense, when she reached the home of her brother and was there observed by his family and the officers, was no error. *Lang v. State*, 230 Miss. 147, 87 So. 2d 265, 1956 Miss. LEXIS 645 (Miss.), cert. denied, 352 U.S. 936, 77 S. Ct. 236, 1 L. Ed. 2d 167, 1956 U.S. LEXIS 165 (U.S. 1956).

In a prosecution of father for rape of his daughter it was an error to admit in evidence the testimony of a physician who testified as to what the mother had told him of the rape of her daughter. *Fairley v. State*, 225 Miss. 371, 83 So. 2d 278, 1955 Miss. LEXIS 593 (Miss. 1955).

In prosecution for rape where the grand jury heard competent evidence, including the testimony of the prosecutrix, an indictment will not be quashed because the grand jury heard incompetent evidence. *Johnson v. State*, 213 Miss. 808, 58 So. 2d 6, 1952 Miss. LEXIS 429 (Miss. 1952).

Exclusion of admissions of female tending to account for physical condition was error and harmful. *Smith v. State*, 141 Miss. 630, 106 So. 817, 1926 Miss. LEXIS 455 (Miss. 1926).

13. Belongings of victim.

At defendant's trial for attempted rape, admission, over defense's objections, of alleged victim's earring, and of testimony concerning earring, constituted reversible error where earring had not been made available to defense for inspection before trial under motion for discovery. *Thomas v. State*, 488 So. 2d 1343, 1986 Miss. LEXIS 2475 (Miss. 1986).

Testimony of the victim, the fact that certain property feloniously taken from the victim's home was found in the accused's possession when he was arrested shortly after the crime was committed, and other corroborating evidence, supported the conviction of rape. *Wilson v. State*, 243 Miss. 859, 140 So. 2d 275, 1962 Miss. LEXIS 413 (Miss. 1962).

It was not error to admit in evidence the bloody clothing of the prosecutrix as part of the res gestae and also to corroborate the testimony of the prosecutrix. *Cameron v. State*, 233 Miss. 404, 102 So. 2d 355, 1958 Miss. LEXIS 397 (Miss. 1958).

Admission of evidence that the accused had taken money and other articles, including a cigarette lighter, from his alleged rape victim was proper, where the taking of these articles occurred on the same occasion when the more serious offense was committed and was so connected as to constitute a continuous transaction, and for the additional reason that the cigarette lighter was of distinct value in establishing the identity of the assailant. *Shay v. State*, 229 Miss. 186, 90 So. 2d 209, 1956 Miss. LEXIS 599 (Miss. 1956).

14. Chastity of victim.

Rape shield law controls over any statutory evidence rules. *Amacker v. State*, 676 So. 2d 909, 1996 Miss. LEXIS 310 (Miss. 1996).

Rape shield law does not apply to evidence pertaining to the sexual act upon which the rape charge is based. *Amacker v. State*, 676 So. 2d 909, 1996 Miss. LEXIS 310 (Miss. 1996).

Rape shield law did not preclude introduction of conflicting testimony as to who actually committed the rape. *Amacker v. State*, 676 So. 2d 909, 1996 Miss. LEXIS 310 (Miss. 1996).

For purposes of Rule 412(b)(2)(A), Miss. R. Ev., which limits what an accused may tell the jury concerning a rape victim's past sexual behavior, "past sexual behavior" refers to sexual behavior at any time in the past, i.e., prior to trial. The relevance of other sexual behavior of the victim which may explain the source of semen, pregnancy, disease or injury and thus exonerate the accused, as a matter of common sense, is not necessarily affected by whether it occurred before or after the event charged in the indictment. Conversely, the reasons why it would be unfair to delve into the victim's sexual experience prior to rape extend equally to post-rape sexual activity. *Goodson v. State*, 566 So. 2d 1142, 1990 Miss. LEXIS 413 (Miss. 1990).

Where the prosecution proves the condition of a rape victim's vaginal opening to induce belief that the condition is the result of an injury-producing and otherwise illegal act of sexual violence committed by the defendant, that injury-produced condition is an "injury" within the

meaning of Rule 412(b)(2)(A), Miss. R. Ev. Goodson v. State, 566 So. 2d 1142, 1990 Miss. LEXIS 413 (Miss. 1990).

The trial court did not err in sustaining state's objection to a question asked, upon cross examination, of rape victim as to whether she and her fiancé, with whom she was with on the night the alleged rape occurred, did not have an affair and that this was the reason she had reported that she had been raped, where the question of the victim's consent was not in issue. Shay v. State, 229 Miss. 186, 90 So. 2d 209, 1956 Miss. LEXIS 599 (Miss. 1956).

Evidence in a rape prosecution tending to show that cabin which prosecutrix was occupying was registered to a male companion under a fictitious name was inadmissible since impeachment of the character of the prosecutrix in respect to chastity must be confined to evidence of her general reputation, and she cannot be examined as to particular acts of intercourse with other men, or that fact otherwise proven. Rodgers v. State, 204 Miss. 891, 36 So. 2d 155, 1948 Miss. LEXIS 418 (Miss. 1948).

In prosecution for attempt to rape, testimony respecting isolated act of sexual intercourse by prosecutrix held properly excluded as irrelevant. Barnes v. State, 164 Miss. 126, 143 So. 475 (Miss. 1932).

Evidence that prosecutrix's general reputation for chastity was bad was admissible in rape case. Wilkerson v. State, 106 Miss. 633, 64 So. 420, 1913 Miss. LEXIS 174 (Miss. 1913).

In a prosecution for rape on a female under twelve years of age, evidence of previous unchaste character is ordinarily immaterial. Richardson v. State, 100 Miss. 514, 56 So. 454, 1911 Miss. LEXIS 42 (Miss. 1911).

15. Competency; child's testimony.

In a statutory rape case, there was no abuse of discretion in a trial court's admission of an eight-year-old victim's out-of-court statements to three witnesses under the tender years hearsay exception of Miss. R. Evid. 803(25) because the statements were reliable, consistent, and spontaneous, and the three witnesses were credible. Furthermore, there was a lack of evidence disputing that the child was par-

ticularly likely to be telling the truth when the contested statements were made. Bridgeman v. State, 58 So. 3d 1208, 2010 Miss. App. LEXIS 593 (Miss. Ct. App. 2010).

Trial court had not erred by allowing the statements of 5-year-old rape victim to be brought before the jury through the testimony of medical professionals who examined or interviewed her because the victim's statements were squarely within the tender years exception to hearsay as provided by Miss. R. Evid. 803(25). There was no doubt that the overwhelming physical evidence of abuse to the child's person corroborated the statements by her alleging sexual abuse and her comments, spontaneously made to a number of professionals trained to detect abuse and its effects, showed an overwhelming sense of adult knowledge of sexual topics of which children in their earliest years should have no knowledge. Foley v. State, 914 So. 2d 677, 2005 Miss. LEXIS 586 (Miss. 2005).

Defendant's conviction for statutory rape in violation of Miss. Code Ann. § 97-3-65(1)(b) was proper where the circuit court did not err in admitting hearsay testimony of the victim into evidence under Miss. R. Evid. 803(25), the "tender years exception," because it appeared that the victim knew the difference in truth and imagination. Further, the record showed that the State established all of the elements of the statutory rape charge. Withers v. State, 907 So. 2d 342, 2005 Miss. LEXIS 439 (Miss. 2005).

Trial court abused its discretion, in prosecution for capital rape, by excluding testimony of child witnesses on grounds that witnesses could not remember exact date of the incident; inability to remember date went to credibility, rather than competence. Amacker v. State, 676 So. 2d 909, 1996 Miss. LEXIS 310 (Miss. 1996).

Trial court has discretion to exclude, as incompetent, testimony of child witness. Amacker v. State, 676 So. 2d 909, 1996 Miss. LEXIS 310 (Miss. 1996).

Child had personal knowledge, directly from her sense of touch, that person in bed with rape victim had curly hair, and, therefore, child could testify to that fact; however, child could not speculate as to

who the person with curly hair was. *Amacker v. State*, 676 So. 2d 909, 1996 Miss. LEXIS 310 (Miss. 1996).

When a reasonably intelligent eyewitness has had a good opportunity to view the features of the perpetrator of a crime, the method the police use in having the witness identify the defendant recedes in importance in inverse ratio to the intelligence of the witness and opportunity to view the perpetrator. Thus, a rape defendant's argument that the victim's in-court identification resulted from an impermissibly suggestive photographic identification of the defendant, or from seeing him at the preliminary hearing, was without merit where the victim was a sensible child who had ample opportunity to view the rapist in the daylight, she gave a description of the defendant to a police officer, the accuracy of which was undisputed, and she identified the defendant's photograph without hesitation no more than 1 ½ hours after the crime. *Powell v. State*, 566 So. 2d 1228, 1990 Miss. LEXIS 461 (Miss. 1990).

An 11-year-old rape victim's testimony that the defendant had forced her to have sex with him 2 to 3 times a week for a period of 6 months prior to the rape giving rise to the prosecution was admissible to show the defendant's lustful, lascivious disposition toward the victim. *White v. State*, 520 So. 2d 497, 1988 Miss. LEXIS 156 (Miss. 1988).

The testimony of a five-year-old prosecutrix was admissible where she demonstrated the capacity to observe, recollect and communicate events, to understand questions and to make intelligent answers with a consciousness of the duty to speak the truth. *Yarbrough v. State*, 202 Miss. 820, 32 So. 2d 436, 1947 Miss. LEXIS 345 (Miss. 1947).

Complaint made by child less than twelve years of age to physicians five and seven days after outrage by her father is inadmissible. *Simmons v. State*, 105 Miss. 48, 61 So. 826, 1913 Miss. LEXIS 180 (Miss. 1913).

16. Consent of victim.

The requirement that there must be both force and lack of consent no longer exists under Miss. Code Ann. § 97-3-

65(3). *Madere v. State*, 794 So. 2d 200, 2001 Miss. LEXIS 235 (Miss. 2001).

Failure to apply proper legal standard to evidence on whether alleged rape victim consented was error; in ruling on admissibility of evidence of kissing between parties a month prior to incident, trial court did not consider exception to evidentiary rule excluding victim's sexual behavior for behavior that occurs with accused and is offered by accused on issue of whether victim consented to alleged sexual offense. *Peterson v. State*, 671 So. 2d 647, 1996 Miss. LEXIS 54 (Miss. 1996).

Error in failure to apply proper legal standards in excluding evidence of prior kissing between parties in rape case was harmless; other evidence included that parties were previously acquainted, that defendant was high or intoxicated night of incident, that during sexual encounter victim was injured, that victim ran away from scene in distraught, frantic manner in state of undress, that parties were kissing and fondling on night of incident, and defense failed to demonstrate significance and nature of previous kissing between parties that had been excluded. *Peterson v. State*, 671 So. 2d 647, 1996 Miss. LEXIS 54 (Miss. 1996).

In prosecution for forcibly ravishing a girl over the age of 12 years against her will, where defendant testified that he and the girl engaged in acts of sexual intercourse shortly before date of alleged crime and planned the specific act charged, the testimony should have been admitted, since it was not only competent in defense, but it was very material and relevant as throwing light on the issue of whether or not the act was forcibly done or was with the consent of the alleged victim. *Lewis v. State*, 217 Miss. 488, 64 So. 2d 634, 1953 Miss. LEXIS 456 (Miss. 1953).

17. Victims statement to third party.

In defendant's trial on a charge of statutory rape wherein the victim was defendant's fourteen-year-old daughter, the trial court properly admitted, under Miss. R. Evid. 803(4), hearsay statements during the testimony of the nurse who examined the victim because statements made by the victim and her mother for the purpose of the victim receiving medical

treatment were admissible and statements identifying defendant as the abuser were reasonably pertinent to treatment and relied upon in diagnosis and treatment. *Pittman v. State*, 109 So. 3d 599, 2013 Miss. App. LEXIS 63 (Miss. Ct. App. 2013).

Trial court did not err in allowing a child rape victim's hearsay statements to be admitted under Miss. R. Evid. 803(25) in defendant's statutory rape trial as the victim was eleven years old when she told her mother and aunt that defendant had been having sexual intercourse with her, the statements were spontaneous and consistently repeated, the victim's mental stated seemed to be one of a person who would not fabricate, the victim seemed to be of the character that would be able to relate things reliably to those she to whom she was speaking, more than one person had heard the statements, her relationships to the witnesses showed reliability, the possibility of a faulty recollection was remote, and the people giving the statements seemed to be credible. *Anderson v. State*, 62 So. 3d 927, 2011 Miss. LEXIS 194 (Miss. 2011).

In defendant's trial for statutory rape, the trial court did not abuse its discretion in allowing the victim's hearsay testimony under the "tender years" exception of Miss. R. Evid. 803(25). The trial court weighed its concerns with the victim's credibility against the other circumstances and found substantial indicia of reliability in her hearsay statements, and the reviewing court could not state with a definite and firm conviction that the trial court reached the wrong result pursuant to Miss. R. Evid. 103(a). *Grimes v. State*, 1 So. 3d 951, 2009 Miss. App. LEXIS 32 (Miss. Ct. App. 2009).

Trial court had not erred by allowing the statements of 5-year-old rape victim to be brought before the jury through the testimony of medical professionals who examined or interviewed her because the statements to doctors were statements made for the purposes of medical treatment, and thus an exception to the hearsay rule of exclusion. And, the statements were made as a part of neutral medical evaluations and thus were not testimonial and defendant's confrontation clause vio-

lation argument was without merit. *Foley v. State*, 914 So. 2d 677, 2005 Miss. LEXIS 586 (Miss. 2005).

Trial court had not erred by allowing the statements of 5-year-old rape victim to be brought before the jury through the testimony of medical professionals who examined or interviewed her because the statements to doctors were admissible under Miss. R. Evid. 803(4) as statements made for the purposes of medical treatment, and thus an exception to the hearsay rule of exclusion. *Foley v. State*, 914 So. 2d 677, 2005 Miss. LEXIS 586 (Miss. 2005).

Hearsay rule addressing statements made by child of tender years describing any act of sexual contact performed with or on child by another allows statements of causation and fault and has been expanded to include identity of perpetrator in child abuse cases. *Young v. State*, 679 So. 2d 198, 1996 Miss. LEXIS 416 (Miss. 1996).

Admission, in rape prosecution, of anatomical drawing used by social worker during interview of child who was alleged victim, under tender years exception, was erroneous, as defendant objected to drawing as hearsay, trial court failed to hold hearing or make findings regarding trustworthiness of document, and state did not present any other basis for admitting document. *Young v. State*, 679 So. 2d 198, 1996 Miss. LEXIS 416 (Miss. 1996).

Error in admitting anatomical drawing used by social worker during interview of child who was alleged rape victim was harmless, notwithstanding defendant's hearsay objection and trial court's failure to make findings supporting admission of drawing, as drawing was cumulative of social worker's testimony that child identified defendant as perpetrator, which defendant did not object to, as well as testimony of police officer that he heard child identify defendant and child's own testimony that defendant was perpetrator. *Young v. State*, 679 So. 2d 198, 1996 Miss. LEXIS 416 (Miss. 1996).

In a sexual battery prosecution involving the defendant's sexual abuse of his stepdaughter, the trial court did not err in allowing the defendant's mental health therapist to testify about communications

during the defendant's therapy sessions, where the defendant waived any and all rights under the psychotherapist-patient privilege by requesting the therapist to write a letter to the court informing the trial judge of his therapy sessions which treated his sexual behavior toward his stepdaughter; by making such a request, the defendant intended the communications to be disclosed to a third person, namely the court. *Everett v. State*, 572 So. 2d 838, 1990 Miss. LEXIS 451 (Miss. 1990).

To extent that admission of accusatory statement made by rape victim to third party shortly after alleged crime was committed is error, error is harmless and does not prejudice defendant where statement contains nothing which has not previously been testified to in competent testimony to which no objection has been made. *Barker v. State*, 463 So. 2d 1080, 1985 Miss. LEXIS 1894 (Miss. 1985).

In a rape prosecution the state may show that the prosecutrix made complaint as soon as a reasonable opportunity presented itself, and the statement of prosecutrix to her mother upon coming home and finding her daughter crying that "he hurt me" was properly admitted. *Winston County Community Hospital v. Hathorn*, 242 So. 2d 865, 1970 Miss. LEXIS 1393 (Miss. 1970).

Statement by prosecutrix to her mother upon being asked why she was crying that "he hurt me" did not specifically name or identify the defendant, but was admissible. *Winston County Community Hospital v. Hathorn*, 242 So. 2d 865, 1970 Miss. LEXIS 1393 (Miss. 1970).

In rape prosecution, evidence may be admitted that prosecutrix that she had been raped, including language indicating time and place of the occurrence, but testimony as to further details stated by her would be inadmissible hearsay. *Lauderdale v. State*, 227 Miss. 113, 85 So. 2d 822, 1956 Miss. LEXIS 661 (Miss. 1956).

In a prosecution of a father for the rape of his daughter it was prejudicial error to permit a deputy sheriff to testify that the prosecutrix told him that her father had raped her. *Fairley v. State*, 225 Miss. 371, 83 So. 2d 278, 1955 Miss. LEXIS 593 (Miss. 1955).

Testimony of the father of an eight year old girl as to the details of her alleged rape elicited from her by threats of whipping and by a method of cross-examination which destroyed the voluntary character of the information held to be erroneously admitted warranting a reversal of conviction. *Lewis v. State*, 183 Miss. 192, 184 So. 53, 1938 Miss. LEXIS 233 (Miss. 1938).

Permitting witness to testify that soon after alleged attempted rape prosecutrix told witness that accused broke into her house held not reversible error. *Barnes v. State*, 164 Miss. 126, 143 So. 475 (Miss. 1932).

Details told by prosecutrix to third person during unofficial investigation inadmissible. *Clark v. State*, 124 Miss. 841, 87 So. 286, 1921 Miss. LEXIS 185 (Miss. 1921).

In a prosecution for rape, it was error to admit the testimony of the injured girl's mother that defendant was confronted with his victim, and that the girl charged the defendant with the crime, where witness also stated that the defendant promptly denounced the charge as false. *Garner v. State*, 120 Miss. 744, 83 So. 83, 1919 Miss. LEXIS 127 (Miss. 1919).

Fatal error to permit witnesses to testify in detail as to what prosecutrix told them, including what she stated about the locality where the offense occurred. *Frost v. State*, 100 Miss. 796, 57 So. 221, 1911 Miss. LEXIS 76 (Miss. 1911).

In a prosecution for attempt to rape, it is error to permit a state's witness to detail particulars of the affair as narrated by prosecutrix shortly after assault. *Frost v. State*, 94 Miss. 104, 47 So. 898, 1908 Miss. LEXIS 31 (Miss. 1908).

On prosecution for rape, it was error to admit what the assaulted girl said day after assault, as to who committed it, in absence of the accused. *Jeffries v. State*, 89 Miss. 643, 42 So. 801, 1906 Miss. LEXIS 85 (Miss. 1906).

18. Photographs.

When a reasonably intelligent eyewitness has had a good opportunity to view the features of the perpetrator of a crime, the method the police use in having the witness identify the defendant recedes in importance in inverse ratio to the intelli-

gence of the witness and opportunity to view the perpetrator. Thus, a rape defendant's argument that the victim's in-court identification resulted from an impermissibly suggestive photographic identification of the defendant, or from seeing him at the preliminary hearing, was without merit where the victim was a sensible child who had ample opportunity to view the rapist in the daylight, she gave a description of the defendant to a police officer, the accuracy of which was undisputed, and she identified the defendant's photograph without hesitation no more than 1 ½ hours after the crime. *Powell v. State*, 566 So. 2d 1228, 1990 Miss. LEXIS 461 (Miss. 1990).

In a rape prosecution arising from the defendant's frequent acts of sexual intercourse with his daughter from age 5 to 13, photographs of the victim in the nude which were taken by the defendant were admissible into evidence in order to establish the defendant's licentious disposition and lust for the victim. *Lovejoy v. State*, 555 So. 2d 57, 1989 Miss. LEXIS 503 (Miss. 1989).

Evidence of prior molestation of child was admissible because in context of sexual crimes, relaxation of rule that prosecution cannot offer evidence of criminal conduct not charged in indictment of which accused has not been convicted has long been recognized; substantially similar prior sexual acts with same person, that is, sexual acts of same general type as those charged in indictment, are as matter of common sense probative of issue being tried. *Wilson v. State*, 515 So. 2d 1181, 1987 Miss. LEXIS 2926 (Miss. 1987).

Trial court did not abuse its discretion in allowing photographs that showed victim's injured face, head, and arm, but were not "gruesome" in nature, into evidence in rape trial. *Sims v. State*, 512 So. 2d 1256, 1987 Miss. LEXIS 2701 (Miss. 1987).

Introduction of photographs showing victim's body was not improper where both photographs were sufficiently relevant and material to support their admission; photograph which showed torn pajama pants was evidence to support State's contention of non-consensual

sexual intercourse; photograph which showed crime scene was admissible to support testimony of witnesses who described scene upon their respective arrivals. *McFee v. State*, 511 So. 2d 130, 1987 Miss. LEXIS 2630 (Miss. 1987).

Photographs of rape victim's face are admissible to not only exemplify extent of force used in commission of crime but also to corroborate testimony of victim, notwithstanding gruesome appearance of victim in photograph and that photograph is cumulative of other evidence. *Luvane v. State*, 481 So. 2d 323, 1985 Miss. LEXIS 2436 (Miss. 1985).

In a prosecution for rape, photographs, the accuracy of which had been established and which showed a 5-strand barbed wire fence through which the complaining witness admitted having gone with the defendant, voluntarily accompanying him to the secluded spot where the incident occurred, should have been admitted on the issue of consent, and their exclusion was prejudicial error where the fact of intercourse had been admitted. *Carr v. State*, 258 So. 2d 417, 1972 Miss. LEXIS 1496 (Miss. 1972).

Identification of photographs depicting the scene of the crime by prosecutrix in rape prosecution did not violate the rule which prohibits the state from showing any statement made by her except the mere complaint that she had been violated. *Powell v. State*, 195 Miss. 161, 13 So. 2d 622, 1943 Miss. LEXIS 121 (Miss. 1943).

Identification by prosecutrix in rape prosecution of photographs depicting the scene of the crime was proper, where the basis for their admission was to establish venue, and the scene shown by the photographs was testified to by others present when the pictures were made. *Powell v. State*, 195 Miss. 161, 13 So. 2d 622, 1943 Miss. LEXIS 121 (Miss. 1943).

19. Confession of accused.

Defendant's mild mental retardation did not render his confession per se involuntary, and the trial court properly found that the confession was voluntary, although the interrogator told defendant that he would receive forgiveness from God according to defendant's own ex-

pressed belief that God forgives all, where there was nothing to indicate that defendant did not understand what was going on, that he had a particular susceptibility to religious matters, or that he was overcome due to a lack of mental capacity. The trial court fairly considered defendant's mental deficiency as one factor in the totality of the circumstances. *Harden v. State*, 59 So. 3d 594, 2011 Miss. LEXIS 210 (Miss. 2011).

Defendant's statement of age made to detective was "admission" for purposes of capital rape prosecution. *Fisher v. State*, 690 So. 2d 268, 1996 Miss. LEXIS 490 (Miss. 1996).

A defendant accused of having carnal knowledge of his step-daughter was entitled to have the jury hear and consider evidence as to whether his wife had promised him that, if he signed a written confession, he would receive a light sentence, since such a promise was relevant in weighing the credibility of the confession. *Darghty v. State*, 530 So. 2d 27, 1988 Miss. LEXIS 329 (Miss. 1988).

Substantial evidence supported finding that defendant was competent at time of his confession and that it was freely, voluntarily, and knowingly given where police did not question defendant until some 24 hours after his arrest, because at time of arrest he appeared to be under influence of "something". *Johnson v. State*, 511 So. 2d 1360, 1987 Miss. LEXIS 2667 (Miss. 1987).

Objection to admission of a confession, held to be voluntary, on the ground that it showed that defendant had fondled the prosecutrix at times prior to the rape, which act was in itself a violation, was properly overruled, the rule for allowing evidence of other offenses in rape of one under age of consent being that evidence which shows or tends to show prior offenses of the same kind committed by defendant with the prosecuting witness is generally admissible. *Winston County Community Hospital v. Hathorn*, 242 So. 2d 865, 1970 Miss. LEXIS 1393 (Miss. 1970).

Where the accused's confession, giving in detail his movements, as well as the physical situation at his victim's home, and his struggle with her before accom-

plishing his purpose, corresponded with the true facts disclosed by other testimony, and all the witnesses to the confession, who were able to testify, testified that it was made without hope of reward or fear of punishment, the confession was properly admitted in evidence in a rape prosecution. *Drake v. State*, 228 Miss. 589, 89 So. 2d 593, 1956 Miss. LEXIS 550 (Miss. 1956).

Incriminating statements made to officers held admissible where statements were voluntarily made without inducement or threat, notwithstanding prisoner was not warned that what he said might be used against him. *McGee v. State*, 40 So. 2d 160 (Miss.), cert. denied, 338 U.S. 805, 70 S. Ct. 77, 94 L. Ed. 487, 1949 U.S. LEXIS 1886 (U.S. 1949); *McGee v. State*, 203 Miss. 609, 35 So. 2d 628, 1948 Miss. LEXIS 312 (Miss. 1948), overruled, *Haralson v. State*, 308 So. 2d 222, 1975 Miss. LEXIS 1852 (Miss. 1975).

In a prosecution for statutory rape, court's failure to hold a preliminary hearing outside presence of jury on the question of admissibility of confession which defendant contended was not freely and voluntarily made, and admission of such confession over objection was held prejudicial error. *English v. State*, 206 Miss. 170, 39 So. 2d 876, 1949 Miss. LEXIS 251 (Miss. 1949), overruled, *Brooks v. State*, 242 So. 2d 865, 1971 Miss. LEXIS 1498 (Miss. 1971).

20. Conduct of accused; previous or criminal.

Defendant could not complain about prosecutrix being allowed to testify about other crimes committed by him where such testimony was invited or induced by defendant himself; on direct examination, prosecutrix related various incidents and happenings during course of night on which she was raped by defendant, including statement that on one occasion defendant had talked to her. While prosecutor had told her not to repeat what defendant had said, defendant's counsel asked what had been said, and her reply was that defendant had told her about other girls he had raped and about ones he was going to rape. *Singleton v. State*, 518 So. 2d 653, 1988 Miss. LEXIS 3 (Miss. 1988).

Evidence that defendant fled in automobile when sheriff's investigator attempted to stop him was admissible at rape trial to show guilty knowledge on part of defendant. *Mariche v. State*, 495 So. 2d 507, 1986 Miss. LEXIS 2684 (Miss. 1986).

Evidence that rape defendant committed burglary in apartment complex, where victim lived, shortly prior to rape is inadmissible on issue of identification of rapist where rape victim and victim's roommate have definitely identified defendant. *Williams v. State*, 463 So. 2d 1078, 1985 Miss. LEXIS 1881 (Miss. 1985).

21. Sufficiency of evidence; generally.

One victim's testimony that defendant began sexually abusing her when she was seven and that it occurred every day, and the victim's statement during the forensic interview that the last time it occurred was a few days earlier was sufficient for the jury to find that defendant committed the crimes on or about December 2017, which was the month prior to the victim's disclosure. *Ross v. State*, 288 So. 3d 317, 2020 Miss. LEXIS 13 (Miss. 2020).

Evidence was sufficient to support defendant's conviction of statutory rape because the victim testified that defendant put his penis inside of her vagina, that defendant had put something in her juice that made her feel lightheaded, he placed her on the bed and removed her pants, he got on top of the victim, she felt pressure and pain in her vaginal area, she passed out, when she regained consciousness she was covered in blood and surrounded by bloody sheets, and she continued to find traces of blood in her panties for two months thereafter. *Bishop v. State*, 282 So. 3d 633, 2019 Miss. App. LEXIS 345 (Miss. Ct. App. 2019).

Evidence supported defendant's conviction for rape because the victim testified that defendant entered the trailer in which the victim lived and sexually assaulted the victim, defendant had a key to a trailer door in defendant's possession, and a forensic DNA analyst testified that the analyst performed tests and could not exclude defendant as a possible contributor to the male DNA found on the victim's vaginal swabs and that the odds that the DNA was not defendant's were approxi-

mately one in ten billion. *Kimble v. State*, 270 So. 3d 940, 2018 Miss. App. LEXIS 463 (Miss. Ct. App. 2018).

Trial court did not abuse its discretion in denying defendant's request for a new trial, as the verdict finding defendant guilty of statutory rape was not so contrary to the weight of the evidence as to constitute an unconscionable injustice. *Strickland v. State*, 215 So. 3d 514, 2017 Miss. App. LEXIS 178 (Miss. Ct. App. 2017).

Because the State proved beyond a reasonable doubt that defendant committed statutory rape when he engaged in sexual intercourse with the minor victim, the trial court did not err in denying defendant's motion for a directed verdict. *Strickland v. State*, 215 So. 3d 514, 2017 Miss. App. LEXIS 178 (Miss. Ct. App. 2017).

Circuit court properly denied defendant's motion for a judgment notwithstanding the verdict or, in the alternative, a new trial, because there was sufficient evidence for a reasonable jury to find defendant guilty of statutory rape where, inter alia, the victim testified that she began a sexual relationship with defendant when she was 13 years old and that it continued until she was 16 years old, and defendant's co-worker overheard him discussing his 16-year-old girlfriend, whom he met through the girl's mother, and that it appeared defendant liked her and wanted to marry her. *Lewis v. State*, 245 So. 3d 539, 2017 Miss. App. LEXIS 658 (Miss. Ct. App. 2017).

Trial court did not abuse its discretion in denying defendant's motion for a new trial because the verdict was not contrary to the overwhelming weight of the evidence; the evidence demonstrated that defendant committed the crime of attempted rape because he unlawfully entered the victim's home, dragged her to her bedroom while making sexual comments, tore at her clothing, and only ceased his attempt to rape the victim in order to obtain money from her. *Scott v. State*, 231 So. 3d 1024, 2016 Miss. App. LEXIS 404 (Miss. Ct. App. 2016), *aff'd*, 231 So. 3d 995, 2017 Miss. LEXIS 440 (Miss. 2017).

Evidence was sufficient to provide the elements of attempted rape because de-

fendant dragged the victim to the bedroom, tore her clothing, and said sexually explicit statements, which demonstrated his intent and constituted an overt act toward the act of rape; defendant only ended his attempt to rape the victim when she told him she would give him money to leave her alone. *Scott v. State*, 231 So. 3d 1024, 2016 Miss. App. LEXIS 404 (Miss. Ct. App. 2016), *aff'd*, 231 So. 3d 995, 2017 Miss. LEXIS 440 (Miss. 2017).

Evidence that the victim did not invite defendant into her home, defendant hid in the home and grabbed the victim from behind, and the two struggled in multiple rooms, leaving items knocked out of place, before the rape occurred, was sufficient for the jury to find the elements of burglary of a dwelling and forcible rape proven beyond a reasonable doubt *Rollings v. State*, 192 So. 3d 1133, 2016 Miss. App. LEXIS 343 (Miss. Ct. App. 2016).

Evidence was sufficient to prove that defendant was properly convicted of statutory rape because the testimony of the victim and a police officer, along with photographs depicting explicit sexual activity between the victim and defendant, provided evidence that defendant had engaged in sexual intercourse with the victim, who at the time was not defendant's spouse and was at least fourteen years old but under sixteen years old and thirty-six months younger than defendant. *Hernandez v. State*, 137 So. 3d 889, 2013 Miss. App. LEXIS 793 (Miss. Ct. App. 2013), *cert. denied*, 139 So. 3d 74, 2014 Miss. LEXIS 239 (Miss. 2014).

Evidence was sufficient to convict defendant of statutory-rape and sexual battery and the verdicts were not against the overwhelming weight of the evidence because the victim, who was not defendant's wife, was 14 years of age, and defendant was 26 years of age at the time of the October incident; the victim testified that defendant inserted his private organ into her rectum; and the absence of physical evidence did not negate his conviction as there was testimonial evidence. *Sims v. State*, 127 So. 3d 307, 2013 Miss. App. LEXIS 861 (Miss. Ct. App. 2013).

Sufficient evidence supported defendant's conviction for statutory rape, Miss. Code Ann. § 97-3-65(1)(a), because the

fourteen-year-old victim, defendant's biological daughter, stated to the nurse who examined her that she had been having intercourse with defendant on numerous occasions for about a year, and the victim's mother, also defendant's wife, informed the nurse and a police officer that she had witnessed defendant having intercourse with the victim. *Pittman v. State*, 109 So. 3d 599, 2013 Miss. App. LEXIS 63 (Miss. Ct. App. 2013).

Defendant's statutory-rape conviction under Miss. Code Ann. § 97-3-65(1)(b) was supported by sufficient evidence where: (1) defendant confessed, and the victim gave a detailed account of the rape; (2) physical evidence, including the victim's blood-stained underwear and the jeans she had worn on the day of the rape, and the DNA evidence proved that the intercourse occurred; (3) the DNA evidence did not rule out defendant as the assailant; (4) the victim was 13 at the time and defendant was almost 33 months older than the victim; and (5) the victim was not defendant's spouse. *Jennings v. State*, 127 So. 3d 263, 2013 Miss. App. LEXIS 25 (Miss. Ct. App.), *rev'd*, 127 So. 3d 185, 2013 Miss. LEXIS 645 (Miss. 2013).

Evidence was sufficient to support defendant's rape conviction as the evidence showed that the victim testified that defendant held her down and raped her despite her attempt to resist, that DNA from both the victim and defendant was found on a paper towel near where the rape had occurred, and that the victim testified that she did not report the rape immediately because she was ashamed of what had happened. It was the jury's job to determine the victim's credibility. *Ben v. State*, 96 So. 3d 9, 2011 Miss. App. LEXIS 298 (Miss. Ct. App. 2011), *aff'd*, 95 So. 3d 1236, 2012 Miss. LEXIS 411 (Miss. 2012).

Evidence was sufficient to support defendant's convictions on two counts of statutory rape, in violation of Miss. Code Ann. § 97-3-65, where the eight-year-old victim disclosed to several witnesses that defendant had sexually assaulted her and that penetration had occurred and the medical evidence likewise created a strong inference that defendant had given

the child a sexually transmitted disease. *Bridgeman v. State*, 58 So. 3d 1208, 2010 Miss. App. LEXIS 593 (Miss. Ct. App. 2010).

Defendant's conviction of statutory rape of a child under 14 years of age was not against the overwhelming weight of the evidence, given that (1) the victim stated consistently that defendant raped her, (2) the fact of her rape, if perhaps not the identity of the perpetrator, was corroborated by compelling medical evidence, including that she had untreated chlamydia, and (3) although the State failed to prove that defendant was infected with chlamydia, the State showed that defendant had taken an antibiotic that was used to treat the disease and defendant might have been infected at the time of the rape but did not know it. *Hodges v. State*, 14 So. 3d 786, 2009 Miss. App. LEXIS 491 (Miss. Ct. App. 2009).

Denial of defendant's motion for a new trial after he was convicted of statutory rape and unlawful touching of a child for lustful purposes, in violation of Miss. Code Ann. §§ 97-3-65(1)(b) and 97-5-23(1), was appropriate because defendant's argument on appeal raised the same points that were part of his trial defense. Defendant also failed to point to anything in the record negating the State's evidence. *Paramore v. State*, 5 So. 3d 1074, 2009 Miss. LEXIS 128 (Miss. 2009).

Taking as true the evidence which supported the verdict, including the statements of the victim, her mother, the Department of Human Services social worker, the doctor who examined the victim, and the nurse who completed the rape kit, the jury's finding that defendant was guilty of the statutory rape of the victim was not so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction unconscionable injustice. *Stevenson v. State*, 13 So. 3d 314, 2008 Miss. App. LEXIS 778 (Miss. Ct. App. 2008), cert. denied, 14 So. 3d 731, 2009 Miss. LEXIS 360 (Miss. 2009), dismissed, — So. 3d —, 2019 Miss. LEXIS 146 (Miss. 2019).

Defendant's conviction for capital rape in violation of Miss. Code Ann. § 97-3-65(1)(b) was appropriate because the victim, who was six years old, testified as to

the events that occurred; she also tested positive for a sexually transmitted disease. *Gordon v. State*, 977 So. 2d 420, 2008 Miss. App. LEXIS 169 (Miss. Ct. App. 2008).

Evidence was sufficient to sustain a statutory rape conviction because the victim gave detailed testimony about her sexual encounter with defendant, it was undisputed that the victim was present at defendant's home at the time of the incident, and although the victim did not immediately report the incident to the authorities, she did discuss it with a friend in a note written five days after the incident. The victim's denial of the allegations to the defense investigator and statements about her stepmother's threats did not so thoroughly discredit or contradict her testimony that a reasonable jury could not have concluded that she had sex with defendant. *Woods v. State*, 973 So. 2d 1022, 2008 Miss. App. LEXIS 75 (Miss. Ct. App. 2008).

Defendant's conviction for forcible rape in violation of Miss. Code Ann. § 97-3-65(4)(a) was supported by the evidence where the victim was clear in testifying that the victim had not been sexually involved with defendant, and defendant failed to offer any evidence to contradict the testimony. *Robinson v. State*, 966 So. 2d 209, 2007 Miss. App. LEXIS 690 (Miss. Ct. App. 2007), cert. dismissed, 15 So. 3d 426, 2009 Miss. LEXIS 401 (Miss. 2009).

Trial court did not err by denying defendant's motions for judgment notwithstanding the verdict and for a new trial after he was convicted of rape, kidnapping, and armed robbery because the evidence, viewed in the light most favorable to the prosecution, showed that: (1) defendant bound the victim and forcibly raped her, threatening her with a knife; (2) DNA testing from the rape kit showed the presence of semen but no sperm in the victim's vagina, consistent with a male donor not reaching ejaculation; (3) defendant forced the victim into her car; and (4) defendant forced the victim to make an ATM withdrawal and give him the cash. *Taggart v. State*, 957 So. 2d 981, 2007 Miss. LEXIS 330 (Miss. 2007).

Evidence was sufficient to convict defendant of rape as: (1) the victim testified

that defendant was between her legs and inside of her; (2) she was unable to get away from defendant when he was on top of her; (3) defendant would not stop when she told him to; (4) although defendant did not beat her during the attacks, she testified that he forced her to take her clothes off; (5) she did not scream because she was scared; and (6) two witnesses testified that defendant "messed with" the victim. *Goodin v. State*, 977 So. 2d 353, 2007 Miss. App. LEXIS 298 (Miss. Ct. App. 2007), *aff'd in part and rev'd in part*, 977 So. 2d 338, 2008 Miss. LEXIS 143 (Miss. 2008).

In a statutory rape case under Miss. Code Ann. § 97-3-65(1)(b), a motion for a new trial was properly denied because the guilty verdict was not against the overwhelming weight of the evidence; the victim testified regarding penetration by defendant's penis, defendant admitted to having sex with the victim, and the victim's story was corroborated by her friends, and defendant's denials at trial were the only evidence supporting his claim that the two did not have sex. *Roles v. State*, 952 So. 2d 1043, 2007 Miss. App. LEXIS 180 (Miss. Ct. App. 2007).

Jury's verdict finding defendant guilty of statutory rape was not against the overwhelming weight of the evidence and the evidence was sufficient to convict defendant of statutory rape because, *inter alia*: (1) the victim testified that she was younger than 14 when defendant had sex with her on several occasions; (2) defendant was 44 years old when the rapes occurred and the victim was 12 so there was more than 24 months age difference between the victim and defendant; and (3) the victim's mother testified that she saw defendant have sex with the victim several times; thus, the trial court did not abuse its discretion when it overruled defendant's motion for a new trial or for a judgment notwithstanding the verdict. *Terrell v. State*, 952 So. 2d 998, 2006 Miss. App. LEXIS 816 (Miss. Ct. App. 2006).

Where a fifteen-year-old victim claimed that defendant had sexual relations with her and DNA testing showed that defendant was the father of her aborted child, the evidence was sufficient to support his conviction of statutory rape. *Carr v. State*, 911 So. 2d 589, 2005 Miss. App. LEXIS 648 (Miss. Ct. App. 2005).

Trial court had not erred in denying defendant's motion for a medical and forensic examination of the child victim because defendant failed to specifically show how that proposed examination would aid his defense. The authority he relied on addressed medical records and medical evidence already in existence and that was a fundamentally different issue from that of forcing a victim to submit to an examination. *Lee v. State*, 944 So. 2d 56, 2005 Miss. App. LEXIS 918 (Miss. Ct. App. 2005), *aff'd*, 944 So. 2d 35, 2006 Miss. LEXIS 680 (Miss. 2006).

Trial court had not abused its discretion in denying defendant's motion in limine and refusing to exclude photographs taken of defendant's genital area because the defense's cross-examination of the child victim had put her credibility into issue and that the photograph went to the victim's credibility as well as to the crime itself. The photograph corroborated the victim's testimony and showed that defendant had a scar on his abdomen and that he shaved his genital area. *Lee v. State*, 944 So. 2d 56, 2005 Miss. App. LEXIS 918 (Miss. Ct. App. 2005), *aff'd*, 944 So. 2d 35, 2006 Miss. LEXIS 680 (Miss. 2006).

Trial court had not abused its discretion in denying defendant's motion to suppress and refusing to exclude a vibrator and the thong from evidence as those items were utilized in defendant's enticement of the child victim, were part of the complete story of the crimes, and corroborated the victim's testimony. *Lee v. State*, 944 So. 2d 56, 2005 Miss. App. LEXIS 918 (Miss. Ct. App. 2005), *aff'd*, 944 So. 2d 35, 2006 Miss. LEXIS 680 (Miss. 2006).

There was sufficient evidence to convict defendant of capital rape and sexual assault where the State offered the testimony of a number of medical and counseling professionals indicating that the victim's statements were consistent with those of a sexual abuse victim. The victim named defendant as the perpetrator, and the State offered physical evidence in the form of medical diagnoses and test results as well as many of the objects the victim stated defendant utilized in his abuse of her. *Foley v. State*, 914 So. 2d 677, 2005 Miss. LEXIS 586 (Miss. 2005).

Where the victim testified that defendant forced her to perform oral sex on him

and raped her, the evidence was sufficient to support defendant's conviction for sexual battery and rape. The victim gave a recorded statement to the police that night; the fact that the rape kit did not conclusively identify defendant as the source of semen retrieved from the victim did not detract from the validity of her testimony. *Green v. State*, 887 So. 2d 840, 2004 Miss. App. LEXIS 931 (Miss. Ct. App. 2004).

Unsupported word of the victim of a sex crime is sufficient to support a guilty verdict where that testimony is not discredited or contradicted by other credible evidence, especially if the conduct of the victim is consistent with the conduct of one who has been victimized by a sex crime. *Green v. State*, 887 So. 2d 840, 2004 Miss. App. LEXIS 931 (Miss. Ct. App. 2004).

Where the child-victims testified as to several incidents of sexual abuse spanning the course of several years and police found items in defendant's home that the victims alleged were used during their sexual encounters, including a pornographic tape, condoms, and some lubricant, the evidence was sufficient to support defendant's conviction for five counts of statutory rape, one count of sexual battery, and three counts of fondling. *Moses v. State*, 885 So. 2d 730, 2004 Miss. App. LEXIS 912 (Miss. Ct. App. 2004).

Defendant was properly convicted of statutory rape for having sexual intercourse with a minor, his girlfriend's daughter. The State offered taped conversations between defendant and his girlfriend's children and the testimony of the victim as evidence to demonstrate that defendant had sexual contact with the victim. *Fisackerly v. State*, 880 So. 2d 368, 2004 Miss. App. LEXIS 809 (Miss. Ct. App. 2004).

Both girls testified as both victims and eyewitnesses to defendant's crimes of statutory rape and sexual battery; any issues of credibility or motive was for the jury to decide. Thus, the verdict was not contrary to both the weight and the sufficiency of the the evidence, and defendant's convictions for statutory rape and sexual battery were affirmed. *Barrett v. State*, 886 So. 2d 22, 2004 Miss. App. LEXIS 484

(Miss. Ct. App.), cert. denied, 887 So. 2d 183, 2004 Miss. LEXIS 1371 (Miss. 2004).

Where victim's mother stated that defendant, the mother's boyfriend, had sex with her 10-year-old daughter, the jury's guilty verdict of sexual battery and statutory rape was not against the overwhelming weight of the evidence, as the jury had heard the evidence and the testimony of the witnesses, including a social worker, a doctor who examined the victim and determined that she had been sexually abused, and a molecular biology and DNA expert who opined that the genetic profile of the sperm extracted from the victim's panties was consistent with the suspect being the major contributor. *Sanderson v. State*, 872 So. 2d 735, 2004 Miss. App. LEXIS 441 (Miss. Ct. App. 2004).

There was sufficient evidence to support defendant's rape conviction, and although the indictment did not make reference to the statute alleged to have criminalized defendant's activity, the court concluded that the State proceeded on the theory that defendant's conduct constituted a violation of Miss. Code Ann. § 97-3-65(4)(a); although defendant attempted to portray the incident as a consensual sexual encounter, the State presented evidence that defendant had held the victim around the neck and forced her onto the back seat of the vehicle before he raped her, there was no evidence that the victim failed to resist defendant by whatever means were available to her, and the victim's testimony was not so incredible or otherwise contradicted that it was rendered unworthy of belief. *Davis v. State*, 863 So. 2d 1000, 2004 Miss. App. LEXIS 12 (Miss. Ct. App. 2004).

Defendant had not been entitled to a directed verdict on a charge of forcible sexual intercourse, as the victim testified that defendant penetrated her, and defendant confessed to committing rape. *Bryant v. State*, 853 So. 2d 814, 2003 Miss. App. LEXIS 491 (Miss. Ct. App.), cert. denied, 852 So. 2d 577, 2003 Miss. App. LEXIS 880 (Miss. Ct. App. 2003).

Evidence was sufficient to convict defendant under Miss. Code Ann. § 97-3-65(3)(a), as the unsupported word of the victim was sufficient to support a guilty verdict where the sex crime testimony was not discredited or contradicted by other

credible evidence, especially as the conduct of the victim was consistent with the conduct of one who had been victimized by a sex crime. *Price v. State*, 847 So. 2d 290, 2003 Miss. App. LEXIS 496 (Miss. Ct. App. 2003).

Defendant rather repulsively argued on appeal that because the victim had not testified with clinical certainty about the extent to which defendant had penetrated the victim, the victim's evidence did not prove forcible sexual intercourse; however, when defendant's statement that defendant had raped the victim was taken together with the victim's testimony, the trial court below properly denied defendant's motion for a directed verdict. *Bryant v. State*, 2003 Miss. App. LEXIS 80 (Miss. Ct. App. Feb. 18, 2003), sub. op., 853 So. 2d 814, 2003 Miss. App. LEXIS 491 (Miss. Ct. App. 2003).

Defendant's conviction for statutory rape was affirmed where the evidence in the record proved that defendant, who was 20 years old at the time, had engaged in sexual intercourse with the victim who was a 12-year-old girl; the age of the victim was adequately proven by testimony. *Wright v. State*, 856 So. 2d 341, 2003 Miss. App. LEXIS 135 (Miss. Ct. App.), cert. denied, 860 So. 2d 1223, 2003 Miss. LEXIS 853 (Miss. 2003).

Testimony of the 15-year-old victim that she and defendant had an ongoing sexual relationship with the 38-year-old defendant, coupled with evidence that the victim had been sexually active and had been absent from school when the sexual contacts allegedly took place, was sufficient to support defendant's conviction for statutory rape, and the trial court did not err in denying defendant's motions for judgment n.o.v. or, in the alternative, a new trial. *Farrish v. State*, 840 So. 2d 820, 2003 Miss. App. LEXIS 232 (Miss. Ct. App. 2003).

Evidence was insufficient to show the sexual intercourse element of statutory rape, and, thus, defendant's convictions on two counts of the statutory rape of defendant's daughter could not be upheld on appeal as the evidence did not show there was an insertion of the male penis into the vagina of the female, as was required to show the sexual intercourse element. *Pitt-*

man v. State, 836 So. 2d 779, 2002 Miss. App. LEXIS 316 (Miss. Ct. App. 2002), cert. denied, 835 So. 2d 952, 2003 Miss. LEXIS 737 (Miss. 2003).

Evidence that defendant did not attempt to penetrate defendant's daughter meant that the State was not relieved of the requirement of proving penetration as statutory law did not require the State to prove penetration where it was shown that the genitals, anus, or perineum of a child under age 16-years-old was lacerated or torn in an attempt to have sexual intercourse with the child, and the evidence showed the child was under age 16, had lesions on the child's perineum, and an anal tear, but the lesions and the tear were not shown to have occurred during an attempt to have sexual intercourse, and, indeed, the daughter testified that defendant had not tried to penetrate her with defendant's male sex organ. *Pittman v. State*, 836 So. 2d 779, 2002 Miss. App. LEXIS 316 (Miss. Ct. App. 2002), cert. denied, 835 So. 2d 952, 2003 Miss. LEXIS 737 (Miss. 2003).

Evidence was sufficient to prove statutory rape where (1) the defendant and the victim both testified that they engaged in sexual intercourse, though they disagreed as to the time and place, (2) the victim testified concerning her birth date and verified that she was 13 years old at the time of the intercourse with the defendant, (3) an investigator established that the defendant was 33 years old, and (4) the victim testified she was not married to the defendant. *Hayes v. State*, 803 So. 2d 473, 2001 Miss. App. LEXIS 125 (Miss. Ct. App. 2001).

Evidence was sufficient to support the defendant's conviction for capital rape. *Allen v. State*, 749 So. 2d 1152, 1999 Miss. App. LEXIS 506 (Miss. Ct. App. 1999).

Guilty verdict in rape prosecution was not against weight of evidence, notwithstanding either inflammatory nature of crime, poor quality of evidence, or defendant's assertions that evidence consisted primarily of child victim's statements and repetitions of those statements, that child at times mentioned name of another relative living in household, and that jury had difficulty with case. *Young v. State*, 679 So. 2d 198, 1996 Miss. LEXIS 416 (Miss. 1996).

Rape conviction was supported by complainant's testimony and identification of defendant as perpetrator, defendant's possession of long-barrel gun and silver flashlight which complainant described, fact that defendant was driving vehicle which matched general description provided by complainant, and fact that defendant was found within hours of rape in same general vicinity as incident occurred. *Thomas v. McDonald*, 667 So. 2d 594, 1995 Miss. LEXIS 588 (Miss. 1995).

In a prosecution for rape of a child under the age of 14, proof of penetration is required absent evidence that the private parts of the child have been lacerated or torn, though actual medical evidence of penetration is not required; thus, in a prosecution for rape under this section, there was sufficient evidence of penetration, even though there was no medical testimony showing that the victim's private parts had been lacerated or torn, where the victim specifically testified that her private parts had been penetrated. *Wilson v. State*, 606 So. 2d 598, 1992 Miss. LEXIS 534 (Miss. 1992).

In a juvenile delinquency proceeding, evidence that the juvenile had a medium-sized pocketknife, forcibly took the victim behind a woodpile in the backyard, pushed her to the ground, and then voluntarily stopped the assault was insufficient to support a finding of guilty of attempted rape. In *Interest of R.T.*, 520 So. 2d 136, 1988 Miss. LEXIS 124 (Miss. 1988).

The evidence was sufficient to sustain a conviction for rape where the victim testified as to the occurrence, tests indicated the presence of sperm in the victim, an acid phosphatase test was positive, and the physician testified that he observed evidence of recent injury to the victim's body on the evening the rape occurred. *Dixon v. State*, 519 So. 2d 1226, 1988 Miss. LEXIS 152 (Miss. 1988).

Jury verdict was not against overwhelming weight of evidence where defendant argued that it was virtually impossible for all things that victim and her husband testified about to have occurred in 5 minute interval that husband was away from home. Defendant also argued that children of victim were asleep in bedroom across hall yet never awakened

while victim was allegedly screaming. Although evidence was conflicting and 5 minutes did seem to be rather short time for all that State alleged to have transpired, court would not disturb jury's finding on conflicting testimony where there was substantial evidence to support verdict. *Pinson v. State*, 518 So. 2d 1220, 1988 Miss. LEXIS 37 (Miss. 1988).

Lower court did not err in overruling defendant's motion for directed verdict where state had put on ample evidence that there was conflict about defendant's whereabouts at time of rape, victim knew defendant and identified him as her rapist, giving detailed description of night in question, and her daughter's testimony substantiated her own. *Singleton v. State*, 518 So. 2d 653, 1988 Miss. LEXIS 3 (Miss. 1988).

Evidence was sufficient to sustain verdict of guilt on principal charge of rape where defendant confessed to crime. *Johnson v. State*, 511 So. 2d 1360, 1987 Miss. LEXIS 2667 (Miss. 1987).

Defendant charged with rape was not entitled to a directed verdict on sanity issue, since the testimony of an officer, who had executed an affidavit stating that defendant was not of sound mind and memory, was insufficient as a matter of law to rebut presumption of sanity, and there was nothing in the record to show that, at the time of the crime, defendant was *McNaughten* insane. *Brown v. State*, 501 So. 2d 1131, 1987 Miss. LEXIS 2297 (Miss. 1987).

Assignments of error by defendant who was convicted of raping female under 12 years of age that jury verdict was contrary to the weight of the evidence was without merit where the state's evidence was overwhelming as to defendant's guilt and the defendant's testimony was incredible. *McBride v. State*, 492 So. 2d 581, 1986 Miss. LEXIS 2539 (Miss. 1986).

Trial court's guilty verdict was supported by the evidence, including accused's admission that he was in the victim's bedroom on the night of the crime and physical evidence placing the accused at the crime scene, and where, although accused denied committing the rape, there was no physical evidence of a second person being in the victim's home that night.

Braxton v. State, 485 So. 2d 300, 1986 Miss. LEXIS 2428 (Miss. 1986).

Circumstantial evidence strongly suggesting that murder victim was in truck with defendant on night victim was murdered, coupled with evidence that defendant had never known victim before and fact that she was found strangled to death several days later, and evidence showing that victim had sexual intercourse with male on night in question is sufficient to establish to exclusion of every reasonable hypothesis consistent with innocence of defendant that victim was raped, that person who committed rape was defendant, that defendant acted with felonious intent, and that rape occurred in substantial temporal and factual relation to victim's murder at hands of defendant. *Fisher v. State*, 481 So. 2d 203, 1985 Miss. LEXIS 2281 (Miss. 1985).

Undisputed evidence that defendant propositioned victim in lewd manner, exposed himself, seized victim and attempted to drag her away with him, and that lack of success in defendant's attempt to rape victim resulted from victim's resistance, not defendant's abandonment of crime, is sufficient to support conviction for attempted rape. *Harden v. State*, 465 So. 2d 321, 1985 Miss. LEXIS 1959 (Miss. 1985).

Defendant was properly convicted of raping a female under the age of 12 years, even though the state's evidence did not establish penetration, where the examining physician found a fresh laceration at the opening of the vagina. *Horton v. State*, 374 So. 2d 764, 1979 Miss. LEXIS 2297 (Miss. 1979).

Where there was no material discrepancy in the version given by the victim on the witness stand at the trial, and that given in the confession of the accused, and the physical condition of the victim, as well as other testimony, explained the failure of the victim to make a specific accusation against the accused on the night of the attack, the state sufficiently proved the corpus delicti. *Cameron v. State*, 233 Miss. 404, 102 So. 2d 355, 1958 Miss. LEXIS 397 (Miss. 1958).

It is not indispensable that the penetration be proved by the testimony of the prosecutrix, it may be established by cir-

cumstantial evidence. *Lang v. State*, 230 Miss. 147, 87 So. 2d 265, 1956 Miss. LEXIS 645 (Miss.), cert. denied, 352 U.S. 936, 77 S. Ct. 236, 1 L. Ed. 2d 167, 1956 U.S. LEXIS 165 (U.S. 1956).

In a prosecution for rape the failure of defendant's fingerprints to conform to those prints which were taken from the window did not necessarily create a reasonable doubt as to the defendant's guilt. *Lang v. State*, 230 Miss. 147, 87 So. 2d 265, 1956 Miss. LEXIS 645 (Miss.), cert. denied, 352 U.S. 936, 77 S. Ct. 236, 1 L. Ed. 2d 167, 1956 U.S. LEXIS 165 (U.S. 1956).

Direct evidence of the prosecutrix was sufficient to make a case for the jury; conviction of accused for rape committed upon girl 15 years of age affirmed. *Powell v. State*, 195 Miss. 161, 13 So. 2d 622, 1943 Miss. LEXIS 121 (Miss. 1943).

Whether penetration was insufficient to constitute offense held for the jury. *Bardwell v. State*, 155 Miss. 711, 125 So. 85, 1929 Miss. LEXIS 341 (Miss. 1929).

Conviction on impeached testimony of accomplice reversed. *Hunter v. State*, 137 Miss. 276, 102 So. 282, 1924 Miss. LEXIS 229 (Miss. 1924).

22. —Corroborating evidence.

Evidence was sufficient to support defendant's convictions for forcible intercourse and sexual battery where defendant's accomplice admittedly punched the victim, the victim was scared, the accomplice's testimony corroborated the event as the victim had described it, and the jury heard the testimony of the convenience store employee's testimony recounting the moments following the incident, the testimony of the registered nurse who had performed the victim's rape kit, and the testimony of three law enforcement officers involved in the case. *Graham v. State*, 185 So. 3d 992, 2016 Miss. LEXIS 86 (Miss. 2016).

Trial court properly denied defendants motions for a directed verdict and a judgment notwithstanding the verdict because there was sufficient evidence to convict him of burglary and rape where the shoes found in his bedroom closet matched a footprint left at the crime scene and his DNA was found on the shoes and the

victim's thigh. *Harris v. State*, 169 So. 3d 949, 2014 Miss. App. LEXIS 390 (Miss. Ct. App. 2014).

Defendant's statutory-rape conviction under Miss. Code Ann. § 97-3-65(1)(b) was not against the weight of the evidence where: (1) although the victim's timeline of events might have been distorted, she clearly testified that defendant lured her into his grandmother's house, pushed her down onto the bed, removed her pants and underwear, held her down, and attempted to put his private part inside her; (2) the State presented the bloody underwear and pants the victim had worn that day and testimony from the emergency-room nurse that the victim was bleeding from her vagina when she arrived at the hospital; (3) a doctor testified that he had tested the buccal swab taken from defendant and the vaginal swab taken from the victim and that 7 of 16 DNA markers from the vaginal swab were also present in defendant's DNA profile; and (4) the jury heard defendant's confession and his admission that he saw the victim bleeding. *Jennings v. State*, 127 So. 3d 263, 2013 Miss. App. LEXIS 25 (Miss. Ct. App.), rev'd, 127 So. 3d 185, 2013 Miss. LEXIS 645 (Miss. 2013).

Defendant's conviction for the statutory rape of his 11-year-old daughter was supported by the evidence because his daughter's testimony that he raped her was corroborated by the medical evidence; although defendant testified that he had never been infected with trichomoniasis, that statement was contradicted by his prior admission to the police that he had, in fact, contracted the disease. *Powell v. State*, 49 So. 3d 166, 2010 Miss. App. LEXIS 650 (Miss. Ct. App. 2010).

Jury's verdict convicting defendant of statutory rape was not so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice. While defendant raised some legitimate concerns about the victim's credibility, her testimony was corroborated by a friend's testimony and compelling medical evidence. *Grimes v. State*, 1 So. 3d 951, 2009 Miss. App. LEXIS 32 (Miss. Ct. App. 2009).

In a statutory rape case under Miss. Code Ann. § 97-3-65(1)(b), a motion for a

directed verdict was properly denied because the evidence was sufficient to support the conviction based on the testimony of the victim, her friends, and several officers; defendant admitted to having sex with the victim during a police interview, the victim stated that defendant penetrated her with his penis, and the victim's friends saw her leave with defendant on the date of the alleged incident. *Roles v. State*, 952 So. 2d 1043, 2007 Miss. App. LEXIS 180 (Miss. Ct. App. 2007).

There was sufficient evidence to support defendant's conviction of forcible rape because: (1) the victim testified that the sex was forcible, not consensual; (2) the victim called the police immediately after defendant's departure; (3) the victim bore injuries consistent with her allegation of having been forcibly attacked; (4) all of the law enforcement officers and hospital personnel involved observed that the victim's injuries were fresh and that she was upset and anxious; and (5) while the physician was unable to discern whether the victim's vaginal injuries were indicative of forcible sexual intercourse, he never testified that her injuries were inconsistent with rape. *Magee v. State*, 966 So. 2d 173, 2007 Miss. App. LEXIS 120 (Miss. Ct. App.), cert. denied, 966 So. 2d 172, 2007 Miss. LEXIS 567 (Miss. 2007).

Defendant's convictions for attempted rape and statutory rape in violation of Miss. Code Ann. §§ 97-1-7 and 97-3-65(1)(b) were proper based on the victim's testimony and the corroboration of that testimony by defendant's wife, a physician and a psychologist. *Lee v. State*, 910 So. 2d 1123, 2005 Miss. App. LEXIS 216 (Miss. Ct. App. 2005).

Victim's testimony alone is sufficient to support a rape conviction, even though not corroborated, where it is consistent with the circumstances. *Green v. State*, 887 So. 2d 840, 2004 Miss. App. LEXIS 931 (Miss. Ct. App. 2004).

Verdict of jury was not contrary to overwhelming weight of evidence, although facts indicated that sperm found in prosecutrix' vagina were nonmotile and there were no bite marks found on defendant's body, despite allegation of prosecutrix that she had bitten him, where at trial doctor testified that sperm could lose mo-

tility at any period of time between ejaculation and 72 hours and defendant was not examined for bite marks until several days after incident; allegations of prosecutrix were corroborated by her physical and mental condition after incident, as well as fact that she immediately reported rape. *Inman v. State*, 515 So. 2d 1150, 1987 Miss. LEXIS 2896 (Miss. 1987).

Jury's verdict convicting defendant of rape was supported by sufficient evidence where: 2 individuals were present in victim's home on morning of rape; pubic hair possessing same characteristics as defendant's was combed from victim's pubic hair, while no hairs that exhibited same characteristics as those of other person present in victim's home on morning of rape were found; along with proof that victim had been raped, this evidence was sufficient to place jury's verdict beyond court's authority to disturb. *McFee v. State*, 511 So. 2d 130, 1987 Miss. LEXIS 2630 (Miss. 1987).

Eyewitness testimony of police officer identifying rape defendant as person seen by officer at scene of crime, as well as other evidence placing defendant at scene, is sufficient to support conviction for rape. *Campbell v. State*, 480 So. 2d 1161, 1985 Miss. LEXIS 2437 (Miss. 1985).

In a rape prosecution, evidence was sufficient to support conviction, notwithstanding that there was testimony that the victim had remained on friendly, even intimate, terms with the defendant following the rape, as the uncorroborated testimony of a victim that was consistent with the circumstances alone would be sufficient to justify conviction, where, in this case, the victim's testimony was corroborated and entirely consistent with the other evidence, and where the incident occurred in a sparsely populated rural community in which recurring contact, desired or not, with members of the community, including the defendant, was probably inevitable. *Goss v. State*, 465 So. 2d 1079, 1985 Miss. LEXIS 1984 (Miss. 1985).

Testimony of rape victim which has been corroborated by and is entirely consistent with testimony offered by other state witnesses is sufficient basis upon which jury is free to reject defense claim of

consent, notwithstanding testimony, including admission of victim, that victim remained on friendly, even intimate, terms with men involved in rape where incident occurred in sparsely populated rural community in which recurring contact, desired or not, with members of community is probably inevitable. *Goss v. State*, 465 So. 2d 1079, 1985 Miss. LEXIS 1984 (Miss. 1985).

Testimony of rape victim which has been corroborated by physical facts and by testimony of examining physician and forensic serologist is sufficient to support rape conviction. *Barker v. State*, 463 So. 2d 1080, 1985 Miss. LEXIS 1894 (Miss. 1985).

Testimony of rape victim identifying defendant as assailant, combined with testimony of defendant's former girl friend placing defendant at scene of crime at approximate time of assault and proof of defendant's lack of upper teeth, corroborating description of assailant given by victim, is sufficient to sustain conviction. *Harper v. State*, 463 So. 2d 1036, 1985 Miss. LEXIS 1857 (Miss. 1985).

In a prosecution for rape, the evidence was sufficient to support the conviction where the testimony of the victim that she had been forced to commit sexual intercourse with the defendant was corroborated by witnesses who knew the defendant and had seen him, as well as his truck, in the vicinity of the victim's home at the time of the crime. *Davis v. State*, 406 So. 2d 795, 1981 Miss. LEXIS 2163 (Miss. 1981), cert. denied, 457 U.S. 1113, 102 S. Ct. 2918, 73 L. Ed. 2d 1324, 1982 U.S. LEXIS 2503 (U.S. 1982).

Evidence of physician and another witness held sufficient to corroborate testimony of prosecutrix. *Bardwell v. State*, 155 Miss. 711, 125 So. 85, 1929 Miss. LEXIS 341 (Miss. 1929).

Testimony of prosecutrix that she was raped while in a vacant house, corroborated by a person seeing accused on the gallery of such house who had examined her shortly thereafter when told what had taken place, and a physician had examined her shortly thereafter and found her lacerated and injured, was not uncorroborated testimony of the prosecutrix. *McArthur v. State*, 105 Miss. 398, 62 So. 417, 1913 Miss. LEXIS 220 (Miss. 1913).

23. —Uncorroborating evidence.

Evidence was sufficient to sustain a statutory rape conviction where a victim testified that defendant, who was 28 years old, inserted his penis into her vagina several times while the victim was less than 14 years old. *Price v. State*, 898 So. 2d 641, 2005 Miss. LEXIS 127 (Miss. 2005).

Evidence was sufficient to convict defendant of sexual battery, statutory rape, and touching a child for lustful purposes where the totally uncorroborated testimony of the victims was sufficient to support a guilty verdict as that testimony was not discredited or contradicted by other evidence; it was the jury's duty to resolve conflicts in testimony. *Carle v. State*, 864 So. 2d 993, 2004 Miss. App. LEXIS 33 (Miss. Ct. App. 2004).

A conviction of rape may be upheld with the uncorroborated testimony of the victim. Thus, the identification testimony of a rape victim was sufficient to support a conviction despite the existence of strong alibi testimony where the victim's conduct was consistent with that of a person who has been raped and some seminal fluid was found during an examination of the victim. *McKinney v. State*, 521 So. 2d 898, 1988 Miss. LEXIS 112 (Miss. 1988), cert. denied, 494 U.S. 1017, 110 S. Ct. 1321, 108 L. Ed. 2d 497, 1990 U.S. LEXIS 1182 (U.S. 1990).

In a prosecution under this statute [Code 1942, § 2358], the victim's testimony is sufficient although not corroborated, if it is consistent with the circumstances. *Lee v. State*, 242 Miss. 97, 134 So. 2d 145, 1961 Miss. LEXIS 535 (Miss. 1961).

While a conviction for rape may rest on the uncorroborated testimony of the person alleged to have been raped, it should always be scrutinized with caution; and where there is much in the facts and circumstances in the evidence to discredit her testimony, another jury should be permitted to pass thereon. *Richardson v. State*, 196 Miss. 560, 17 So. 2d 799, 1944 Miss. LEXIS 234 (Miss. 1944); *Rodgers v. State*, 204 Miss. 891, 36 So. 2d 155, 1948 Miss. LEXIS 418 (Miss. 1948); *Johnson v. State*, 213 Miss. 808, 58 So. 2d 6, 1952 Miss. LEXIS 429 (Miss. 1952).

Conviction of forcibly ravishing may be had on prosecutrix's uncorroborated testimony. *Sanders v. State*, 150 Miss. 296, 116 So. 433, 1928 Miss. LEXIS 113 (Miss. 1928); *McLaurin v. State*, 129 Miss. 362, 92 So. 289, 1922 Miss. LEXIS 52 (Miss. 1922); *Fairley v. State*, 152 Miss. 656, 120 So. 747, 1929 Miss. LEXIS 238 (Miss. 1929).

Though the uncorroborated testimony of prosecutrix may be sufficient, it is not when there are numerous and serious contradictions therein. *Allen v. State*, 45 So. 833 (Miss. 1908); *Grogan v. State*, 151 Miss. 652, 118 So. 627, 1928 Miss. LEXIS 370 (Miss. 1928).

Evidence in a prosecution for rape where the only witness connecting defendant with the crime was the prosecutrix herself, did not sustain a conviction. *Rawls v. State*, 105 Miss. 406, 62 So. 420, 1913 Miss. LEXIS 224 (Miss. 1913).

III. UNDER FORMER § 97-3-67.**24. In general.**

"Mistake of age" is not defense to crime of statutory rape, but, rather, knowledge or ignorance of age of child victim is irrelevant to offense of statutory rape. *Collins v. State*, 691 So. 2d 918, 1997 Miss. LEXIS 6 (Miss.), cert. denied, 522 U.S. 877, 118 S. Ct. 198, 139 L. Ed. 2d 135, 1997 U.S. LEXIS 5567 (U.S. 1997).

Instruction on crime of statutory rape was not warranted in prosecution for rape of 13-year-old victim, as offense of statutory rape requires that victim be over 14 years of age but under age of 18. *Collins v. State*, 691 So. 2d 918, 1997 Miss. LEXIS 6 (Miss.), cert. denied, 522 U.S. 877, 118 S. Ct. 198, 139 L. Ed. 2d 135, 1997 U.S. LEXIS 5567 (U.S. 1997).

Imposition of civil damages on newspaper for publishing rape victim's name which was lawfully obtained from police records violated First Amendment, since news article contained lawfully obtained, truthful information about matter of public significance, and imposing liability under circumstances was not narrowly tailored means of furthering state interests in maintaining privacy and safety of sexual assault victim or encouraging such victims to report offenses. *Florida Star v.*

B. J. F., 491 U.S. 524, 109 S. Ct. 2603, 105 L. Ed. 2d 443, 1989 U.S. LEXIS 3120 (U.S. 1989).

Since this statute [Code 1942, § 2359] runs the gamut from a minor misdemeanor to a repulsive felony, the calling of a special term to try one person indicted on this charge only was such as to indicate to the jury that the court considered it a serious charge, and so deprived the defendant of a fair trial. *Coker v. State*, 200 Miss. 535, 27 So. 2d 898, 1946 Miss. LEXIS 319 (Miss. 1946).

Marriage by husband who was not threatened with bodily harm if he did not marry wife, but who had married her to escape penalty for statutory rape, of which he was not guilty because wife was above age of consent, held not invalid because of coercion. *Zeigler v. Zeigler*, 174 Miss. 302, 164 So. 768, 1935 Miss. LEXIS 89 (Miss. 1935).

Defendant was guilty of seduction, if female between twelve and eighteen consented to sexual intercourse as result of defendant's promise to give her money and clothes. *Stone v. Bang*, 153 Miss. 892, 122 So. 95, 1929 Miss. LEXIS 97 (Miss. 1929).

Title of act fixing age of consent at 18 years held sufficient. *Hollins v. State*, 128 Miss. 119, 90 So. 630, 1921 Miss. LEXIS 306 (Miss. 1921).

Fact that the girl, previous to the act of intercourse relied on for conviction, had copulated with accused is a defense, for she was not, at the time, chaste. *Rodgers v. State*, 111 Miss. 781, 72 So. 198, 1916 Miss. LEXIS 393 (Miss. 1916).

25. Evidence; generally.

Where the testimony amply supported a jury verdict finding defendant guilty and there were no grounds for reversal, the conviction was affirmed. *Gautier v. State*, 233 Miss. 329, 101 So. 2d 648, 1958 Miss. LEXIS 384 (Miss. 1958).

Corpus delicti of forcibly ravishing a female of about thirty years of age may be proved by the uncorroborated testimony of the prosecutrix. *Buchanan v. State*, 225 Miss. 399, 83 So. 2d 627, 1955 Miss. LEXIS 597 (Miss. 1955).

In prosecution under this section [Code 1942, § 2359], trial court does not abuse

its discretion in permitting prosecution to ask leading questions of victim, a sixteen-year-old girl who was reluctant to testify, where court has observed witness' demeanor on witness stand and considers leading questions reasonably necessary and where defendant has admitted to official acts to which witness testifies and offers no evidence to contradict facts. *Summerville v. State*, 207 Miss. 54, 41 So. 2d 377, 1949 Miss. LEXIS 316 (Miss. 1949).

Trial court does not commit reversible error in permitting case to be reopened after State and defendant had rested their case to allow state to prove fact that female victim in prosecution under this section [Code 1942, § 2359] is unmarried, failure to prove this fact previously being mere oversight. *Summerville v. State*, 207 Miss. 54, 41 So. 2d 377, 1949 Miss. LEXIS 316 (Miss. 1949).

In prosecution for violating age of consent law, evidence of accused's guilt held for jury as against defense of alibi. *Johnson v. State*, 171 Miss. 321, 157 So. 896, 1934 Miss. LEXIS 264 (Miss. 1934).

Evidence held sufficient to support conviction. *Gillis v. State*, 152 Miss. 551, 120 So. 455, 1929 Miss. LEXIS 226 (Miss. 1929).

Evidence may be offered at any time within two years prior to indictment for statutory rape. *Kolb v. State*, 129 Miss. 834, 93 So. 358, 1922 Miss. LEXIS 97 (Miss. 1922).

Evidence of size and appearance of prosecutrix in given year admissible, as tending to show age when chastity violated. *Kolb v. State*, 129 Miss. 834, 93 So. 358, 1922 Miss. LEXIS 97 (Miss. 1922).

Prosecutrix testifying that accused violated her chastity may be impeached by showing contrary statements. *Kolb v. State*, 129 Miss. 834, 93 So. 358, 1922 Miss. LEXIS 97 (Miss. 1922).

26. —Chastity of victim.

Evidence of conversations with an absent witness offered to refute presumption of chaste character of prosecutrix under Code 1942, § 2360, was inadmissible whether viewed as hearsay statements of isolated facts or as attempt to prove character by reputation. *Harrison v. State*, 44 So. 2d 403 (Miss. 1950).

Statement by prisoner when being questioned about taking money from victim that "I didn't rob her but I did have sexual intercourse with her," was admissible in evidence against him in prosecution for rape under this section [Code 1942, § 2359], there being no suggestion in record that any threat or advantage of any kind was intimated to induce statement, and jury being instructed to disregard statements concerning taking of money. *Summerville v. State*, 207 Miss. 54, 41 So. 2d 377, 1949 Miss. LEXIS 316 (Miss. 1949).

Admission of evidence of intercourse subsequent to first, held error. *Arthur v. State*, 147 Miss. 136, 113 So. 199, 1927 Miss. LEXIS 337 (Miss. 1927).

General reputation of prosecutrix for chastity prior to act of accused admissible in statutory rape. *Kolb v. State*, 129 Miss. 834, 93 So. 358, 1922 Miss. LEXIS 97 (Miss. 1922).

Error to admit acts of sexual intercourse subsequent to first act which completes offense of statutory rape; acts of sexual intercourse prior to act constituting statutory rape admissible. *Kolb v. State*, 129 Miss. 834, 93 So. 358, 1922 Miss. LEXIS 97 (Miss. 1922).

Prosecutrix's reputation for chastity or specific acts of unchastity after time proven on accused inadmissible. *Kolb v. State*, 129 Miss. 834, 93 So. 358, 1922 Miss. LEXIS 97 (Miss. 1922).

27. Corroboration.

In a prosecution for rape the evidence failed to corroborate the prosecutrix' testimony, where such evidence was by the prosecutrix and her mother, was self-serving, admittedly hearsay, and was denied by the defendant. *Howard v. State*, 417 So. 2d 932, 1982 Miss. LEXIS 2103 (Miss. 1982).

Although Mississippi has required by statute that the complaining witness' testimony be corroborated in prosecutions for certain sexual offenses (e.g. Code 1942, §§ 2359, 2374), the state courts have specifically held that the requirement for corroboration is confined to those offenses wherein the statute expressly so provides, and no such corroboration is required in prosecution of defendant for disturbing

the peace of the complaining witness, on allegations that the defendant had touched complainant's private parts. *Henry v. Williams*, 299 F. Supp. 36, 1969 U.S. Dist. LEXIS 8507 (N.D. Miss. 1969).

While sufficient for conviction, uncorroborated testimony of the person alleged to have been raped should be scrutinized with caution. *Goode v. State*, 245 Miss. 391, 146 So. 2d 74, 1962 Miss. LEXIS 559 (Miss. 1962).

Under this statute [Code 1942, § 2359] corroboration must be, not merely of incidental details, but of the commission of the prohibited act, and even though circumstances and admissions may be sufficient to this end, mere opportunity creating a possibility is not enough of itself. *Yancey v. State*, 202 Miss. 662, 32 So. 2d 151, 1947 Miss. LEXIS 328 (Miss. 1947).

Findings of physician after personal examination of prosecutrix, that her condition could innocently have been caused, was insufficient to supply the corroborative proof required by the statute. *Yancey v. State*, 202 Miss. 662, 32 So. 2d 151, 1947 Miss. LEXIS 328 (Miss. 1947).

Testimony of witness that at about the time and at the place where the alleged assault was committed, he saw a car, identified by other witnesses as being similar to the car of defendant, but that he saw therein only a man whom he could not identify seated behind the steering wheel, was insufficient to corroborate testimony of prosecutrix. *Yancey v. State*, 202 Miss. 662, 32 So. 2d 151, 1947 Miss. LEXIS 328 (Miss. 1947).

Testimony of prosecutrix that on two prior occasions defendant had been guilty of related indecencies towards her does not of itself satisfy the requirement of corroboration. *Yancey v. State*, 202 Miss. 662, 32 So. 2d 151, 1947 Miss. LEXIS 328 (Miss. 1947).

Corroboration is necessary in prosecution for attempt to violate age of consent statute. *Jones v. State*, 155 Miss. 335, 124 So. 368, 1929 Miss. LEXIS 296 (Miss. 1929).

Corroboration means to strengthen, to support, or confirm testimony of injured female in respect to main fact of corpus delicti. *Jones v. State*, 155 Miss. 335, 124 So. 368, 1929 Miss. LEXIS 296 (Miss. 1929).

Defendant's admissions in prosecution for attempt to violate age of consent statute held sufficient corroboration. *Jones v. State*, 155 Miss. 335, 124 So. 368, 1929 Miss. LEXIS 296 (Miss. 1929).

IV. UNDER FORMER § 97-5-21.

28. In general.

Forty-six year old male who engages in wholly consensual sexual intercourse with 13 year old female may not be convicted under child seduction statute (former § 97-5-21) where child has previously been intimate with at least 2 other men; nor may he be convicted under child fondling statute (§ 97-5-23) on basis of foreplay leading to intercourse. *McBrayer v. State*, 467 So. 2d 647, 1985 Miss. LEXIS 1856, 1985 Miss. LEXIS 2065 (Miss. 1985).

As to promise of marriage, evidence of previous chastity is necessary. *King v. State*, 121 Miss. 230, 83 So. 164, 1919 Miss. LEXIS 158 (Miss. 1919).

Previous chaste character question for jury. *King v. State*, 121 Miss. 230, 83 So. 164, 1919 Miss. LEXIS 158 (Miss. 1919).

Burden of proof is on the state. *King v. State*, 121 Miss. 230, 83 So. 164, 1919 Miss. LEXIS 158 (Miss. 1919).

Intercourse with female already unchaste is not seduction. *Hatton v. State*, 92 Miss. 651, 46 So. 708, 1908 Miss. LEXIS 246 (Miss. 1908).

29. Indictment.

Indictment was not defective for failure

to use the words "then and there" before the expression "of previous chaste character." *Terry v. State*, 97 Miss. 472, 52 So. 483, 1910 Miss. LEXIS 240 (Miss. 1910).

It is not necessary under this section [Code 1942, § 2054] to charge that the woman was unmarried, her marriage being a matter of defense. *Hoff v. State*, 83 Miss. 488, 35 So. 950, 1903 Miss. LEXIS 69 (Miss. 1903).

Under this section [Code 1942, § 2054] an indictment pursuing its exact language is not subject to demurrer because it does not aver that the accused is a "man" and that the female is over the age of ten years. *Carlisle v. State*, 73 Miss. 387, 19 So. 207, 1895 Miss. LEXIS 150 (Miss. 1895).

30. Evidence.

Although defendant pled guilty, there was sufficient evidence in defendant's plea colloquy and the post-conviction hearing testimony that the State could have proved its charge of seduction against defendant under former § 97-5-21. *Carter v. State*, 775 So. 2d 91, 1999 Miss. LEXIS 374 (Miss. 1999).

Defendant's admissions held admissible to prove that seduction was result of promises made to prosecutrix, though insufficient alone to constitute corroboration. *Stone v. State*, 152 Miss. 274, 119 So. 198, 1928 Miss. LEXIS 258 (Miss. 1928).

Testimony of prosecutrix must be corroborated in order to sustain conviction. *Terry v. State*, 97 Miss. 472, 52 So. 483, 1910 Miss. LEXIS 240 (Miss. 1910).

OPINIONS OF THE ATTORNEY GENERAL

Penalty for crime or rape of child under fourteen, if committed by adult, is life imprisonment or death and jurisdiction is in circuit court. *Genin* Aug. 25, 1993, A.G. Op. #93-0611.

Circuit court, not youth court, has original jurisdiction over any violation of this section, notwithstanding that consent has been raised as defense. *Genin* Aug. 25, 1993, A.G. Op. #93-0611.

Section 47-7-33 does not empower cir-

cuit judges to suspend sentences pursuant to Section 97-3-65(2)(c) and Section 97-3-101(3) because the latter sections each provide that a life sentence is the maximum sentence that may be imposed. *Caranna*, May 5, 2000, A.G. Op. #2000-0239.

A defendant charged with statutory rape is ineligible for the pretrial intervention program even if the facts do not involve any use of force or violence. *Brewer*, July 28, 2006, A.G. Op. 06-0289.

RESEARCH REFERENCES

ALR.

Inclusion or exclusion of the day of birth in computing one's age. 5 A.L.R.2d 1143.

Admissibility in rape prosecution, of evidence that accused is married, has children, and the like. 62 A.L.R.2d 1067.

Admissibility, in nonstatutory rape prosecution, of evidence of pregnancy of prosecutrix. 62 A.L.R.2d 1083.

Intercourse under pretext of medical treatment as rape. 70 A.L.R.2d 824.

Intercourse accomplished under pretext of medical treatment as rape. 70 A.L.R.2d 824.

Incest as included within charge of rape. 76 A.L.R.2d 484.

Criminal responsibility of husband for rape, or assault to commit rape, on wife. 84 A.L.R.2d 1017.

Rape by fraud or impersonation. 91 A.L.R.2d 591.

Mistake or lack of information as to victim's age as defense to statutory rape. 8 A.L.R.3d 1100.

Impotency as defense to charge of rape, attempt to rape, or assault with intent to commit rape. 23 A.L.R.3d 1351.

Statutory rape of female who is or has been married. 32 A.L.R.3d 1030.

Mistake or lack of information as to victim's chastity as defense to statutory rape. 44 A.L.R.3d 1434.

What constitutes penetration in prosecution for rape or statutory rape. 76 A.L.R.3d 163.

Multiple instances of forcible intercourse involving same defendant and same victim as constituting multiple crimes of rape. 81 A.L.R.3d 1228.

Propriety of, or prejudicial effect of omitting or giving, instruction to jury, in prosecution for rape or other sexual offense, as to ease of making or difficulty of defending against such a charge. 92 A.L.R.3d 866.

Modern status of admissibility, in forcible rape prosecution, of complainant's general reputation for unchastity. 95 A.L.R.3d 1181.

Constitutionality of rape laws limited to protection of females only. 99 A.L.R.3d 129.

Criminal responsibility for physical measures undertaken in connection with

treatment of mentally disordered patient. 99 A.L.R.3d 854.

Admissibility, in rape case, of evidence that accused raped or attempted to rape person other than prosecutrix. 2 A.L.R.4th 330.

Validity and construction of statute defining crime of rape to include activity traditionally punishable as sodomy or the like. 3 A.L.R.4th 1009.

Criminal responsibility of husband for rape, or assault to commit rape, on wife. 24 A.L.R.4th 105.

Sufficiency of allegations or evidence of serious bodily injury to support charge of aggravated degree of rape, sodomy, or other sexual abuse. 25 A.L.R.4th 1213.

Admissibility, at criminal prosecution, of expert testimony on rape trauma syndrome. 42 A.L.R.4th 879.

Admissibility of expert testimony as to criminal defendant's propensity toward sexual deviation. 42 A.L.R.4th 937.

Necessity or permissibility of mental examination to determine competency or credibility of complainant in sexual offense prosecution. 45 A.L.R.4th 310.

Conviction of rape or related sexual offenses on basis of intercourse accomplished under the pretext of, or in the course of, medical treatment. 65 A.L.R.4th 1064.

Prosecution of female as principal for rape. 67 A.L.R.4th 1127.

Fact that murder-rape victim was dead at time of penetration as affecting conviction for rape. 76 A.L.R.4th 1147.

Admissibility of evidence that juvenile prosecuting witness in sex offense case had prior sexual experience for purposes of showing alternative source of child's ability to describe sex acts. 83 A.L.R.4th 685.

Statute protecting minors in a specified age range from rape or other sexual activity as applicable to defendant minor within protected age group. 18 A.L.R.5th 856.

Propriety of publishing identity of sexual assault victim. 40 A.L.R.5th 787.

Mistake or lack of information as to victim's age as defense to statutory rape. 46 A.L.R.5th 499.

Application of death penalty to nonhomicide cases. 62 A.L.R.5th 1.

Am. Jur.

65 Am. Jur. 2d, Rape §§ 11 et seq.

10 Am. Jur. Pl & Pr Forms (Rev), False Imprisonment, Form 1.1 (complaint, petition, or declaration – false imprisonment imposed by private individual – sexual assault).

45 Am. Jur. Proof of Facts 2d 631, Age of Person.

8 Am. Jur. Proof of Facts 3d 749, Foundation for DNA Fingerprint Evidence.

2 Am. Jur. Trials, Investigating Particular Crimes §§ 37-39 (rape).

18 Am. Jur. Trials, Handling the Defense in a Rape Prosecution §§ 1 et seq.

CJS.

75 C.J.S., Rape §§ 22, 23, 26.

Law Reviews.

DuBose, The Florida Star – “happy 200th” to the first amendment, but a setting sun for victims’ privacy? 10 Miss. C. L. Rev. 193, A Spring, 1990.

1982 Mississippi Supreme Court Review: Criminal Law and Procedure: Rape. 53 Miss. L. J. 149, March, 1983.

1984 Mississippi Supreme Court Review: Criminal Law. 55 Miss. L. J. 77, March, 1985.

1985 Mississippi Supreme Court Review—Criminal Law. 55 Miss. L. J. 789, December, 1985.

1989 Mississippi Supreme Court Review: Sentencing of Criminal Defendant. 59 Miss. L. J. 871, Winter, 1989.

Family Law At the Turn of the Century, 71 Miss. L.J. 781, Spring, 2002.

Comment: Eliminating Injustice: Revising Mississippi’s Statutory Rape Laws, 76 Miss. L.J. 1067, Spring, 2007.

Practice References.

Ronald L. Schoenberg, Criminal Law Deskbook (Matthew Bender).

The Prosecution and Defense of Sex Crimes (Matthew Bender).

Sexual Assault Trials, Second Edition (Michie).

§ 97-3-67. Repealed.

Repealed by Laws, 1998, ch. 549, § 6, eff from and after July 1, 1998.

§ 97-3-67. [Codes, Hemingway’s 1917, § 1093; 1930, § 1123; 1942, § 2359; Laws, 1914, ch. 171; Laws, 1962, ch. 320; Laws, 1980, ch. 390; Laws, 1985, ch. 389, § 4]

Editor’s Notes — Former § 97-3-67 related to rape and carnal knowledge of unmarried persons over fourteen and under eighteen years of age. See now, §§ 97-3-65, 97-3-95 and 97-5-23.

For judicial decision notes under former § 97-3-67 relating to rape and carnal knowledge of unmarried persons over fourteen and under eighteen years of age, see § 97-3-65.

§ 97-3-68. Rape; procedure for introducing evidence of sexual conduct of complaining witness; “complaining witness” defined.

(1) In any prosecution for rape under Section 97-3-65, former 97-3-67 or 97-3-71, if evidence of sexual conduct of the complaining witness is offered to attack the credibility of said complaining witness, the following procedure shall be followed:

(a) A written motion shall be made by the defendant to the court and prosecutor stating that the defense has an offer of proof of the relevancy of evidence of the sexual conduct of the complaining witness proposed to be

presented and its relevancy in attacking the credibility of the complaining witness.

(b) The written motion shall be accompanied by an affidavit in which the offer of proof shall be stated.

(c) If the court finds that the offer of proof is sufficient, the court shall order a closed hearing in chambers, out of the presence of the jury, if any, and at such closed hearing allow the questioning of the complaining witness regarding the offer of proof made by the defendant.

(d) At the conclusion of the hearing, if the court finds that evidence proposed to be offered by the defendant regarding the sexual conduct of the complaining witness is relevant and otherwise admissible, the court may make an order stating what evidence may be introduced by the defendant, and the nature of the questions to be permitted. The defendant may then offer evidence pursuant to the order of the court.

(2) As used in this section and Section 97-3-70 [Repealed], “complaining witness” means the alleged victim of the crime charged, the prosecution of which is subject to this section.

HISTORY: Laws, 1977, ch. 438, § 1, eff from and after July 1, 1977.

Editor’s Notes — Section 97-3-67, referred to in (1), related to rape and carnal knowledge of unmarried persons between the ages of 14 and 18 and was repealed by Laws of 1998, ch. 549, § 6, effective from and after July 1, 1998. For present similar provisions see §§ 97-3-65, 97-3-95, and 97-5-23.

Section 97-3-70, referred to in (2), excluded from rape trials evidence pertaining to the victim’s reputation or sexual conduct, with minor exceptions, and was repealed by Laws of 1991, ch. 573, § 141, effective from and after July 1, 1991.

Cross References — Sexual battery, see §§ 97-3-95 through 97-3-103.

Evidentiary rule as to relevance of rape victim’s past behavior, see Rule 412, Mississippi Rules of Evidence.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Sufficiency of evidence.

1. In general.

Defendant’s prosecution for statutory rape, under Miss. Code Ann. § 97-3-65, was not barred by the two-year statute of limitations in Miss. Code Ann. § 99-1-5 because, although statutory rape was not expressly included in the statute, it was within the definition of rape under Miss. Code Ann. § 97-3-68, for purposes of the exceptions to the general two-year statute of limitations. *Hernandez v. State*, 137 So. 3d 889, 2013 Miss. App. LEXIS 793 (Miss. Ct. App. 2013), cert. denied, 139 So. 3d 74, 2014 Miss. LEXIS 239 (Miss. 2014).

Defendant’s motion for a new trial was properly denied where the evidence was sufficient to support a rape conviction given the victim’s uncontradicted testimony; defendant’s act of opening the porch door was clearly sufficient to constitute a breaking, and entry through the porch was required to gain entrance into the victim’s home. *Davis v. State*, 910 So. 2d 1228, 2005 Miss. App. LEXIS 615 (Miss. Ct. App. 2005).

Indictment was sufficient to put defendant on notice that he was being charged with attempted rape, and the indictment specifically set forth the conduct which the State planned to use as evidence; defendant failed to complete the crime of rape because he was unable to get an erection, and consequently unable to pen-

strate the victim's vagina, such that the record supported a conviction of attempted rape. *Purnell v. State*, 878 So. 2d 124, 2004 Miss. App. LEXIS 24 (Miss. Ct. App.), cert. denied, 878 So. 2d 67, 2004 Miss. LEXIS 938 (Miss. 2004).

State rape-shield statute, insofar as it authorized preclusion of evidence of past sexual conduct between victim and accused, did not per se violate Sixth Amendment where statute permits defendant to introduce evidence of own past sexual conduct with alleged victim upon timely filing written motion and offer of proof; it was error for state Court of Appeals of state to adopt "per se rule" that notice requirement violates Sixth Amendment in all cases where requirement was used to preclude introduction of such evidence; it would be left to state courts on remand to address whether statute authorized preclusion of such evidence and whether preclusion violated Sixth Amendment on facts of case. *Michigan v. Lucas*, 500 U.S. 145, 111 S. Ct. 1743, 114 L. Ed. 2d 205, 1991 U.S. LEXIS 2778 (U.S. 1991).

Imposition of civil damages on newspaper for publishing rape victim's name which was lawfully obtained from police records violated First Amendment, since news article contained lawfully obtained, truthful information about matter of public significance, and imposing liability under circumstances was not narrowly tailored means of furthering state interests in maintaining privacy and safety of sexual assault victim or encouraging such victims to report offenses. *Florida Star v. B. J. F.*, 491 U.S. 524, 109 S. Ct. 2603, 105 L. Ed. 2d 443, 1989 U.S. LEXIS 3120 (U.S. 1989).

2. Sufficiency of evidence.

Defendant's conviction for statutory

rape was not contrary to the overwhelming weight of the evidence because defendant was on sufficient notice of the statutory-rape charge, the jury was properly instructed that it had to consider each count separately and that it had to find beyond a reasonable doubt that defendant committed the statutory rape on or about the date charged, and the circuit court granted an alibi-defense instruction, but the jury rejected it, as it was free to do; the victim's testimony that the first sexual encounter occurred on July 30 and that it occurred on the day of a casino trip did not necessarily contradict her testimony that the casino trip took place either July 30 or 31, the circuit court instructed that the State had to prove beyond a reasonable doubt that the offense charged occurred "on or about July 30," and the victim's testimony was sufficiently specific to prove that necessary element. *Timmons v. State*, 44 So. 3d 1021, 2010 Miss. App. LEXIS 32 (Miss. Ct. App.), cert. denied, 49 So. 3d 106, 2010 Miss. LEXIS 517 (Miss. 2010).

When the victim went to the post office at night to check her mail, a man placed a gun to her back, told her he needed money, drove to an ATM, withdrew money from her account, and then raped her; the victim identified defendant's voice as belonging to her assailant and she was absolutely certain that he was the man who attacked her. Defendant's fingerprints were found at the crime scene, he did not testify at trial, and the only defense witness did not provide a conclusive alibi; the evidence was sufficient to sustain defendant's conviction for kidnapping, rape, and armed robbery. *Burton v. State*, 970 So. 2d 229, 2007 Miss. App. LEXIS 807 (Miss. Ct. App. 2007).

RESEARCH REFERENCES

ALR.

Modern status of admissibility, in statutory rape prosecution, of complainant's prior sexual acts or general reputation for unchastity. 90 A.L.R.3d 1300.

Modern status of admissibility, in forcible rape prosecution, of complainant's prior sexual acts. 94 A.L.R.3d 257.

Constitutionality of "rape shield" stat-

ute restricting use of evidence of victim's sexual experiences. 1 A.L.R.4th 283.

Constitutionality, with respect to accused's rights to information or confrontation, of statute according confidentiality to sex crime victim's communications to sexual counselor. 43 A.L.R.4th 395.

Necessity or permissibility of mental examination to determine competency or

credibility of complainant in sexual offense prosecution. 45 A.L.R.4th 310.

Impeachment or cross-examination of prosecuting witness in sexual offense trial by showing that prosecuting witness threatened to make similar charges against other persons. 71 A.L.R.4th 448.

Impeachment or cross-examination of prosecuting witness in sexual offense trial by showing that similar charges were made against other persons. 71 A.L.R.4th 469.

Admissibility in prosecution for sex offense of evidence of victim's sexual activity after the offense. 81 A.L.R.4th 1076.

Admissibility of evidence that juvenile prosecuting witness in sex offense case had prior sexual experience for purposes of showing alternative source of child's ability to describe sex acts. 83 A.L.R.4th 685.

Am. Jur.

65 Am. Jur. 2d, Rape §§ 64 et seq.

§ 97-3-69. Rape; "chaste character" presumed; uncorroborated testimony of victim insufficient.

In the trial of all cases under the last preceding section, it shall be presumed that the female was previously of chaste character, and the burden shall be upon the defendant to show that she was not; but no person shall be convicted upon the uncorroborated testimony of the injured female.

HISTORY: Codes, Hemingway's 1917, § 1094; 1930, § 1124; 1942, § 2360; Laws, 1914, ch. 171.

Cross References — Sexual battery, see §§ 97-3-95 through 97-3-103.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Chaste character of female.
3. Corroboration.

1. In general.

Defendant contended the jury's decision was based solely on conjecture and inference, and he maintained that he was not identified by the victim and that the evidence was circumstantial; however, the victim testified that defendant, her nephew, had raped her, her testimony was not impeached, deoxyribonucleic acid evi-

CJS.

75 C.J.S., Rape § 71.

Law Reviews.

DuBose, The Florida Star – "happy 200th" to the first amendment, but a setting sun for victims' privacy? 10 Miss. C. L. Rev. 193, A Spring, 1990.

McCormick, The Repealer: Conflicts in Evidence Created by Misapplication of Mississippi Rule of Evidence 1103. 67 Miss. L. J. 547, Winter, 1997.

Practice References.

Ronald L. Schoenberg, Criminal Law Deskbook (Matthew Bender).

The Prosecution and Defense of Sex Crimes (Matthew Bender).

Sexual Assault Trials, Second Edition (Michie).

dence connected semen evidence to defendant, and the evidence was sufficient to sustain his conviction. Grant v. State, 913 So. 2d 316, 2005 Miss. App. LEXIS 253 (Miss. Ct. App. 2005).

This section [Code 1942, § 2360] is limited in its application to cases of statutory rape and has no application to a robbery prosecution. Sistrunk v. State, 200 Miss. 437, 27 So. 2d 606, 1946 Miss. LEXIS 307 (Miss. 1946).

2. Chaste character of female.

In prosecution for statutory rape under Code 1942, § 2359, evidence of conversa-

tions with an absent witness offered to refute presumption of chaste character of prosecutrix was inadmissible. *Harrison v. State*, 44 So. 2d 403 (Miss. 1950).

The testimony of two witnesses residing in the same locality as the prosecutrix as to her unchaste reputation was not rebutted by the contrary testimony of two witnesses who, for some years, had lived more than eight miles away. *Barker v. State*, 200 Miss. 416, 27 So. 2d 555, 1946 Miss. LEXIS 304 (Miss. 1946).

Under this section [Code 1942, § 2360] the female is presumed to have been of previous chaste character. *Smith v. State*, 188 Miss. 339, 194 So. 922, 1940 Miss. LEXIS 34 (Miss. 1940).

Instruction that burden was on defendant, after chastity of prosecutrix attacked, to prove her unchaste held erroneous. *Johnson v. State*, 136 Miss. 775, 101 So. 685, 1924 Miss. LEXIS 165 (Miss. 1924).

3. Corroboration.

There was sufficient evidence for a rational trier of fact to find defendant guilty of forcible rape because the victim's testimony was not uncorroborated since the victim she was able to describe and lead

police to the exact location of where the alleged incident had occurred; even if the victim's testimony had been uncorroborated, her testimony was not discredited or contradicted by credible evidence because the victim's post-incident behavior was a factor for the jury to consider, but her actions were not highly unreasonable or improbable. *Ben v. State*, 95 So. 3d 1236, 2012 Miss. LEXIS 411 (Miss. 2012), cert. denied, 569 U.S. 905, 133 S. Ct. 1723, 185 L. Ed. 2d 788, 2013 U.S. LEXIS 2589 (U.S. 2013).

The requirement that testimony of the outraged female be corroborated does not extend to prosecutions for an indecent assault on a female under 13. *Pittman v. State*, 236 Miss. 592, 111 So. 2d 415, 1959 Miss. LEXIS 353 (Miss. 1959).

Uncorroborated testimony of prosecutrix sufficient for conviction under Ch. 171, Laws 1908-not under this section [Code 1942, § 2360]. *McLaurin v. State*, 129 Miss. 362, 92 So. 289, 1922 Miss. LEXIS 52 (Miss. 1922).

In statutory rape prosecution, where prosecutrix's testimony is uncorroborated court should direct acquittal. *State v. Bradford*, 126 Miss. 868, 89 So. 767, 1921 Miss. LEXIS 86 (Miss. 1921).

RESEARCH REFERENCES

ALR.

Inclusion or exclusion of the day of birth in computing one's age. 5 A.L.R.2d 1143.

Admissibility of prosecution evidence on issue of consent, that rape victim was a virgin, absent defense attack on her chastity. 35 A.L.R.3d 1452.

Mistake or lack of information as to victim's chastity as defense to statutory rape. 44 A.L.R.3d 1434.

Modern status of admissibility, in statutory rape prosecution, of complainant's prior sexual acts or general reputation for unchastity. 90 A.L.R.3d 1300.

Modern status of rule regarding necessity for corroboration of victim's testimony in prosecution for sexual offense. 31 A.L.R.4th 120.

Necessity or permissibility of mental examination to determine competency or credibility of complainant in sexual offense prosecution. 45 A.L.R.4th 310.

Admissibility in prosecution for sex offense of evidence of victim's sexual activity after the offense. 81 A.L.R.4th 1076.

Am. Jur.

2 Am. Jur. Trials, Investigating Particular Crimes §§ 37-39 (rape).

18 Am. Jur. Trials, Handling the Defense in a Rape Prosecution §§ 1 et seq.

CJS.

75 C.J.S., Rape § 14.

Law Reviews.

DuBose, The Florida Star – “happy 200th” to the first amendment, but a setting sun for victims’ privacy? 10 Miss. C. L. Rev. 193, A Spring, 1990.

Practice References.

Ronald L. Schoenberg, Criminal Law Deskbook (Matthew Bender).

Anthony Morosco, *The Prosecution and Defense of Sex Crimes* (Matthew Bender). Sexual Assault Trials, Second Edition (Michie).

§ 97-3-70. Repealed.

Repealed by Laws, 1991, ch. 573, § 141, eff from and after July 1, 1991.
§ 97-3-70. [En Laws, 1977, ch. 438, § 2]

Editor's Notes — Former § 97-3-70 excluded from rape trials evidence pertaining to the victim's reputation or sexual conduct, with minor exceptions.

§ 97-3-71. Rape; assault with intent to ravish.

Every person who shall be convicted of an assault with intent to forcibly ravish any female of previous chaste character shall be punished by imprisonment in the penitentiary for life, or for such shorter time as may be fixed by the jury, or by the court upon the entry of a plea of guilty.

HISTORY: Codes, 1906, § 1359; Hemingway's 1917, § 1096; 1930, § 1125; 1942, § 2361; Laws, 1962, ch. 321, eff from and after passage (approved March 8, 1962).

Cross References — Prohibition of person convicted of crimes affecting children or other violent crimes from being licensed as foster parent or a foster home, see § 43-15-6.

Rape, as provided in this section, defined as crime of violence, see § 97-3-2.

Sexual battery, see §§ 97-3-95 through 97-3-103.

Mandatory reporting of offense under this section relating to rape and assault with intent to ravish when committed by an adult against a minor under the age of sixteen, see § 97-5-51.

Testing of persons convicted of rape for HIV and AIDS, see §§ 99-19-201 and 99-19-203.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Indictment.
3. Evidence.
4. —Corroboration.
5. Instructions.

1. In general.

Defendant's convictions of rape, Miss. Code Ann. § 97-3-71, and armed robbery, Miss. Code Ann. § 97-3-79, were affirmed; defendant's claims concerning the sufficiency and weight of the evidence were procedurally barred, as defendant failed to renew a motion for a directed verdict. *Collins v. State*, 858 So. 2d 217, 2003 Miss. App. LEXIS 1004 (Miss. Ct. App. 2003).

Petitioner's sentence of five years pro-

bation was within the statutory limit of Miss. Code Ann. § 97-3-71; statutes governing parole contained no mandatory language and as such, prisoners had no constitutionally recognized liberty interest in parole. *Payton v. State*, 845 So. 2d 713, 2003 Miss. App. LEXIS 398 (Miss. Ct. App.), cert. denied, 859 So. 2d 392, 2003 Miss. LEXIS 436 (Miss. 2003), cert. denied, 540 U.S. 1078, 124 S. Ct. 931, 157 L. Ed. 2d 751, 2003 U.S. LEXIS 9076 (U.S. 2003).

Imposition of civil damages on newspaper for publishing rape victim's name which was lawfully obtained from police records violated First Amendment, since news article contained lawfully obtained, truthful information about matter of public significance, and imposing liability un-

der circumstances was not narrowly tailored means of furthering state interests in maintaining privacy and safety of sexual assault victim or encouraging such victims to report offenses. *Florida Star v. B. J. F.*, 491 U.S. 524, 109 S. Ct. 2603, 105 L. Ed. 2d 443, 1989 U.S. LEXIS 3120 (U.S. 1989).

Under this section [Code 1942, § 2361] the previous chaste character of a female is an essential element of crime. *Thames v. State*, 221 Miss. 573, 73 So. 2d 134, 1954 Miss. LEXIS 565 (Miss. 1954).

Sentence under this section [Code 1942, § 2361] after indictment, trial and conviction, was not improper because of the mere probability that accused could have been prosecuted and sentenced under Code 1942, § 2011 for assault and battery with a deadly weapon with intent to ravish, or under Code 1942, § 2017 for an attempt. *Lee v. State*, 201 Miss. 423, 29 So. 2d 211, 1947 Miss. LEXIS 402 (Miss. 1947), rev'd, 332 U.S. 742, 68 S. Ct. 300, 92 L. Ed. 330, 1948 U.S. LEXIS 2619 (U.S. 1948).

Court may call attention of jury to failure to assess punishment. *Thompson v. State*, 124 Miss. 463, 86 So. 871, 1920 Miss. LEXIS 530 (Miss. 1920).

2. Indictment.

Defendant was charged with two completed acts of rape under Miss. Code Ann. § 97-3-65(4)(a), and the reference to Miss. Code Ann. § 97-3-71, which dealt with attempted rape, was merely a scrivener's error in the indictment, and any reference to Miss. Code Ann. § 97-3-71 in defendant's indictment was of no moment as the substance of the indictment clearly charged defendant with forcible rape under Miss. Code Ann. § 97-3-65; thus, defendant was not entitled to have the jury fix his sentence upon conviction pursuant to the language of Miss. Code Ann. § 97-3-71, and Miss. Code Ann. § 97-3-65(4)(a) clearly allowed the trial court to fix the penalty in the event that the jury failed to do so. *Golden v. State*, 968 So. 2d 378, 2007 Miss. LEXIS 530 (Miss. 2007), cert. dismissed, 977 So. 2d 343, 2008 Miss. LEXIS 111 (Miss. 2008).

Indictment charging making of lewd suggestion by defendant to victim and

violent making of attack or assault upon victim properly charges attempted rape under § 97-3-65, rather than assault with intent to rape under this section, where indictment accurately tracks § 97-3-65 by omitting mention of "previous chaste character" and affirmatively asserts "carnally know," and where, at trial, at specific request of defendant, defendant is informed that prosecution is under § 97-3-65 and defendant makes no objection to being tried under that statute. *Harden v. State*, 465 So. 2d 321, 1985 Miss. LEXIS 1959 (Miss. 1985).

Where the evidence positively established the completed act of sexual intercourse, it was error to prosecute and convict the appellant of assault with intent to ravish. *Young v. State*, 317 So. 2d 402, 1975 Miss. LEXIS 1752 (Miss. 1975).

Where an indictment charged the defendant with an assault with intent to ravish a female of previous chaste character, of the age of 14 years, and was drawn under this section (Code 1930, § 1125), it was error for the trial court to treat the indictment as if drawn under Code 1930, § 793, the attempt statute. *John v. State*, 191 Miss. 152, 2 So. 2d 800, 1941 Miss. LEXIS 149 (Miss. 1941).

The trial court is without power to impose a sentence of one year's imprisonment on a defendant convicted upon an indictment drawn under this section [Code 1930, § 1125] and charging the defendant with an assault with intent to ravish a female of previous chaste character, of the age of 14 years, unless such term of imprisonment was fixed by the jury trying the case. *John v. State*, 191 Miss. 152, 2 So. 2d 800, 1941 Miss. LEXIS 149 (Miss. 1941).

Indictment held not to comply with provisions of statute. *Barnes v. State*, 164 Miss. 126, 143 So. 475 (Miss. 1932).

Chastity of female not element of offense and need not be alleged in prosecution for attempt to rape female of previous chaste character; separate offense from assault to rape female not of previous chaste character. *Hicks v. State*, 130 Miss. 411, 94 So. 218, 1922 Miss. LEXIS 211 (Miss. 1922).

In assault with intent, state must allege and prove previous chaste character of

female. *Wyche v. State*, 124 Miss. 736, 87 So. 286, 1920 Miss. LEXIS 564 (Miss. 1920).

In order to convict, the indictment must allege the previous chastity of the female assaulted. *Frost v. State*, 94 Miss. 104, 47 So. 898, 1908 Miss. LEXIS 31 (Miss. 1908).

An indictment pursuing the very language of Code 1906, § 1359 cannot be sustained as an indictment under Code 1892, § 967, relative to assault, including assault with intent to rape. *Barton v. State*, 94 Miss. 375, 47 So. 521, 1908 Miss. LEXIS 12 (Miss. 1908).

Where an indictment was manifestly under Code 1906, § 1359, the verdict being merely guilty as charged, the sentence to five years' imprisonment was erroneous. *Barton v. State*, 94 Miss. 375, 47 So. 521, 1908 Miss. LEXIS 12 (Miss. 1908).

3. Evidence.

Defendant contended the jury's decision was based solely on conjecture and inference, and he maintained that he was not identified by the victim and that the evidence was circumstantial; however, the victim testified that defendant, her nephew, had raped her, her testimony was not impeached, deoxyribonucleic acid evidence connected semen evidence to defendant, and the evidence was sufficient to sustain his conviction. *Grant v. State*, 913 So. 2d 316, 2005 Miss. App. LEXIS 253 (Miss. Ct. App. 2005).

Because the laboratory director testified to having trained the technician who performed the DNA testing, having examined the technician's proficiency, and having checked the protocols and checked and signed all DNA test results, the laboratory director's testimony as to the DNA test results was properly admitted; further, where the trial court found the laboratory followed the guidelines on the admissibility of DNA evidence as outlined in *Polk v. State*, there was no due process violation simply because the laboratory had not gained national certification at the time of the first set of tests. *Morris v. State*, 887 So. 2d 804, 2004 Miss. App. LEXIS 447 (Miss. Ct. App. 2004), cert. denied, 896 So. 2d 373, 2005 Miss. LEXIS 158 (Miss. 2005).

Sufficient evidence existed to support the charge of attempted rape as underlying the capital murder charge; the State's evidence concerning the underlying charge was not based on circumstantial evidence. *Powers v. State*, 883 So. 2d 20, 2003 Miss. LEXIS 850 (Miss. 2003), cert. denied, 543 U.S. 1155, 125 S. Ct. 1297, 161 L. Ed. 2d 121, 2005 U.S. LEXIS 1584 (U.S. 2005).

In a case where defendant threatened his estranged wife with a gun, forced her to have intercourse with him, and struck her, the evidence was sufficient to support defendant's rape and simple assault convictions based on the victim's testimony, as her testimony was not incredible on its face nor was it contradicted by other, more compelling, evidence. *Williams v. State*, 868 So. 2d 346, 2003 Miss. App. LEXIS 669 (Miss. Ct. App. 2003).

Defendant rather repulsively argued on appeal that because the victim had not testified with clinical certainty about the extent to which defendant had penetrated the victim, the victim's evidence did not prove forcible sexual intercourse; however, when defendant's statement that defendant had raped the victim was taken together with the victim's testimony, the trial court below properly denied defendant's motion for a directed verdict. *Bryant v. State*, 2003 Miss. App. LEXIS 80 (Miss. Ct. App. Feb. 18, 2003), sub. op., 853 So. 2d 814, 2003 Miss. App. LEXIS 491 (Miss. Ct. App. 2003).

Evidence that assailant attempted to unbutton prosecutrix's blouse, but used no lewd or lascivious language, that defendant accused of being assailant is identified by prosecutrix only by voice, and that prosecutrix bit assailant on arm during assault but that police officer who arrested defendant on following day did not see any scars, bite marks, fresh scratches or bruises on defendant's arm is insufficient to support conviction of attempted rape. *Clemons v. State*, 470 So. 2d 653, 1985 Miss. LEXIS 2110 (Miss. 1985).

Conviction under this section [Code 1942, § 2361] is warranted where testimony of prosecutrix was supported by defendant's oral confession to the sheriff and in substantial part by his own testimony. *Polk v. State*, 247 Miss. 734, 156 So.

2d 592, 1963 Miss. LEXIS 351 (Miss. 1963).

In a prosecution under this section [Code 1942, § 2361] a burglarious breaking is evidence of some unlawful purpose, the nature of which may be established circumstantially. *Lee v. State*, 201 Miss. 423, 29 So. 2d 211, 1947 Miss. LEXIS 402 (Miss. 1947), rev'd, 332 U.S. 742, 68 S. Ct. 300, 92 L. Ed. 330, 1948 U.S. LEXIS 2619 (U.S. 1948).

The trial court did not abuse its discretion in allowing the state, after both sides had rested in a prosecution under this section [Code 1942, § 2361], to introduce testimony it had overlooked, in the direct examination of the victim and her mother, to establish previous chastity, since ample opportunity for cross examination was allowed and such proof was an element of the accusation of which defendant had been duly informed. *Lee v. State*, 201 Miss. 423, 29 So. 2d 211, 1947 Miss. LEXIS 402 (Miss. 1947), rev'd, 332 U.S. 742, 68 S. Ct. 300, 92 L. Ed. 330, 1948 U.S. LEXIS 2619 (U.S. 1948).

Evidence that defendant laid hands on shoulder and throat of female, and that he turned her loose and ran when she continued to scream, held insufficient to sustain conviction for assault with intent to rape. *Pew v. State*, 172 Miss. 885, 161 So. 678, 1935 Miss. LEXIS 186 (Miss. 1935).

Evidence sustaining conviction of assault with intent to ravish. *Thompson v. State*, 124 Miss. 463, 86 So. 871, 1920 Miss. LEXIS 530 (Miss. 1920).

Where evidence did not show the use of such violence as might be necessary to

overcome resistance to the attempt, accused could not be convicted of attempt to commit rape. *Austin v. State*, 48 So. 817 (Miss. 1909).

4. —Corroboration.

There was sufficient evidence for a rational trier of fact to find defendant guilty of forcible rape because the victim's testimony was not uncorroborated since the victim she was able to describe and lead police to the exact location of where the alleged incident had occurred; even if the victim's testimony had been uncorroborated, her testimony was not discredited or contradicted by credible evidence because the victim's post-incident behavior was a factor for the jury to consider, but her actions were not highly unreasonable or improbable. *Ben v. State*, 95 So. 3d 1236, 2012 Miss. LEXIS 411 (Miss. 2012), cert. denied, 569 U.S. 905, 133 S. Ct. 1723, 185 L. Ed. 2d 788, 2013 U.S. LEXIS 2589 (U.S. 2013).

Corroboration of the testimony of the prosecutrix is unnecessary. *Gerrard v. State*, 34 So. 2d 195 (Miss. 1948).

Corroboration of prosecutrix held not required in prosecution for attempt to rape. *Barnes v. State*, 164 Miss. 126, 143 So. 475 (Miss. 1932).

5. Instructions.

Instruction in a prosecution for assault with intent to rape, as to the nature of the force used, was erroneous. *Corley v. State*, 99 Miss. 896, 56 So. 179, 1911 Miss. LEXIS 265 (Miss. 1911).

RESEARCH REFERENCES

ALR.

Impotency as defense to charge of rape, attempt to rape, or assault with intent to commit rape. 23 A.L.R.3d 1351.

What constitutes penetration in prosecution for rape or statutory rape. 76 A.L.R.3d 163.

Modern status of admissibility, in statutory rape prosecution, of complainant's prior sexual acts or general reputation for unchastity. 90 A.L.R.3d 1300.

Criminal responsibility of husband for

rape, or assault to commit rape, on wife. 24 A.L.R.4th 105.

Prosecution of female as principal for rape. 67 A.L.R.4th 1127.

Fact that murder-rape victim was dead at time of penetration as affecting conviction for rape. 76 A.L.R.4th 1147.

Am. Jur.

65 Am. Jur. 2d, Rape §§ 15 et seq.

2 Am. Jur. Trials, Investigating Particular Crimes §§ 37-39 (rape).

18 Am. Jur. Trials, Handling the Defense in a Rape Prosecution §§ 1 et seq.

Law Reviews.

DuBose, The Florida Star—"happy 200th" to the first amendment, but a setting sun for victims' privacy? 10 Miss. C. L. Rev. 193, Spring, 1990.

Practice References.

Ronald L. Schoenberg, Criminal Law Deskbook (Matthew Bender).

Anthony Morosco, The Prosecution and Defense of Sex Crimes (Matthew Bender).

Sexual Assault Trials, Second Edition (Michie).

§ 97-3-73. Robbery; definition.

Every person who shall feloniously take the personal property of another, in his presence or from his person and against his will, by violence to his person or by putting such person in fear of some immediate injury to his person, shall be guilty of robbery.

HISTORY: Codes, Hutchinson's 1848, ch. 64, art. 12, Title 4 (55); 1857, ch. 64, art. 220; 1871, § 2674; 1880, § 2944; 1892, § 1284; 1906, § 1361; Hemingway's 1917, § 1097; 1930, § 1126; 1942, § 2362.

Cross References — Ineligibility for parole of persons convicted of robbery or attempted robbery through display of a firearm, see § 47-7-3.

Robbery, as provided in this section, defined as crime of violence, see § 97-3-2.

Penalty for robbery, see § 97-3-75.

Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see § 97-43-1 et seq.

Enhancement of offenses listed in 99-19-401(2) if the instrumentality used in the commission of the 99-19-401(2) offense was initially obtained in the course of the commission of the crime(s) provided for in this section, see § 99-19-401.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Indictment.
3. Evidence.
4. Instructions.
5. Miscellaneous.
6. Sentence.

1. In general.

Three essential elements of robbery are as follows: (1) felonious intent, (2) force or putting in fear as a means of effectuating the intent, and (3) by that means taking and carrying away the property of another from his person or in his presence; in dealing with the second element, if putting in fear is relied upon, it must be the fear under duress of which the owner parts with possession. *Murphy v. State*, 868 So. 2d 1030, 2003 Miss. App. LEXIS 1161 (Miss. Ct. App. 2003), cert. denied,

868 So. 2d 345, 2004 Miss. LEXIS 297 (Miss. 2004).

The statute is the same as the common-law definition of the offense. *Cittadino v. State*, 199 Miss. 235, 24 So. 2d 93, 1945 Miss. LEXIS 284 (Miss. 1945).

Statute (Code 1942, § 2367), pertaining to robbery by use of a deadly weapon, is merely an extension of this section [Code 1942, § 2362], and the evil sought to be abated is the employment of such weapons as are generally considered to be deadly. *Cittadino v. State*, 199 Miss. 235, 24 So. 2d 93, 1945 Miss. LEXIS 284 (Miss. 1945).

The means used to effect a robbery is important only to the extent that it reasonably instills a disabling apprehension of great personal injury. *Cittadino v. State*, 199 Miss. 235, 24 So. 2d 93, 1945 Miss. LEXIS 284 (Miss. 1945).

It is not essential that the owner of the

goods should have been put in fear. The statute is in the alternative “by violence to his person” or “by putting such person in fear.” *McDaniel v. State*, 16 Miss. 401, 1847 Miss. LEXIS 36 (Miss. 1847); *Lovern v. State*, 30 So. 2d 511 (Miss. 1947).

2. Indictment.

Defendant's purported conviction for robbery was plain error because he had been indicted for burglary, not the entirely distinct crime of robbery, which was not a lesser-included offense of burglary, and a court could not make, alter, or substantively amend a felony indictment; defendant's conviction for robbery was a plain, clear, and obvious error that violated his fundamental rights and constituted a manifest miscarriage of justice. *Pace v. State*, 242 So. 3d 107, 2018 Miss. LEXIS 199 (Miss. 2018).

Indictment sufficiently identifying robbery under as the underlying offense and listing its statutory section is all that is required to charge capital murder premised on robbery; because petitioner's indictment identified the underlying felony as robbery and listed the statutory section under which he was charged, the capital murder charge was sufficiently pleaded and the indictment was not defective. *Randall v. State*, 148 So. 3d 686, 2014 Miss. App. LEXIS 575 (Miss. Ct. App. 2014).

No prejudice resulted to the defense because the jury instructions given by the trial court properly related the robbery charge to the testimony and evidence presented to the jury for their deliberations. Moreover, the record failed to reflect any evidence of variation between the elements and the factual proof in support of each element of the robbery charge. *Faust v. State*, 113 So. 3d 614, 2013 Miss. App. LEXIS 243 (Miss. Ct. App. 2013).

Indictment properly charged defendant with an overt act toward the commission of strong-arm robbery where it stated that, in attempting to take an automobile and cash from the victim, defendant threatened to drag the victim from his car, physically assault him, and rob him, placing him in fear of some immediate injury to his person. *Gaston v. State*, 922 So. 2d 841, 2006 Miss. App. LEXIS 140 (Miss. Ct. App. 2006).

Because defendant's indictment failed to charge the essential elements of armed robbery, the circuit court lacked subject matter jurisdiction over the offense of armed robbery, but the indictment properly charged defendant with the crime of simple robbery; however, defendant's guilty plea was involuntary because he was not informed of the true nature and consequences of the charge. *Garner v. State*, 944 So. 2d 934, 2006 Miss. App. LEXIS 921 (Miss. Ct. App. 2006), cert. dismissed, 951 So. 2d 563, 2007 Miss. LEXIS 534 (Miss. 2007).

Because the information did not sufficiently charge defendant with armed robbery, as it did not charge the overt act as the display of a weapon by another perpetrator and then the shooting of the victim, defendant's armed robbery conviction, the result of a guilty plea, was reversed; however, because there was a sufficient charge of simple robbery, if not for the word “attempt,” the court affirmed a conviction of robbery, and remanded for sentencing on that count. *Neal v. State*, 936 So. 2d 463, 2006 Miss. App. LEXIS 589 (Miss. Ct. App. 2006).

Indictment alleging robbery by fear does not vary fatally from proof offered at trial merely because proof can be interpreted as showing robbery by force as well as robbery by fear. *Ingram v. State*, 483 So. 2d 688, 1986 Miss. LEXIS 2376 (Miss. 1986).

Indictment charging that money was forcibly snatched from person of another held sufficient to support conviction for grand larceny, so that defendant could not complain of variance on ground proof showed robbery while indictment charged grand larceny. *Dixon v. State*, 169 Miss. 876, 154 So. 290, 1934 Miss. LEXIS 85 (Miss. 1934).

Allegation in indictment for robbery that money was feloniously taken, stolen, and carried away by putting owner in fear held sufficient to charge intent to steal. *State v. Snowden*, 164 Miss. 613, 145 So. 622, 1933 Miss. LEXIS 253 (Miss. 1933).

Indictment charging robbery “of about \$6.00 lawful and legal money and tender of the United States of America of the value unknown” held sufficient allegation of amount. *State v. Snowden*, 164 Miss.

613, 145 So. 622, 1933 Miss. LEXIS 253 (Miss. 1933).

Allegations of indictment for robbery held sufficient, though not following statutory form. *State v. Snowden*, 164 Miss. 613, 145 So. 622, 1933 Miss. LEXIS 253 (Miss. 1933).

Allegation that defendant did feloniously take, steal, and carry away property by putting owner in fear held to sufficiently allege intent. *Webster v. State*, 146 Miss. 682, 111 So. 749, 1927 Miss. LEXIS 216 (Miss. 1927).

Where statute makes punishable the doing of several acts, doing all in one transaction violates the act but once; and indictment may allege defendant did all, employing the conjunction "and" where the statute has "or." *Brady v. State*, 128 Miss. 575, 91 So. 277, 1922 Miss. LEXIS 143 (Miss. 1922).

Indictment for robbery held fatally defective for omission to allege immediate danger to person alleged to have been robbed. *Webb v. State*, 99 Miss. 545, 55 So. 356, 1911 Miss. LEXIS 227 (Miss. 1911).

Indictment which fails to charge an intent to steal is defective. *Jones v. State*, 95 Miss. 121, 48 So. 407, 1909 Miss. LEXIS 213 (Miss. 1909).

Indictment need not charge an assault in terms, where it charges taking of goods from person. *State v. Presley*, 91 Miss. 377, 44 So. 827, 1907 Miss. LEXIS 152 (Miss. 1907).

In an indictment under this section [Code 1942, § 2362] seeking to charge a robbery by taking property from the person of another by putting him in fear, it is essential to charge either that the person said to have been robbed was put in fear of some immediate danger to his person or that the property was taken from his person. *Smith v. State*, 82 Miss. 793, 35 So. 178, 1903 Miss. LEXIS 191 (Miss. 1903).

An indictment charging a taking from the person of another or in his presence against his will by violence is not bad for failing to include or by putting in fear of immediate bodily injury. *Cunningham v. State*, 28 So. 750 (Miss. 1900); *State v. Presley*, 91 Miss. 377, 44 So. 827, 1907 Miss. LEXIS 152 (Miss. 1907).

3. Evidence.

Evidence was sufficient to convict defen-

dant of robbery and the verdict was not against the overwhelming weight of the evidence because the assistant manager was a store employee who had custody over store merchandise until it was purchased; and, when defendant attempted to exit the store without paying for the television in his cart, the assistant manager blocked him and only relinquished the television upon defendant's threats. *Pettis v. State*, — So. 3d —, 2019 Miss. App. LEXIS 167 (Miss. Ct. App. Apr. 23, 2019).

Although defendant argued that he was guilty of only shoplifting because he took possession of the television before threatening the assistant manager, there was no merit to defendant's reasoning that his simple act of placing the television in a cart constituted a taking as the taking was complete when defendant ran from the assistant manager and left the store with the unpaid-for television; thus, his conviction for robbery was affirmed. *Pettis v. State*, — So. 3d —, 2019 Miss. App. LEXIS 167 (Miss. Ct. App. Apr. 23, 2019).

Evidence was sufficient to support defendant's conviction of conspiracy to commit robbery because it showed that he was not only present during the commission of the robbery but he also helped bring it about by knocking on the window of the victim's bedroom to buy drugs, saw the shoe box where the victim kept drugs and money, he returned a second time, he was armed, and did nothing to stop the robbery. Defendant was later seen sorting the money and drugs from the shoe box at a friend's house. *Story v. State*, 296 So. 3d 104, 2019 Miss. App. LEXIS 539 (Miss. Ct. App. 2019), cert. denied, 293 So. 3d 833, 2020 Miss. LEXIS 223 (Miss. 2020).

Evidence was sufficient to support defendant's conviction of two counts capital murder because it showed that he acted in concert or aided and abetted the shooter in the robbery during which the two victims were shot and killed. After defendant initially observed the layout of the victim's bedroom with his first purchase of pills, defendant and the shooter returned armed, defendant stood behind the shooter as the shooter asked the victim where the money was, and when the victim did not respond he shot both victims.

Story v. State, 296 So. 3d 104, 2019 Miss. App. LEXIS 539 (Miss. Ct. App. 2019), cert. denied, 293 So. 3d 833, 2020 Miss. LEXIS 223 (Miss. 2020).

There was sufficient evidence to support defendant's conviction for robbery because the victim's testimony supplied evidence sufficient for a jury to find the elements of robbery beyond a reasonable doubt; the victim identified defendant as the individual who took his wallet from a photo lineup and in open court. Gillespie v. State, 196 So. 3d 1073, 2016 Miss. App. LEXIS 398 (Miss. Ct. App. 2016), op. withdrawn, — So. 3d —, 2017 Miss. App. LEXIS 35 (Miss. Ct. App. 2017).

Evidence was sufficient to convict defendant of capital murder with the underlying felony of robbery because two witnesses testified that the accomplice informed them that he was going to beat the victim because the victim owed him money; defendant then gave the accomplice the padlock, which the accomplice used to beat the victim to death; it was undisputed that defendant removed the victim's wallet from his pocket after the accomplice fatally beat the victim; and the victim's murder and the removal of his wallet were part of a continuous chain of events. Hampton v. State, 188 So. 3d 625, 2016 Miss. App. LEXIS 205 (Miss. Ct. App. 2016).

Trial court properly denied defendant's motion for a new trial because the evidence at trial was sufficient to convict him of aggravated assault on a law enforcement officer and robbery where, inter alia, a surveillance video admitted into evidence showed him as an inmate grab a correctional officer, throw her around and choke her while she was screaming in obvious fear for her life, the evidence also established that defendant stealthily grabbed her cell phone and that she was in fear for her life when he took her phone. Pritchett v. State, 171 So. 3d 594, 2015 Miss. App. LEXIS 407 (Miss. Ct. App. 2015).

Evidence was sufficient to convict defendant of capital murder with the underlying felony of robbery because defendant and two other individuals were the only people inside the victim's house at the time of his attack; a witness testified that

she saw a television and other personal property being taken out of the victim's house and she saw defendant leaving the victim's house with a metal bar; the doctor who performed the autopsy opined that the bar defendant was seen leaving the residence with was consistent with the type of blunt object that caused the victim's fatal injuries; and the doctor testified that the victim's death was a homicide. Burleson v. State, 166 So. 3d 499, 2015 Miss. LEXIS 243 (Miss. 2015).

Evidence supported defendant's conviction for robbery, under Miss. Code Ann. § 97-3-73, because (1) the victim testified that defendant used force and violence against her to take possession of her mother's pickup truck; (2) the victim identified defendant as the person who took the truck from her control; (3) a deputy testified that, at the time of defendant's arrest, the truck was stopped in the middle of the road, rather than neatly parked at a library as defendant claimed; and (4) two deputies identified defendant as the person removed from the allegedly stolen truck. Faust v. State, 113 So. 3d 614, 2013 Miss. App. LEXIS 243 (Miss. Ct. App. 2013).

Evidence supported defendant's conviction for capital murder with the underlying felony of robbery because defendant stated in a confession that defendant killed the victim during a fight, left the apartment for approximately an hour and a half, and then returned and began a clean-up effort when defendant was discovered by a sheriff's deputy. Other evidence showed that defendant used the victim's cash and credit card to purchase cleaning supplies with which to conceal the crime. Batiste v. State, 121 So. 3d 808, 2013 Miss. LEXIS 295 (Miss. 2013), cert. denied, 572 U.S. 1117, 134 S. Ct. 2287, 189 L. Ed. 2d 178, 2014 U.S. LEXIS 3424 (U.S. 2014).

Defendant's conviction for robbery was proper because the sum of \$1,200 was taken from the store and two store clerks testified that defendant demanded that they give him the money several times. Defendant ultimately insisted the money be given to him or the clerks would not live to see another day; both clerks were afraid for their lives due to defendant's

threats. *Taylor v. State*, 62 So. 3d 962, 2011 Miss. LEXIS 272 (Miss. 2011).

Conviction for robbery under Miss. Code Ann. § 97-3-73 was not against the overwhelming weight of the evidence where the evidence showed that appellant attacked a victim and took her cell phone; moreover, the jury inferred intent from appellant's actions, and it was the jury's job to determine the credibility of the witnesses. *Armstead v. State*, 80 So. 3d 112, 2011 Miss. App. LEXIS 365 (Miss. Ct. App. 2011), cert. denied, 80 So. 3d 111, 2012 Miss. LEXIS 77 (Miss. 2012).

Because the victim was aware that defendant was attempting to take the victim's rifle, did not consent to defendant's taking it, and let go of the victim's end of the rifle in fear of being shot, the evidence was sufficient to prove that defendant's taking of the rifle was effectuated through violence, as required by Miss. Code Ann. § 97-3-73. *Davis v. State*, 75 So. 3d 569, 2011 Miss. App. LEXIS 234 (Miss. Ct. App.), cert. denied, 76 So. 3d 169, 2011 Miss. LEXIS 583 (Miss. 2011).

Defendant's conviction for simple robbery was appropriate because there was testimony that defendant participated in the robbery, that he gave misleading information to a 911 operator about the robber's location, and a sergeant testified that defendant had deliberately blocked the sergeant's pursuit of a codefendant. *Dora v. State*, 61 So. 3d 226, 2011 Miss. App. LEXIS 22 (Miss. Ct. App. 2011).

Defendant's conviction for simple robbery was appropriate because his argument that the charge for armed robbery could not stand because a codefendant did not have a weapon was without merit. During the trial, defendant made a motion for a directed verdict on the basis that the State did not prove that the codefendant had a weapon and the trial court allowed the case to proceed on the lesser-included offense of simple robbery, which was an appropriate action; further, the jury convicted defendant of simple robbery, not armed robbery. *Dora v. State*, 61 So. 3d 226, 2011 Miss. App. LEXIS 22 (Miss. Ct. App. 2011).

Evidence was sufficient to convict defendant of simple robbery because a sandwich shop clerk identified defendant from

a photographic lineup, and defendant's wife corroborated the clerk's identification testimony that defendant had rough-looking hands, a gap in his teeth, and spoke with a stutter. *Sanders v. State*, 32 So. 3d 1214, 2009 Miss. App. LEXIS 717 (Miss. Ct. App. 2009), cert. denied, 42 So. 3d 24, 2010 Miss. LEXIS 433 (Miss. 2010).

After the victim stated that he wanted to have sex with defendant's sister, defendant became enraged, picked up a lead pipe, walked away from the campsite, told two witnesses that he was going to kill the victim, returned to the campsite ten minutes later, and beat the victim in the head repeatedly with the pipe. Defendant's admission that he took the victim's keys and truck before driving to Alabama to dispose of the body was sufficient to establish the offense of robbery under Miss. Code Ann. § 97-3-73 as the underlying felony in the capital murder case. *Woods v. State*, 14 So. 3d 767, 2009 Miss. App. LEXIS 233 (Miss. Ct. App. 2009).

Defendant's convictions for robbery and capital murder were appropriate because, while the circuit court erred in allowing references to a deceased codefendant's statement to law enforcement to corroborate defendant's statement, the violation of defendant's constitutional right to confront the witness was harmless since the weight of the evidence was overwhelming. Defendant's own statement confessing to robbing the victim and stabbing him in the abdomen with a screwdriver was entered into evidence; other evidence included an officer's and sheriff's recounting of the "treasure hunt" with the codefendant, where they traveled to various areas and retrieved evidence that corroborated defendant's statement to a "T." Singleton *v. State*, 1 So. 3d 930, 2008 Miss. App. LEXIS 641 (Miss. Ct. App. 2008).

Evidence of robbery was sufficient because it established that the defendant grabbed the victim and said, "This is a robbery, give me all your money"; he threatened to shoot her, cut her or hit her over the head with a beer bottle if she tried to get away; the victim identified defendant as her assailant; and the victim's checkbook was recovered from defendant's vehicle pursuant to a search warrant. *Scott v. State*, 981 So. 2d 964, 2008 Miss. LEXIS 230 (Miss. 2008).

Defendant's conviction for capital murder while in the commission of a robbery was appropriate because defendant admitted that he went to an individual's house with the intention of stealing the victim's personal property and further admitted to shooting the victim; he also admitted that the crack cocaine at issue was stolen from the victim. The only dispute was how he came into possession of the crack cocaine and a witness testified that after shooting the victim, defendant rolled the victim over and picked up a pill bottle. *Nelson v. State*, 995 So. 2d 799, 2008 Miss. App. LEXIS 319 (Miss. Ct. App.), cert. denied, 999 So. 2d 374, 2008 Miss. LEXIS 660 (Miss. 2008).

Defendant's conviction for robbery was appropriate because the evidence indicated that defendant took the money as a quid pro quo to stop beating his father; thus, it was only the threat of a continued beating that caused the father to hand over the money. *Downs v. State*, 962 So. 2d 1255, 2007 Miss. LEXIS 444 (Miss. 2007).

Evidence was sufficient to convict defendant of robbery when the gas station clerk identified defendant as the person who came into the station and asked her to hand over the cash in the drawer, and the clerk's testimony was corroborated by an eyewitness who had seen defendant at the gas station before and after the robbery and who was able to identify defendant. *Reed v. State*, 956 So. 2d 1110, 2007 Miss. App. LEXIS 351 (Miss. Ct. App. 2007).

In a case where the identity of two alleged armed robbery victims was not placed into evidence, there was insufficient evidence to support convictions under Miss. Code Ann. § 97-3-73 since identity was an essential element of the crime; although the victims were identified in the indictment, they did not testify at trial, and police did not reveal their identities during examination. *Carter v. State*, 965 So. 2d 705, 2007 Miss. App. LEXIS 287 (Miss. Ct. App. 2007).

Owner testified that he locked the doorknob and shut the door after allowing defendant to enter his mobile home, and both the owner and a victim testified that defendant declined to sit down and that she stood facing them with her back to the door; according to the victim, defendant

had her hand on the doorknob before three masked men rushed through the door, and she never saw any of the masked men point a gun at defendant. Also, immediately after the men left, defendant refused to help the victim untie the owner; thus, the evidence was sufficient, and defendant's convictions for burglary of a dwelling, robbery, kidnapping, and auto theft were not against the weight of the evidence. *Brown v. State*, 926 So. 2d 283, 2006 Miss. App. LEXIS 268 (Miss. Ct. App. 2006).

In a case where defendant was convicted of capital murder during the commission of a robbery when he killed his father and stole his father's revolver and car, the jury's verdict was not against the overwhelming weight of the evidence because, inter alia: (1) there was testimony that placed defendant at or near the scene of the crime; (2) several area residents testified to hearing loud bangs around the time defendant was at the scene of the crime, and to hearing a car door slam, tires squeal, and a car speed off from the area moments after hearing the unidentified loud bangs; and (3) there was testimony that the revolver found at the scene of defendant's car accident belonged to his father. *Boone v. State*, 964 So. 2d 512, 2006 Miss. App. LEXIS 894 (Miss. Ct. App. 2006), cert. denied, 964 So. 2d 508, 2007 Miss. LEXIS 515 (Miss. 2007).

Sufficient evidence existed to convict defendant of Miss. Code Ann. § 97-3-73 as the jury could infer felonious intent from the circumstances surrounding the crime, and the victim's own testimony under direct examination established that defendant used force to take and carry away the victim's property. *Moore v. State*, 942 So. 2d 251, 2006 Miss. App. LEXIS 588 (Miss. Ct. App.), cert. denied, 942 So. 2d 164, 2006 Miss. LEXIS 757 (Miss. 2006).

Where a bank teller testified that defendant went through the bank line, placed a knife on the counter, and demanded money from two tellers, defendant was indicted for armed robbery in violation of Miss. Code Ann. § 97-3-79; the evidence was sufficient to support the jury's verdict convicting him of the lesser-included offense of robbery under Miss. Code Ann. § 97-3-73, and when police apprehended

defendant he had a steak knife on his person. *Wilson v. State*, 935 So. 2d 945, 2006 Miss. LEXIS 303 (Miss. 2006), cert. denied, 549 U.S. 1348, 127 S. Ct. 2047, 167 L. Ed. 2d 780, 2007 U.S. LEXIS 4088 (U.S. 2007).

Defendant's conviction for robbery in violation of Miss. Code Ann. § 97-3-73 was proper where the victim saw and felt defendant take her ring off of her finger. She was aware that he was taking her ring and she did not consent to the taking. *Cabrere v. State*, 920 So. 2d 1062, 2006 Miss. App. LEXIS 100 (Miss. Ct. App. 2006).

Evidence was sufficient to accept defendant's guilty plea to robbery because defendant handed the bank teller a note, and when she asked him what he wanted, he gave her a bag and told her to fill it with money. Although the teller was not injured, and the note said, "I'm a bum" as opposed to "I have a bomb," the evidence was clear that defendant was in possession of \$7,000 of the bank's money that he received after placing the bank teller in immediate fear of a bodily injury to herself. *Covington v. State*, 909 So. 2d 160, 2005 Miss. App. LEXIS 582 (Miss. Ct. App. 2005).

Where the store owner testified that defendant entered the grocery store wearing a red ski mask, jabbed a knife at the store owner, and took \$ 440 from the cash register, the evidence supported the verdict finding him guilty of robbery. The trial judge acted within his discretion by denying defendant's motion for a directed verdict. *Smith v. State*, 913 So. 2d 365, 2005 Miss. App. LEXIS 274 (Miss. Ct. App. 2005).

Record reflected that three individuals, the victim and two eyewitnesses, testified regarding defendant's participation in a parking lot robbery. The victim and one of said witnesses positively identified defendant from a pretrial photo array and in court, while the third witness could only say that he believed defendant was the assailant; thus, where each witness was subjected to cross-examination by two separate defense counsels and gave similar accounts of the robbery, defendant's motion for a new trial or judgment notwithstanding the verdict, based on insuf-

ficient evidence, was properly denied. *Bynum v. State*, 929 So. 2d 324, 2005 Miss. App. LEXIS 267 (Miss. Ct. App. 2005), aff'd, 929 So. 2d 312, 2006 Miss. LEXIS 261 (Miss. 2006).

State established a prima facie case that accomplice's knife was used during the course of the transaction; thus, there was sufficient evidence to convict defendant for robbery. *Sullivan v. State*, 883 So. 2d 142, 2004 Miss. App. LEXIS 942 (Miss. Ct. App. 2004).

Defendant's motion for a judgment notwithstanding the verdict was properly denied where the absence of physical evidence did not negate a conviction where there was testimonial evidence; the victim was able to easily identify defendant as the perpetrator, and although defendant testified on his own behalf and asserted that he had not committed the crime, juries in Mississippi were permitted to accept or reject testimony by a witness. *Williams v. State*, 879 So. 2d 1126, 2004 Miss. App. LEXIS 779 (Miss. Ct. App. 2004).

Evidence was sufficient to convict defendant of robbery as the victim was able to identify defendant, and testified how defendant had hit him in the face, forced him into a ditch, and made him give him his money. *Lee v. State*, 877 So. 2d 543, 2004 Miss. App. LEXIS 589 (Miss. Ct. App. 2004).

Defendant claimed that there was insufficient evidence that defendant participated in the robbery of the victim because defendant's co-indictee (who pled to manslaughter) actually took the wallet. However, the jury heard testimony that defendant stated to the co-indictee that, "I got him good, the blade went all the way through," and that defendant then searched through the victim's wallet which was later found in the possession of both men. Thus, a reasonable juror would have found defendant guilty and substantial evidence supported defendant's conviction for capital murder. *Stewart v. State*, 881 So. 2d 919, 2004 Miss. App. LEXIS 556 (Miss. Ct. App. 2004).

Sufficient evidence existed to convict defendant of robbery as defendant entered the victims' home, demanded money, and forcefully moved the 82-year-old husband

around the home until he received it. *Mayo v. State*, 886 So. 2d 734, 2004 Miss. App. LEXIS 430 (Miss. Ct. App.), cert. denied, 887 So. 2d 183, 2004 Miss. LEXIS 1383 (Miss. 2004).

State proved that the victim identified defendant from a photo line-up and in the courtroom, and recognized him when he returned to the store on another occasion; the victim was in fear of immediate injury to her person and the trial transcript demonstrated that she testified that defendant had told her to open the cash register or he would kill her. *Armstead v. State*, 869 So. 2d 1052, 2004 Miss. App. LEXIS 68 (Miss. Ct. App. 2004).

Where codefendants testified that defendant shot the owner of the lounge and fled with billfolds taken from the owner and patrons, and the owner and the co-owner both identified defendant as the shooter, the evidence was sufficient to sustain defendant's convictions for armed robbery and aggravated assault, even though the money and the gun were not recovered and the bullet fragments were not retrieved from the ceiling and the victim's head. *Graham v. State*, 861 So. 2d 1053, 2003 Miss. App. LEXIS 1194 (Miss. Ct. App. 2003).

Where defendant accused the victims of defrauding defendant's poker machines in defendant's bar, attacked one man with a bat, ordered the men to strip, and took the victim's money, defendant's argument that the trial court erred when it found that defendant's pointing the pistol at one victim's head as the victims departed the bar was a part of a single transaction or occurrence and was admissible to show intent, was rejected, as that evidence assisted in telling the story of the armed robbery. *Pierce v. State*, 860 So. 2d 855, 2003 Miss. App. LEXIS 1153 (Miss. Ct. App. 2003).

Testimony presented by the two victims provided direct evidence of defendant's specific intent to rob the men alleged by defendant to be defrauding defendant's poker machines, as after attacking one victim with a ball bat, defendant made the victims disrobe and empty their pockets, and then took the money that was in the men's pockets; no evidence was presented at the trial that the victims were the

culprits in defrauding the poker machines on the night in question or the previous night, although one victim was found with a laminated money strip. *Pierce v. State*, 860 So. 2d 855, 2003 Miss. App. LEXIS 1153 (Miss. Ct. App. 2003).

Sufficient evidence existed to convict the inmate of robbery where the State's evidence, in conjunction with the inmate's admission of guilt, supported the felonious taking of the victim's purse while putting her in fear for herself. *Clark v. State*, 854 So. 2d 1086, 2003 Miss. App. LEXIS 764 (Miss. Ct. App. 2003).

Evidence was sufficient to support defendant's conviction where the victim's testimony provided evidence of all of the essential elements of the crime and her testimony identifying defendant was unequivocal; the verdict was not so against the weight of the evidence as to lead the appellate court to the conclusion that the trial court abused its discretion. *Garner v. State*, 856 So. 2d 729, 2003 Miss. App. LEXIS 936 (Miss. Ct. App. 2003).

Record presented substantial evidence to support the verdict where testimony of the victim and corroborating testimony of the officers demonstrated that defendant acted violently towards the victim and stole his property. *Davis v. State*, 850 So. 2d 176, 2003 Miss. App. LEXIS 646 (Miss. Ct. App. 2003).

Evidence that defendant put the victim in fear was sufficient to convict defendant of robbery under Miss. Code Ann. § 97-3-73, as defendant, after raping the victim, told a third party to shoot the victim if she tried to stop defendant from stealing money from the victim's purse. *Williford v. State*, 820 So. 2d 13, 2002 Miss. App. LEXIS 31 (Miss. Ct. App. 2002).

Evidence supported a conviction for robbery where the victim was grocery shopping with her purse in the child seat of her grocery cart and while holding a string which was tied to her purse, when she was pushed from behind and her purse was stolen. *Fair v. State*, 789 So. 2d 818, 2001 Miss. App. LEXIS 212 (Miss. Ct. App. 2001).

Evidence was sufficient to support a conviction where the victim stated that her purse was taken against her will and also stated that she saw the thief ap-

proach her prior to the theft and that as he walked toward her, she became “uncomfortable,” “frightened,” and “afraid.” *McKee v. State*, 791 So. 2d 804, 2001 Miss. LEXIS 113 (Miss. 2001).

Evidence was sufficient to support a conviction for robbery where the victim testified that (1) the defendant, her former boyfriend, ran up to her from behind as she attempted to unlock the door to her apartment, (2) he then pushed her against the wall and grabbed her purse as she turned around and screamed, (3) she did not know if he was going to kill her as she stood pushed against the wall when he grabbed her purse, and (4) she did not give the purse to him, but that he took it. *Washington v. State*, 794 So. 2d 253, 2001 Miss. App. LEXIS 60 (Miss. Ct. App. 2001).

Evidence was sufficient to support a conviction where (1) the victim was able to positively identify the defendants as the men who robbed her, (2) a witness testified that one of the defendants used her telephone to order the pizza the victim was attempting to deliver at the time of the robbery, and (3) the victim was seen returning to her place of employment with a bruised face. *Williams v. State*, 772 So. 2d 1113, 2000 Miss. App. LEXIS 572 (Miss. Ct. App. 2000).

Evidence was insufficient to support a conviction for robbery where the indictment only charged a taking occurred by placing victim in fear of immediate injury to her person, not by violence, and there was no evidence to support the fear of injury theory. *Clayton v. State*, 759 So. 2d 1169, 1999 Miss. LEXIS 381 (Miss. 1999).

Evidence was sufficient to show violence where (1) the defendant reached into the elderly victim's pocket, extracted his wallet, and then later turned the pocket inside out and took the coins that were in the pocket, and (2) the defendant's actions caused the victim to fall to the floor. *Chaney v. State*, 739 So. 2d 416, 1999 Miss. App. LEXIS 194 (Miss. Ct. App. 1999).

The evidence was sufficient to support a conviction for simple robbery based either on actual force (grabbing, disarming, and pushing the victim) or by putting the victim in fear of the use of force (saying it

was a holdup, demanding money, and jumping across the counter) or both. *Lowe v. State*, 736 So. 2d 404, 1999 Miss. App. LEXIS 119 (Miss. Ct. App. 1999).

Evidence was sufficient to show that the victim of a purse snatching experienced fear where the record indicated (1) that the defendant grabbed the victim's purse, (2) that when he did so, she stated that she felt an immediate sensation similar to being struck by lightning, (3) that while not immediately aware of what was occurring, she also had a sense of apprehension, (4) that this apprehension marked the point at which the seed of fear was sown, and (5) that as the defendant continued to tug and pulled the purse away, the victim realized what was occurring at which point the seed of fear germinated and flowered. *Clayton v. State*, 1999 Miss. App. LEXIS 21 (Miss. Ct. App. Jan. 26, 1999), rev'd, 759 So. 2d 1169, 1999 Miss. LEXIS 381 (Miss. 1999).

Where a store clerk testified that she physically resisted the defendant's efforts to obtain possession of items of jewelry, but that he forced her hand open against her will, thus using physical force to overcome the clerk's efforts to retain control of the merchandise, a question of fact for the jury was raised whether the defendant employed the necessary violence to the person of the clerk to constitute the crime of robbery. *Cobb v. State*, 734 So. 2d 182, 1999 Miss. App. LEXIS 4 (Miss. Ct. App. 1999).

The court rejected the defendant's contention that the almost instantaneous snatching of the victim's purse did not constitute the crime of robbery on the basis that there was no proof that he obtained the victim's purse through the use of either violence or by putting her in fear of immediate injury to her person since there was sufficient evidence of force where, as the victim got into her car, the defendant came up and positioned himself between the victim's body and the steering wheel of her automobile, thus effectively immobilizing her while he leaned over and grabbed her purse and the victim described that she felt “pressure on my chest.” *Pickens v. State*, 1998 Miss. App. LEXIS 919 (Miss. Ct. App. Oct. 27, 1998).

In a capital murder prosecution, there was sufficient evidence to support the

jury's verdict that the murder occurred during the course of an armed robbery, in spite of the defendant's argument that the alleged robbery was completed long before the victim was killed 60 miles away in another county, where the jury was instructed that it was necessary for them to find that the defendant had the intent to rob when the killing was done, the evidence offered at trial put the defendant in the same neighborhood as the victim on the date in question, there was evidence of violence in the victim's home, within a few hours the defendant was seen approximately 60 miles away in possession and control of the victim's car, and the victim's personal effects were found in the general vicinity of the car. *Mackbee v. State*, 575 So. 2d 16, 1990 Miss. LEXIS 831 (Miss. 1990).

Evidence of an alleged assault on a police officer which occurred during a chase across state lines subsequent to the robbery of a store, was admissible in the ensuing prosecution for robbery and conspiracy to commit robbery, even though the assault charge was dismissed for lack of jurisdiction, since the assault was so interrelated with the events at the store that it constituted a single occurrence. *Jones v. State*, 567 So. 2d 1189, 1990 Miss. LEXIS 559 (Miss. 1990).

Circumstantial evidence that defendant took several pieces of jewelry, personal property having some value, although modest, from murder victim combined with circumstantial evidence that defendant was person who committed killing, is sufficient to prove that taking of jewelry was by violence to victim or by putting victim in fear of immediate personal injury and is legally adequate to establish that defendant committed felony of robbery underlying capital murder conviction. *Fisher v. State*, 481 So. 2d 203, 1985 Miss. LEXIS 2281 (Miss. 1985).

Evidence identifying defendant as being present on occasion of homicide in convenience store and that defendant was behind counter waiting on customers, that defendant had large amount of cash on him and that over \$300 was taken from store is sufficient to present to jury question of whether robbery and capital murder were committed and whether defen-

dant was person who committed crime. *Johnson v. State*, 476 So. 2d 1195, 1985 Miss. LEXIS 2257 (Miss. 1985).

In a capital murder trial, evidence was sufficient to support the conclusion that the murder had been committed during the course of a robbery, where the evidence indicated that defendant had selected the victims and pointed them out to his codefendant, stating to him that they were going to rob the two men, where defendant and codefendant went with the victims to the victims' apartment after that intent had been made known, where the victims had been cold-bloodedly murdered for no demonstrable reason other than taking what they had, where the car of one of the victims had been taken away after he had told defendant, immediately prior to being stabbed, that his money was in the trunk of the car, and where, as soon as practical, the trunk had been searched by defendant, in that no other evidence would be needed for a jury to find that the cold-blooded murder was done to effect a robbery as defined by this section; moreover, in reviewing the sentence of death as required by § 99-19-105, the Supreme Court, would find unhesitatingly that the elements of passion, prejudice, or any other arbitrary factor did not exist in arriving at the jury verdict. *Dufour v. State*, 453 So. 2d 337, 1984 Miss. LEXIS 1788 (Miss. 1984), cert. denied, 469 U.S. 1230, 105 S. Ct. 1231, 84 L. Ed. 2d 368, 1985 U.S. LEXIS 1123 (U.S. 1985).

In a capital murder prosecution, the jury properly found beyond a reasonable doubt that the alleged killing occurred while defendant was engaged in committing the crime of robbery where the jury was fully instructed that it was necessary for them to find that defendant had the intent to rob when the murder was committed and where, based on the defendant's action as well as the surrounding circumstances, the evidence was sufficient to show such intent. *Voyles v. State*, 362 So. 2d 1236, 1978 Miss. LEXIS 2159 (Miss. 1978), cert. denied, 441 U.S. 956, 99 S. Ct. 2184, 60 L. Ed. 2d 1059, 1979 U.S. LEXIS 1933 (U.S. 1979).

In robbery prosecution, where testimony showed that defendant and companions acted in concert insofar as beating of

victim was concerned, testimony of witness that defendant later told him that boy who was beaten had a dollar bill and a pocket knife, corroborated victim's testimony, and together inferences jury was justified in drawing from other facts were sufficient to withstand defendant's request for peremptory instruction. *Hammons v. State*, 291 So. 2d 177, 1974 Miss. LEXIS 1722 (Miss. 1974).

Evidence that late at night the participants turned aside from the highway to a secluded place on the pretense of wanting to see some person there when it was known (but not to the victim who was an entire stranger to that section) that the place was and had been for some time wholly uninhabited would, with all the other circumstances of the case, justify the conclusion that the participants had done so with the design to commit the robbery there, making each of them a principal. *United Press Assos. v. McComb Broadcasting Corp.*, 201 Miss. 68, 30 So. 2d 511, 1947 Miss. LEXIS 370 (Miss. 1947).

Exclusion of evidence accounting for possession of money by accused prior to robbery held error. *Buford v. State*, 124 Miss. 418, 86 So. 860, 1920 Miss. LEXIS 524 (Miss. 1920).

4. Instructions.

Trial court did not err in denying defendant's request for lesser-included-offense instructions as no factual basis supporting an instruction that a simple robbery, a robbery without a deadly weapon, occurred or that a mere larceny occurred because, during the trial, no conflicting testimony was adduced about whether a robbery occurred, whether the victims were held at gunpoint, and who was involved - the accomplices and defendant; and participation in an armed robbery was sufficient to make one a principal in the crime regardless of whether the participant was the person holding the weapon. *Sharkey v. State*, 265 So. 3d 151, 2019 Miss. LEXIS 86 (Miss. 2019).

Defendant's conviction for capital murder with the underlying felony of robbery was reversed because the trial court erred in denying defendant's proffered circumstantial-evidence instruction as he did not

confess or admit to any significant element of the crime; and the State did not present direct evidence that defendant was a willing participant in the murder or that he took the victim's personal property from him by violence or by putting him in fear of immediate injury. *Burleson v. State*, 166 So. 3d 499, 2015 Miss. LEXIS 243 (Miss. 2015).

Trial court's failure to instruct the jury as to the elements of the underlying felony of burglary during defendant's trial for capital murder deprived defendant of due process in the form of his right to a jury trial because the failure of a jury to find a criminal defendant guilty on each element of the charged crime led to mandatory reversal; the Constitution gives the courts no discretion, and in Mississippi, the right to a jury trial must remain inviolate. *Harrell v. State*, 134 So. 3d 266, 2014 Miss. LEXIS 52 (Miss. 2014).

Conviction for capital murder with the underlying felony of robbery was appropriate because the jury received proper instruction on the elements of capital murder and on the one-continuous-transaction rule. *Batiste v. State*, 121 So. 3d 808, 2013 Miss. LEXIS 295 (Miss. 2013), cert. denied, 572 U.S. 1117, 134 S. Ct. 2287, 189 L. Ed. 2d 178, 2014 U.S. LEXIS 3424 (U.S. 2014).

Three defendants' capital-murder convictions were appropriate because, although a limiting instruction given to the jury regarding confessions by defendants was not sufficient, no prejudice or manifest injustice resulted as to any defendant; each of the defendants gave sufficient evidence of his individual participation in the robbery of a gun store in his separate statements to support a capital-murder charge. *Anderson v. State*, 5 So. 3d 1088, 2007 Miss. App. LEXIS 677 (Miss. Ct. App. 2007), cert. denied, 11 So. 3d 1250, 2009 Miss. LEXIS 171 (Miss. 2009), cert. denied, 11 So. 3d 1250, 2009 Miss. LEXIS 184 (Miss. 2009), cert. denied, 11 So. 3d 1250, 2009 Miss. LEXIS 177 (Miss. 2009).

In defendant's capital murder case, court did not err in failing to instruct on lesser included offenses where the evidence presented did not support a reasonable jury finding defendant guilty of murder rather than capital murder. The

evidence presented at trial, including defendant's own testimony, established that he took the victim's automobile, and the evidence also established that the victim was murdered. *Scott v. State*, 878 So. 2d 933, 2004 Miss. LEXIS 650 (Miss. 2004).

There was no factual basis to support an instruction that a robbery without a deadly weapon occurred; even if defendant was not the person who actually was holding the weapon, defendant participated in the robbery, and the trial court did not err in denying an instruction for simple robbery. *Harrington v. State*, 859 So. 2d 1054, 2003 Miss. App. LEXIS 1084 (Miss. Ct. App. 2003).

Defendant's robbery conviction was proper where the jury should not have been instructed as to the lesser charge of petit larceny because there was simply no evidentiary foundation for the granting of a petit larceny instruction. *Silas v. State*, 847 So. 2d 899, 2002 Miss. App. LEXIS 874 (Miss. Ct. App. 2002).

The trial court did not err in refusing to instruct the jury with regard to petit larceny as a lesser included offense where the record contained no proof of the value of the purse stolen by the defendant or its contents. *McKee v. State*, 791 So. 2d 804, 2001 Miss. LEXIS 113 (Miss. 2001).

The jury was properly instructed regarding an intent to permanently deprive the victim of her property where the court instructed the jury that it was required to find that the defendant had feloniously taken the property of the victim. *Washington v. State*, 794 So. 2d 253, 2001 Miss. App. LEXIS 60 (Miss. Ct. App. 2001).

In prosecution for capital offense of murder during commission of robbery, jury instruction given regarding sequence of the robbery and murder did not sufficiently instruct jury on elements of underlying crime of robbery, for purposes of determining whether failure to specifically instruct jury on elements of robbery constituted reversible error. *Hunter v. State*, 684 So. 2d 625, 1996 Miss. LEXIS 288 (Miss. 1996).

State had duty, in prosecution for capital offense of murder during commission of robbery, to ensure that jury was properly instructed on elements of underlying crime of robbery, and therefore failure to

give such instruction constituted reversible error, even though defendant did not present acceptable robbery instruction. *Hunter v. State*, 684 So. 2d 625, 1996 Miss. LEXIS 288 (Miss. 1996).

In the sentencing phase of a capital murder prosecution, the trial court did not err in stating that "robbery is a crime of violence" when instructing the jury regarding the aggravating circumstance of a previous conviction for an offense involving the use or threat of violence, even though the robbery previously committed by the defendant involved an attempt to snatch cash from a cash register in a store and the record did not indicate that the defendant had a weapon on that occasion, since the very act of reaching across a store counter in the presence of a clerk and seizing money from a cash register intimates a willingness to resort to violence, and this section-the statute under which the defendant pled guilty-defines the crime of robbery as the act of taking another's personal property "by violence to his person or by putting such person in fear of some immediate injury to his person." *Conner v. State*, 632 So. 2d 1239, 1993 Miss. LEXIS 541 (Miss. 1993), cert. denied, 513 U.S. 927, 115 S. Ct. 314, 130 L. Ed. 2d 276, 1994 U.S. LEXIS 7088 (U.S. 1994), overruled, *Weatherspoon v. State*, 732 So. 2d 158, 1999 Miss. LEXIS 4 (Miss. 1999).

In a capital murder prosecution arising from the defendant's alleged killing of the victim while engaged in the commission of a robbery, the jury instructions defining the crimes of robbery and capital murder were adequate, even though neither instruction specifically mentioned the element of robbery known as "felonious intent," where the language "without authority of the law" was used in the instruction defining capital murder, so that robbery was defined correctly tracking the language of the statute when the 2 instructions were read together. *Mackbee v. State*, 575 So. 2d 16, 1990 Miss. LEXIS 831 (Miss. 1990).

An instruction in a robbery prosecution was defective because it did not specifically set out the cause and effect relationship between the taking of personal property and the putting in fear. *Jones v. State*,

567 So. 2d 1189, 1990 Miss. LEXIS 559 (Miss. 1990).

Trial court did not err in denying request for lesser included offense instructions on simple and aggravated assault where defendant was indicated for armed robbery, jury was instructed concerning lesser-included offenses of robbery and petite larceny, and no rational or reasonable juror could have convicted defendant of merely simple or aggravated assault. *Monroe v. State*, 515 So. 2d 860, 1987 Miss. LEXIS 2764 (Miss. 1987).

In a prosecution for armed robbery pursuant to § 97-3-79, the trial court did not err in charging the jury that it could find defendant guilty if it concluded that he had “attempted” to take property from the victim where the statute also prohibited an attempt to commit the crime of robbery, unlike this section, relied upon by defendant, which does not include an attempt in the definition of robbery and was not the statute under which defendant was charged. *Cooper v. State*, 386 So. 2d 1115, 1980 Miss. LEXIS 2057 (Miss. 1980).

In a prosecution for robbery, it was not error for the trial court to refuse the defendant’s requested instruction on the lesser included offense of assault and battery where the requested instruction ignored the charge of robbery and the evidence supporting that charge, and the evidence in the case was such that no fair-minded jury could have reached any other conclusion than that the defendant was guilty of robbery beyond a reasonable doubt. *Presley v. State*, 321 So. 2d 309, 1975 Miss. LEXIS 1530 (Miss. 1975).

Evidence in detail as to defendant’s attempt to escape from arresting officers after he was returned to scene of robbery, was proper, not to show that defendant was guilty of another offense, but as throwing light on question of his guilt of crime of robbery for which he was arrested, and where defendant requests it, court should instruct jury as to purpose for which such testimony is admitted. *McPherson v. State*, 208 Miss. 784, 45 So. 2d 589, 1950 Miss. LEXIS 298 (Miss. 1950).

Failure of court to grant instruction directing jury to find defendant not guilty in robbery prosecution charging him with

taking a pistol from victim by the exhibition of a deadly weapon, where evidence showed that he took pistol by physical force, did not constitute error where the evidence would justify defendant’s conviction under this section [Code 1942, § 2362]. *Newsome v. State*, 203 Miss. 449, 35 So. 2d 441, 1948 Miss. LEXIS 292 (Miss. 1948).

5. Miscellaneous.

Defendant’s guilty plea to manslaughter and robbery was voluntary because he was informed of the elements of both offenses, the trial court assured itself that the elements had been explained prior to accepting defendant’s guilty plea, and the specific elements appeared on several documents that defendant signed. *Neal v. State*, 936 So. 2d 463, 2006 Miss. App. LEXIS 589 (Miss. Ct. App. 2006).

Defendant’s postconviction motion was properly denied as his plea to armed robbery was knowing and voluntary even though he did not initially admit that he had been armed; defendant was given a thorough explanation of the elements and State’s recitation of proof, after which he entered his plea. *Hamlin v. State*, 853 So. 2d 841, 2003 Miss. App. LEXIS 728 (Miss. Ct. App. 2003).

There was nothing in the statute that suggested that the victim had to be aware that his or her personal property was being taken, and certainly a victim’s lack of awareness due to the perpetrator’s actions, such as defendant admittedly hitting the victim, did not take the victim’s actions outside of the robbery statute; rendering a person unconscious and then robbing him was also robbery within the statute. *Wheeler v. State*, 826 So. 2d 731, 2002 Miss. LEXIS 290 (Miss. 2002).

Robbery is not a component of murder and is, therefore, not a lesser included offense of murder. *Ballenger v. State*, 667 So. 2d 1242, 1995 Miss. LEXIS 451 (Miss. 1995), cert. denied, 518 U.S. 1025, 116 S. Ct. 2565, 135 L. Ed. 2d 1082, 1996 U.S. LEXIS 4177 (U.S. 1996).

Robbery is per se crime of violence, for purposes of aggravating circumstances set forth under capital sentencing statute. *Cole v. State*, 666 So. 2d 767, 1995 Miss. LEXIS 595 (Miss. 1995).

Robbery is a crime of violence within the meaning of the habitual offender statute. *Magee v. State*, 542 So. 2d 228, 1989 Miss. LEXIS 179 (Miss. 1989).

Sequestration of the jury was not mandatory in a case where the defendant was indicted for armed robbery, was found guilty by the jury of robbery, as opposed to armed robbery, and was sentenced to 15 years in prison. *Griffin v. State*, 492 So. 2d 587, 1986 Miss. LEXIS 2551 (Miss. 1986).

A sentence of seven years in a state penitentiary imposed on one convicted of robbery was not excessive. *Jones v. State*, 216 Miss. 186, 62 So. 2d 217, 1953 Miss. LEXIS 622 (Miss. 1953).

In robbery prosecution under indictment charging accused as principal, accused may be convicted as accessory before fact under Code 1942, § 1995, providing that every person who shall be accessory to any felony, before fact, shall be deemed a principal and indicted and punished as such. *Goss v. State*, 205 Miss. 177, 38 So. 2d 700, 1949 Miss. LEXIS 424 (Miss. 1949).

Statute dealing with robbery from person by deadly weapon and providing for possible death penalty did not repeal former statutes not mentioning deadly weapon and providing for imprisonment for term not over fifteen years, since later statute simply provided for greater punishment for commission of crime by use of deadly weapon. *Bogan v. State*, 176 Miss. 655, 170 So. 282, 1936 Miss. LEXIS 166 (Miss. 1936).

In robbery prosecution under indictment charging robbery with deadly weapon, accused could be found guilty of robbery without firearms under statute. *Bogan v. State*, 176 Miss. 655, 170 So. 282, 1936 Miss. LEXIS 166 (Miss. 1936).

Where proof was sufficient to support conviction for robbery, conviction for grand larceny which is necessary element of crime of robbery would bar future prosecution for robbery based on same facts. *Dixon v. State*, 169 Miss. 876, 154 So. 290, 1934 Miss. LEXIS 85 (Miss. 1934).

Where two or more persons robbed at the same time, separate offenses, and acquittal in one case is not bar to a prosecution in another. *Johns v. State*, 130 Miss. 803, 95 So. 84, 1922 Miss. LEXIS 256 (Miss. 1922).

6. Sentence.

In an appeal from a circuit court's summary dismissal of his motion for post-conviction relief pursuant to Miss. Code Ann. § 99-39-11(2), a pro se inmate argued unsuccessfully that his sentence illegally exceeded the statutory maximum under Miss. Code Ann. § 97-3-73, and therefore, it was illegal for the circuit court to institute and then revoke his post-release supervision. Since the inmate's sentence did not exceed the maximum allowable sentence as provided for in Miss. Code Ann. § 97-3-75, there was no merit to his argument that because his sentence exceeded the time allowed by the statute, his post-release supervision was not illegally instituted and revoked, there was no merit to his argument that he should have received credit for the time he spent on post-release supervision, and, under Miss. Code Ann. § 47-7-37, the circuit court had the right to reimpose the previously suspended 12-year sentence. *Fluker v. State*, 2 So. 3d 717, 2008 Miss. App. LEXIS 675 (Miss. Ct. App. 2008).

Maximum penalty for the crime of robbery was fifteen years; therefore, since the trial court sentenced defendant to ten years, with five years suspended, the sentence imposed fell clearly within the statutory range. *Cameron v. State*, 919 So. 2d 1042, 2005 Miss. App. LEXIS 465 (Miss. Ct. App. 2005).

Trial court did not err in refusing to allow defendant twelve peremptory challenges because robbery was a noncapital offense as provided in Miss. Code Ann. § 1-3-4 and Miss. Code Ann. § 97-3-73, therefore, Miss. Code Ann. § 99-17-3 and Miss. Unif. Cir. & County Ct. Prac. R. 10.01, the statutory and rules provisions which provide extra peremptory challenges to the venire in capital cases, were inapplicable. The jury was required to determine defendant's guilt on the principal offense and not to consider the prior convictions which brought into consideration his life sentence under the habitual offender statute, Miss. Code Ann. § 99-19-83(3). *Jones v. State*, 902 So. 2d 593, 2004 Miss. App. LEXIS 1011 (Miss. Ct. App. 2004), cert. denied, 901 So. 2d 1273, 2005 Miss. LEXIS 336 (Miss. 2005).

There was no indication in the record that the trial judge enhanced the sentence

of one defendant over the other, and the sentences were all well within the statutory limits for armed robbery, aggravated

assault and accessory after the fact. *Birkley v. State*, 750 So. 2d 1245, 1999 Miss. LEXIS 370 (Miss. 1999).

RESEARCH REFERENCES

ALR.

Robbery or assault to commit robbery as affected by intent to collect or secure debt or claim. 46 A.L.R.2d 1227.

Effect of failure or refusal of court, in robbery prosecution, to instruct on assault and battery. 58 A.L.R.2d 808.

Robbery by means of toy or simulated gun or pistol. 61 A.L.R.2d 996.

Stolen money or property as subject of larceny or robbery. 89 A.L.R.2d 1435.

Larceny: entrapment or consent. 10 A.L.R.3d 1121.

Purse snatching as robbery or theft. 42 A.L.R.3d 1381.

Prosecution for robbery of one person as bar to subsequent prosecution for robbery of another person committed at the same time. 51 A.L.R.3d 693.

Retaking of money lost at gambling as robbery or larceny. 77 A.L.R.3d 1363.

Robbery by means of toy or simulated gun or pistol. 81 A.L.R.3d 1006.

Robbery, attempted robbery, or assault to commit robbery, as affected by intent to collect or secure debt or claim. 88 A.L.R.3d 1309.

Use of force or intimidation in retaining property or in attempting to escape, rather than in taking property, as element of robbery. 93 A.L.R.3d 643.

Coercion, compulsion, or duress as defense to charge of robbery, larceny, or related crime. 1 A.L.R.4th 481.

"Intimidation" as element of bank robbery under 18 USCS § 2113(a). 63 A.L.R. Fed. 430; 163 A.L.R. Fed. 225.

Am. Jur.

4 Am. Jur. Proof of Facts 2d, Criminal Acts Committed under Duress, §§ 6 et seq. (proof of duress excusing commission of robbery and kidnapping).

5 Am. Jur. Proof of Facts 2d, Lack of Capacity to Form Specific Intent-Voluntary Intoxication, §§ 8 et seq. (proof of defendant's lack of capacity, due to intoxication, to form specific intent to commit robbery).

2 Am. Jur. Trials, Investigating Particular Crimes §§ 32-36 (robbery).

3 Am. Jur. Trials, Preparing and Using Photographs in Criminal Cases § 11 (robbery scene).

CJS.

77 C.J.S., Robbery §§ 1 et seq.

Practice References.

Ronald L. Schoenberg, *Criminal Law Deskbook* (Matthew Bender).

§ 97-3-75. Robbery; penalty.

Every person convicted of robbery shall be punished by imprisonment in the penitentiary for a term not more than fifteen years.

HISTORY: Codes, *Hutchinson's* 1848, ch. 64, art. 12, Title 4 (57); 1857, ch. 64, art. 222; 1871, § 2676; 1880, § 2946; 1892, § 1286; 1906, § 1363; *Hemingway's* 1917, § 1099; 1930, § 1128; 1942, § 2364.

Cross References — Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see § 97-43-1 et seq.

Limitations of prosecutions generally, see §§ 99-1-5.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Maximum sentence.

1. In general.

Defendant's 15-year prison sentence for strong arm robbery was not disproportionate to the crime because the sentence was consistent with the State's recommendation, which defendant acknowledged prior to entering a guilty plea; the sentence was also within the statutory limits. *Beamon v. State*, 9 So. 3d 376, 2009 Miss. LEXIS 141 (Miss. 2009).

Explanations given to defendant about the nature of the charge, the possible sentences and other consequences of the plea, and the plea bargaining process all pertained to armed robbery, not to simple robbery, and for this reason, defendant's guilty plea was not voluntary in a constitutional sense; nor was defendant accurately informed of the consequences of a guilty plea to robbery where the maximum sentence for armed robbery was life if fixed by the jury, Miss. Code Ann. § 97-3-79, and the maximum sentence for simple robbery was 15 years, Miss. Code Ann. § 97-3-75; when defendant evaluated the state's plea recommendation and made his decision to plead guilty, he was under the erroneous belief that he could be sentenced to life imprisonment were he to proceed to trial and be found guilty, when in fact he could have received only 15 years. *Garner v. State*, 944 So. 2d 934, 2006 Miss. App. LEXIS 921 (Miss. Ct. App. 2006), cert. dismissed, 951 So. 2d 563, 2007 Miss. LEXIS 534 (Miss. 2007).

Denial of the inmate's petition for post-conviction relief without a hearing was proper where, although the trial judge did not inform the inmate of the minimum sentence for robbery, the petition to enter a guilty plea that he signed clearly stated that the minimum sentence for robbery was zero years and the maximum sentence was 15 years. Thus, his argument that the trial judge failed to inform him of the minimum sentence was without merit. *Sanders v. State*, 900 So. 2d 1213, 2005 Miss. App. LEXIS 256 (Miss. Ct. App. 2005).

Where appellant's sentences for several counts of armed robbery did not exceed the sentence set forth in Miss. Code Ann. § 97-3-75, it was not disproportionate; moreover, appellant was not entitled to receive a sentence proportionate to that imposed upon an accomplice. *Booker v. State*, 840 So. 2d 801, 2003 Miss. App. LEXIS 205 (Miss. Ct. App. 2003).

Although defendant received the maximum sentence on both counts of attempted robbery, there was no evidence that improper consideration infected the court's decision, or that the maximum sentences were given in retribution for defendant's physical outbursts at sentencing. *Bolton v. State*, 752 So. 2d 480, 1999 Miss. App. LEXIS 701 (Miss. Ct. App. 1999).

Sequestration of the jury was not mandatory in a case where the defendant was indicted for armed robbery, was found guilty by the jury of robbery, as opposed to armed robbery, and was sentenced to 15 years in prison. *Griffin v. State*, 492 So. 2d 587, 1986 Miss. LEXIS 2551 (Miss. 1986).

2. Maximum sentence.

Although petitioner alleged that she and a codefendant committed the same crime and pleaded guilty to the same crime, but that the codefendant was sentenced to probation while defendant received a 15-year sentence, defendant offered no proof to support these allegations. Regardless, the trial court acted within its discretion when imposing a sentence on petitioner for robbery that was within the statutory limits. *Carson v. State*, 161 So. 3d 153, 2014 Miss. App. LEXIS 655 (Miss. Ct. App. 2014).

Defendant's robbery conviction was affirmed because (1) counsel, upon finding no arguable appellate issues, complied with Lindsey and Miss. R. App. P. 28, (2) defendant filed no pro se brief, and (3) an independent review of the record showed no arguable appellate issues, as defendant had proper notice of the charge, defendant's alibi witness testified over the State's objection, the jury was instructed on the elements of robbery and the State's burden, the evidence was sufficient, and

defendant's sentence was within the statutory maximum in Miss. Code Ann. § 97-3-75. *Federick v. State*, 109 So. 3d 121, 2012 Miss. App. LEXIS 503 (Miss. Ct. App. 2012), cert. denied, 109 So. 3d 567, 2013 Miss. LEXIS 97 (Miss. 2013).

In an appeal from a circuit court's summary dismissal of his motion for post-conviction relief pursuant to Miss. Code Ann. § 99-39-11(2), a pro se inmate argued unsuccessfully that his sentence illegally exceeded the statutory maximum under Miss. Code Ann. § 97-3-73, and therefore, it was illegal for the circuit court to institute and then revoke his post-release supervision. Since the in-

mate's sentence did not exceed the maximum allowable sentence as provided for in Miss. Code Ann. § 97-3-75, there was no merit to his argument that because his sentence exceeded the time allowed by the statute, his post-release supervision was not illegally instituted and revoked, there was no merit to his argument that he should have received credit for the time he spent on post-release supervision, and, under Miss. Code Ann. § 47-7-37, the circuit court had the right to reimpose the previously suspended 12-year sentence. *Fluker v. State*, 2 So. 3d 717, 2008 Miss. App. LEXIS 675 (Miss. Ct. App. 2008).

RESEARCH REFERENCES

Am. Jur.

67 Am. Jur. 2d, Robbery § 76.

4 Am. Jur. Proof of Facts 2d, Criminal Acts Committed under Duress, §§ 6 et seq. (proof of duress excusing commission of robbery and kidnapping).

CJS.

77 C.J.S., Robbery, §§ 101 et seq.

Practice References.

Ronald L. Schoenberg, *Criminal Law Deskbook* (Matthew Bender).

§ 97-3-77. Robbery; threat to injure person or relative at another time.

Every person who shall feloniously take the personal property of another, in his presence or from his person, which shall have been delivered or suffered to be taken through fear of some injury threatened to be inflicted at some different time to his person or property, or to the person of any member of his family or relative, which fear shall have been produced by the threats of the person so receiving or taking such property, shall be guilty of robbery.

HISTORY: Codes, *Hutchinson's* 1848, ch. 64, art. 12, Title 4 (56); 1857, ch. 64, art. 221; 1871, § 2675; 1880, § 2945; 1892, § 1285; 1906, § 1362; *Hemingway's* 1917, § 1098; 1930, § 1127; 1942, § 2363.

Cross References — Penalty for robbery, see § 97-3-75.

Robbery by threats demanding money or property, see § 97-3-81.

Threats, generally, see §§ 97-3-85, 97-3-87.

Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see § 97-43-1 et seq.

Enhancement of offenses listed in 99-19-401(2) if the instrumentality used in the commission of the 99-19-401(2) offense was initially obtained in the course of the commission of the crime(s) provided for in this section, see § 99-19-401.

JUDICIAL DECISIONS

ANALYSIS

1. Time to suspend or to amend sentence.
2. Sufficiency of evidence.

1. Time to suspend or to amend sentence.

Defendant did not receive an illegal sentence where defendant failed to report and when defendant then appeared before the court the court imposed a sentence of 20 years for robbery; the 20-year sentence was one that could have been imposed at the time defendant pled guilty. *Adams v. State*, 954 So. 2d 1051, 2007 Miss. App. LEXIS 244 (Miss. Ct. App. 2007).

2. Sufficiency of evidence.

When the victim went to the post office

at night to check her mail, a man placed a gun to her back, told her he needed money, drove to an ATM, withdrew money from her account, and then raped her; the victim identified defendant's voice as belonging to her assailant and she was absolutely certain that he was the man who attacked her. Defendant's fingerprints were found at the crime scene, he did not testify at trial, and the only defense witness did not provide a conclusive alibi; the evidence was sufficient to sustain defendant's conviction for kidnapping, rape, and armed robbery. *Burton v. State*, 970 So. 2d 229, 2007 Miss. App. LEXIS 807 (Miss. Ct. App. 2007).

RESEARCH REFERENCES

Am. Jur.

67 Am. Jur. 2d, Robbery §§ 21, 23.

2 Am. Jur. Trials, Investigating Particular Crimes §§ 32-36 (robbery).

Practice References.

Ronald L. Schoenberg, *Criminal Law Deskbook* (Matthew Bender).

CJS.

77 C.J.S., Robbery §§ 23 et seq.

§ 97-3-79. Robbery; use of deadly weapon.

Every person who shall feloniously take or attempt to take from the person or from the presence the personal property of another and against his will by violence to his person or by putting such person in fear of immediate injury to his person by the exhibition of a deadly weapon shall be guilty of robbery and, upon conviction, shall be imprisoned for life in the state penitentiary if the penalty is so fixed by the jury; and in cases where the jury fails to fix the penalty at imprisonment for life in the state penitentiary the court shall fix the penalty at imprisonment in the state penitentiary for any term not less than three (3) years.

HISTORY: Codes, 1942, § 2367; Laws, 1932, ch. 328; Laws, 1974, ch. 576, § 4, eff from and after passage (approved April 23, 1974).

Cross References — Ineligibility for parole of persons convicted of robbery or attempted robbery through display of a firearm, see § 47-7-3.

Robbery, as provided in this section, defined as crime of violence, see § 97-3-2.

Murder committed in the course of robbery as constituting capital murder, see § 97-3-19.

Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see § 97-43-1 et seq.

Enhancement of offenses listed in 99-19-401(2) if the instrumentality used in the commission of the 99-19-401(2) offense was initially obtained in the course of the commission of the crime(s) provided for in this section, see § 99-19-401.

JUDICIAL DECISIONS

ANALYSIS

1. Validity.
2. Construction and application; generally.
3. —Elements of robbery.
4. —What constitutes robbery.
5. —What constitutes deadly weapon.
6. —Property subject to robbery.
7. Indictment.
8. Evidence; generally.
9. —Identification.
10. —Prior to other offenses.
11. —Confession of accused.
12. Sufficiency of evidence; generally.
13. —Exhibition or use of weapon.
14. Instructions; generally.
15. —Intent.
16. —Lesser offenses.
17. —Alibi defense.
18. Conviction of lesser offense.
19. Bail.
20. Sentence.
21. Miscellaneous.
22. Double jeopardy.
23. Verdict.
24. Jury.

1. Validity.

The circuit court had concurrent jurisdiction with the appellate court, for purposes of setting an appearance bond under Code § 99-35-115, over a defendant convicted of attempted armed robbery, even though defendant's appeal had already been perfected. *State v. Maples*, 445 So. 2d 540, 1984 Miss. LEXIS 1617 (Miss. 1984).

The armed robbery statute is valid. *Scott v. State*, 218 Miss. 892, 56 So. 2d 839, 1952 Miss. LEXIS 604 (Miss.), cert. denied, 344 U.S. 805, 73 S. Ct. 38, 97 L. Ed. 627, 1952 U.S. LEXIS 1731 (U.S. 1952).

Statute making robbery or attempt at robbery with deadly weapon a capital offense under certain conditions held not invalid under constitution providing no law shall be revived or amended by reference to title only. *Hall v. State*, 166 Miss.

331, 148 So. 793, 1933 Miss. LEXIS 399 (Miss. 1933).

2. Construction and application; generally.

There is no requirement that a victim actually see a deadly weapon in order to convict for attempted armed robbery under Miss. Code Ann. § 97-3-79; a victim is not required to have "definite knowledge" of a deadly weapon in the sense that the weapon must be seen through the victim's own eyes. *Dambrell v. State*, 903 So. 2d 681, 2005 Miss. LEXIS 144 (Miss. 2005).

Court of appeals erred in reversing defendant's conviction for armed robbery where although the cashier did not actually see the butcher knife before defendant fled, clearly, defendant intended to rob the store, had a deadly weapon, threw down the towel and knife that was in his possession and was only thwarted in his attempt to rob the store. The cashier gained possession of the knife once defendant discarded it and thus, it was clear that defendant had a weapon on entering the store. *Dambrell v. State*, 903 So. 2d 681, 2005 Miss. LEXIS 144 (Miss. 2005).

Armed robbery endangers life, limb, and property as much as any non-capital offense, and carries one of most severe sentences applicable under criminal statutes, thus lends support to sentencing of convicted person to life without parole, under habitual offender statute, even where final conviction precipitating such sentence is for concededly lesser offense. *McGruder v. Puckett*, 954 F.2d 313, 1992 U.S. App. LEXIS 2655 (5th Cir. Miss.), cert. denied, 506 U.S. 849, 113 S. Ct. 146, 121 L. Ed. 2d 98, 1992 U.S. LEXIS 5084 (U.S. 1992).

A 7-year sentence for armed robbery committed with a knife in 1980 in violation of this section was not an unconstitutional application of an ex post facto law, even though § 47-7-3 denied eligibility for parole prior to 1982 only when a robbery was committed with the display of a fire-

arm, where the sentencing order merely established that the defendant serve 7 years and made no mention of "mandatory" or "without parole." Additionally, the sentencing chapter and the parole chapter are separate and distinct; the granting of parole or denial of parole under § 47-7-3 is the exclusive responsibility of the state parole board, which is independent of the circuit court's sentencing authority. Thus, sentencing authority was provided for under this section, rather than § 47-7-3, and the defendant was not "sentenced" under the parole statute, which was later amended. *Mitchell v. State*, 561 So. 2d 1037, 1990 Miss. LEXIS 258 (Miss. 1990).

Armed robbery is a crime of violence, per se, for purposes of sentencing as an habitual offender under § 99-19-83. *King v. State*, 527 So. 2d 641, 1988 Miss. LEXIS 240 (Miss. 1988).

Jury's verdict finding defendant guilty of armed robbery when it had been instructed to find him guilty or not guilty of attempted armed robbery did not require a new trial, since the omission of the word "attempted" from the verdict was an oversight which the court could correct in order to make the verdict confront to the clear and unequivocal jury intent. *Singleton v. State*, 495 So. 2d 14, 1986 Miss. LEXIS 2672 (Miss. 1986).

Armed robbery is the felonious taking of the property of another against his or her will by violence or by putting such person in fear of immediate injury. *Malone v. State*, 486 So. 2d 360, 1986 Miss. LEXIS 2419 (Miss. 1986).

A capital case is any case where the permissible punishment prescribed by the legislature is death, even though such penalty may not be inflicted since the decision of the United States Supreme Court in *Furman v. Georgia*, 408 U.S. 238, 33 L. Ed. 2d 346, 92 S. Ct. 2726, reh den 409 U.S. 902, 34 L. Ed. 2d 163, 93 S. Ct. 89 and on remand 229 Ga 731, 194 SE2d 410. *Hudson v. McAdory*, 268 So. 2d 916, 1972 Miss. LEXIS 1216 (Miss. 1972).

Bank robbery is a crime under both laws of the United States and of the State of Mississippi, and a defendant's conviction under the laws of the United States will be no bar to his subsequent prosecution and conviction under the laws of

Mississippi for the commission of the identical act for which he had previously been convicted in the federal courts. *Bankston v. State*, 236 So. 2d 757, 1970 Miss. LEXIS 1504 (Miss. 1970).

The crime may be committed by taking money from a safe which the person robbed was compelled to open. *Passons v. State*, 239 Miss. 629, 124 So. 2d 847, 1960 Miss. LEXIS 332 (Miss. 1960).

This section [Code 1942, § 2367] is merely an extension of statute (Code 1942, § 2362), defining robbery generally, and the evil sought to be abated is the employment of such weapons as are generally considered to be deadly. *Cittadino v. State*, 199 Miss. 235, 24 So. 2d 93, 1945 Miss. LEXIS 284 (Miss. 1945).

This enactment, supplemental to the old statute on robbery which it did not repeal, was the result of, and was designed to prevent, the systematic business of robbery of banks, mercantile establishments, filling stations and the like, by persons armed with deadly weapons, making a business of banditry, who were so intently predetermined upon the accomplishment of that purpose they would kill in its execution and would also kill in making their escape. *Fortenberry v. State*, 190 Miss. 729, 1 So. 2d 585, 1941 Miss. LEXIS 92 (Miss. 1941).

This statute [Code 1942, § 2367] was not only directed to the means employed, but requires that the particular intent must be one in which lucre or substantial gain in money or property is the dominant or primary purpose, and which is not to be supplied by that which happens as a mere incident to, or as a collateral development in, some other main and primary motive, and the accused must be the aggressor both as to the means and the stated intent. *Fortenberry v. State*, 190 Miss. 729, 1 So. 2d 585, 1941 Miss. LEXIS 92 (Miss. 1941).

Statute dealing with robbery from person by deadly weapon and providing for possible death penalty did not repeal former statutes not mentioning deadly weapon and providing for imprisonment for term not over fifteen years, since later statute simply provided for greater punishment for commission of crime by use of deadly weapon. *Bogan v. State*, 176 Miss.

655, 170 So. 282, 1936 Miss. LEXIS 166 (Miss. 1936).

Laws 1932, ch. 328, was intended to and did compose a new and independent enactment, complete in itself, and required no reference or resort to any other statute to render it intelligible and to determine its meaning and the scope of its operation. *Hall v. State*, 166 Miss. 331, 148 So. 793, 1933 Miss. LEXIS 399 (Miss. 1933).

3. —Elements of robbery.

State had to prove that defendant placed the victim in fear of immediate injury to her person by the exhibition of a deadly weapon. *Lathan v. State*, 164 So. 3d 484, 2014 Miss. App. LEXIS 569 (Miss. Ct. App. 2014), cert. denied, 163 So. 3d 301, 2015 Miss. LEXIS 247 (Miss. 2015).

Although petitioner argued that the factual basis for her guilty plea did not support robbery and constituted a denial of due process, petitioner offered no evidence other than her own assertion that what she pleaded guilty to amounted to accessory after the fact. The factual basis for petitioner's plea met the elements of armed robbery. *Carson v. State*, 161 So. 3d 153, 2014 Miss. App. LEXIS 655 (Miss. Ct. App. 2014).

In a case in which defendant, who had pled guilty to armed robbery, appealed the dismissal of his motion for post-conviction relief, he argued unsuccessfully that the indictment was defective because Count IV did not describe the personal property that was allegedly taken from the victim. Miss. Code Ann. § 97-3-79 did not suggest that a description of the personal property allegedly taken was a necessary element of the crime. *Ewing v. State*, 34 So. 3d 612, 2009 Miss. App. LEXIS 661 (Miss. Ct. App. 2009), cert. denied, 34 So. 3d 1176, 2010 Miss. LEXIS 245 (Miss. 2010).

Factual basis existed for defendant's guilty pleas where the factual summary expressed by the State, and agreed to by defendant, satisfied all elements of both crimes of manslaughter, Miss. Code Ann. § 97-3-35, and armed robbery, Miss. Code Ann. § 97-3-79; it showed that defendant intended to take the victim's automobile through the exhibition of a deadly weapon and it further demonstrated that defendant did, in fact, take the victim's automo-

bile by shooting the victim and the victim died as a result of his wounds. *Keith v. State*, 999 So. 2d 383, 2008 Miss. App. LEXIS 313 (Miss. Ct. App. 2008), cert. denied, 999 So. 2d 852, 2009 Miss. LEXIS 52 (Miss. 2009).

Evidence was sufficient to convict defendant of capital murder under Miss. Code Ann. § 97-3-19 where it was shown that he had felonious intent to commit robbery under Miss. Code Ann. § 97-3-79 in that he admitted that his plan was to kill the victim and take the victim's car to Chicago to get away, and he packed his belongings and left them outside the victim's house for easy access. *Walker v. State*, 913 So. 2d 198, 2005 Miss. LEXIS 216 (Miss.), cert. denied, 546 U.S. 1038, 126 S. Ct. 743, 163 L. Ed. 2d 581, 2005 U.S. LEXIS 8688 (U.S. 2005).

In a criminal prosecution for attempted armed robbery, mere assumption that a deadly weapon exists is not enough, the victim must have definitive knowledge that the deadly weapon does in fact exist to support a conviction under a standard of reasonable doubt. *Dambrell v. State*, 905 So. 2d 655, 2004 Miss. App. LEXIS 479 (Miss. Ct. App. 2004), rev'd, 903 So. 2d 681, 2005 Miss. LEXIS 144 (Miss. 2005).

Armed robbery indictment contained the essential elements constituting the offense charged, as required under Miss. Unif. Cir. & County Ct. Prac. R. 7.06, even though the inmate never took and carried away the property of another, as required under Miss. Code Ann. § 97-3-79; the inmate could be convicted of armed robbery while attempting to complete the crime. *Putnam v. State*, 877 So. 2d 468, 2003 Miss. App. LEXIS 1205 (Miss. Ct. App. 2003), cert. denied, 878 So. 2d 67, 2004 Miss. LEXIS 861 (Miss. 2004).

Defense counsel was not ineffective under Miss. Const. art. III, § 26 where the inmate was allegedly not informed, prior to the inmate's guilty plea, that the inmate's failure to take and carry away property prevented the inmate from satisfying the elements for armed robbery under Miss. Code Ann. § 97-3-79; the inmate did not have to take and carry away the personal property of another to satisfy the elements of armed robbery. *Putnam v. State*, 877 So. 2d 468, 2003 Miss. App.

LEXIS 1205 (Miss. Ct. App. 2003), cert. denied, 878 So. 2d 67, 2004 Miss. LEXIS 861 (Miss. 2004).

The proof of the crime of armed robbery must necessarily include that the exhibition of the deadly weapon, causing violence or fear of immediate injury, was the means by which the personal property of another was taken. *Clark v. State*, 756 So. 2d 730, 1999 Miss. LEXIS 274 (Miss. 1999).

"Violence" requires some use of force, no matter how slight. *Shelton v. State*, 728 So. 2d 105, 1998 Miss. App. LEXIS 958 (Miss. Ct. App. 1998).

Wielding of "slapjack" and wrestling diamonds from victim falls within and establishes all of the elements of armed robbery. *Malone v. State*, 486 So. 2d 360, 1986 Miss. LEXIS 2419 (Miss. 1986).

All that the state is required to prove under the provisions of Code 1942, § 2367 is that the accused took or attempted to take the personal property of the victim from his presence and against his will, by violence, or by putting him in fear of immediate injury to his person by exhibiting a deadly weapon. *Gisch v. State*, 259 So. 2d 118, 1972 Miss. LEXIS 1521 (Miss. 1972).

To warrant conviction under this section [Code 1942, § 2367], it is not necessary to allege or prove that the pistol exhibited by the defendant was pointed at the victim. *Bond v. State*, 236 Miss. 538, 111 So. 2d 422, 1959 Miss. LEXIS 347 (Miss. 1959).

In order to constitute a crime of robbery under this section [Code 1942, § 2367] the personal property of another must be taken from the person or from the presence of such other person either by violence or by putting such person in fear of immediate injury to his person by exhibition of a deadly weapon, and such act must be the means by which the personal property of another shall have been taken. *Register v. State*, 232 Miss. 128, 97 So. 2d 919, 1957 Miss. LEXIS 452 (Miss. 1957).

Test of robbery under this section [Code 1942, § 2367] is whether or not any of the property named in indictment was taken by violence, force or fear. *Passons v. State*, 208 Miss. 545, 45 So. 2d 131, 1950 Miss. LEXIS 273 (Miss. 1950), overruled, *Sim-*

mons v. State, 568 So. 2d 1192, 1990 Miss. LEXIS 605 (Miss. 1990).

The means used to effect a robbery is important only to the extent that it reasonably instills a disabling apprehension of great personal injury. *Cittadino v. State*, 199 Miss. 235, 24 So. 2d 93, 1945 Miss. LEXIS 284 (Miss. 1945).

In robbery prosecution, taking of gloves from pocket of clothing worn by person robbed into possession of one of assailants held sufficient asportation. *Richardson v. State*, 168 Miss. 788, 151 So. 910, 1934 Miss. LEXIS 356 (Miss. 1934).

4. —What constitutes robbery.

Because there were two victims to defendant's robbery, double jeopardy did not attach. *Towner v. State*, 812 So. 2d 1109, 2002 Miss. App. LEXIS 30 (Miss. Ct. App. 2002).

State met its burden of proving robbery under statute by showing that defendant, prior to break in of victim's home, had asked for gun and whether victim had money in her home, had awakened another person and persuaded him to go to victim's home and break in, had used physical force and fear to acquire property of victims, and, after entering home, had found pistol and used it to effectuate crime. *Reed v. State*, 506 So. 2d 277, 1987 Miss. LEXIS 2483 (Miss. 1987).

The crime of armed robbery is committed by a motorist who, after having his fuel tank filled at a service station, got away without paying by pointing a rifle at the attendant. *Hermann v. State*, 239 Miss. 523, 123 So. 2d 846, 1960 Miss. LEXIS 318 (Miss. 1960).

Where the defendant, who was indicted under this section [Code 1942, § 2367], was shown to have left the house immediately following the violence against the prosecuting witness, and it would have been conjecture to assume that the defendant did not take the prosecuting witness's purse prior to the assault and battery upon her, defendant's conviction was reversed, since this section [Code 1942, § 2367] did not apply to the offense proved. *Register v. State*, 232 Miss. 128, 97 So. 2d 919, 1957 Miss. LEXIS 452 (Miss. 1957).

This statute [Code 1942, § 2367] was not applicable to a situation where, as the

outgrowth of the whipping of negro boy, defendants who had come to take the boy home, upon being accosted by a white man took from him a knife and struck him, and the victim later discovered that the sum of \$2 was missing from his person. *Fortenberry v. State*, 190 Miss. 729, 1 So. 2d 585, 1941 Miss. LEXIS 92 (Miss. 1941).

Persons who shot man who opened door and then entered store and shot others and then left store held not guilty of robbery. *Williamson v. State*, 167 Miss. 783, 149 So. 795, 1933 Miss. LEXIS 130 (Miss. 1933).

5. — What constitutes deadly weapon.

Because inmate was informed by the court, prior to his guilty plea, of all the elements of the crime of robbery with a deadly weapon under § 97-3-79, and that a B.B. gun constituted a “deadly weapon,” his claim on appeal that his plea was involuntary and unintelligent was without merit. *Cherry v. State*, 24 So. 3d 1048, 2010 Miss. App. LEXIS 4 (Miss. Ct. App. 2010).

Although a knife was a deadly weapon that qualified to sustain a plea for armed robbery, a judgment was remanded for a correction where it incorrectly showed that an inmate used a firearm instead. *Hinton v. State*, 947 So. 2d 979, 2006 Miss. App. LEXIS 381 (Miss. Ct. App. 2006), cert. denied, 947 So. 2d 960, 2007 Miss. LEXIS 94 (Miss. 2007).

A metal pellet gun weighing 3 or 4 pounds was a “deadly weapon” within the meaning of this section, even though there was a piece missing from the weapon rendering it inoperative and it was not loaded at the time of the robbery, since it could have been used to club the victim and thereby inflict serious bodily injury. *Saucier v. State*, 562 So. 2d 1238, 1990 Miss. LEXIS 244 (Miss. 1990), overruled in part, *White v. State*, 785 So. 2d 1059, 2001 Miss. LEXIS 44 (Miss. 2001).

Jury may find blank starter pistol used during robbery to be deadly weapon. *Duckworth v. State*, 477 So. 2d 935, 1985 Miss. LEXIS 2455 (Miss. 1985).

Assessment of the death penalty was not justified where a dirk knife rather than a pistol was used in a robbery, there

was no real likelihood of personal injury and none occurred, and the defendant participated in the robbery under the urging of an accomplice. *Augustine v. State*, 201 Miss. 277, 28 So. 2d 243, 1946 Miss. LEXIS 358 (Miss. 1946).

A pistol is a “deadly weapon” within statutes denouncing the exhibition or carrying of such weapon, even without proof that the pistol is loaded or presently capable of committing a violent injury. *Cittadino v. State*, 199 Miss. 235, 24 So. 2d 93, 1945 Miss. LEXIS 284 (Miss. 1945).

6. —Property subject to robbery.

When a person takes property in which he himself maintains title, but which is legally in the possession of the victim, by force or threat of force by exhibition of a deadly weapon, the armed-robbery statute, Miss. Code Ann. § 97-3-79, applies. *Veazy v. State*, 113 So. 3d 1226, 2013 Miss. LEXIS 72 (Miss. 2013).

Defendants were properly convicted of armed robbery for taking a car from the victim’s repair shop at gunpoint; although one defendant had legal title to the car, the victim had the right of possession of the car through his mechanic’s lien under Miss. Code Ann. § 85-7-107. *Veazy v. State*, 113 So. 3d 1226, 2013 Miss. LEXIS 72 (Miss. 2013).

Contraband liquor may be the subject of robbery. *Passons v. State*, 208 Miss. 545, 45 So. 2d 131, 1950 Miss. LEXIS 273 (Miss. 1950), overruled, *Simmons v. State*, 568 So. 2d 1192, 1990 Miss. LEXIS 605 (Miss. 1990).

In robbery prosecution, property taken need not have actual pecuniary value if it appears that it had some value to person robbed. *Richardson v. State*, 168 Miss. 788, 151 So. 910, 1934 Miss. LEXIS 356 (Miss. 1934).

That gloves taken were preserved and carried in pocket of owner held sufficient, in robbery prosecution, to show that owner considered them of some value to himself. *Richardson v. State*, 168 Miss. 788, 151 So. 910, 1934 Miss. LEXIS 356 (Miss. 1934).

7. Indictment.

Variance between the indictment and a jury instruction did not relieve the State

of its burden to prove the essential elements of armed robbery because the indictment fully informed defendant of the statute under which he was charged; the instruction tracked the language of the robbery using a deadly weapon statute, and adding the statutory language did not lessen the State's burden or broaden the grounds on which defendant could be convicted. *Jenkins v. State*, 232 So. 3d 167, 2017 Miss. App. LEXIS 239 (Miss. Ct. App.), cert. denied, 229 So. 3d 121, 2017 Miss. LEXIS 500 (Miss. 2017), cert. denied, — U.S. —, 138 S. Ct. 1311, 200 L. Ed. 2d 492, 2018 U.S. LEXIS 1671 (U.S. 2018).

Defendant was adequately put on notice that the State would attempt to prove that he committed armed robbery, as his indictment referenced the statute, the title of the indictment stated armed robbery, and the indictment provided a clear explanation of the charges from which defendant could prepare his defense; the indictment was not fatally defective because it did not include the phrase "exhibition of a deadly weapon." *Chilton v. State*, 245 So. 3d 525, 2017 Miss. App. LEXIS 622 (Miss. Ct. App. 2017), cert. denied, 246 So. 3d 883, 2018 Miss. LEXIS 288 (Miss. 2018).

Indictment on armed robbery stated that defendant did willfully, unlawfully, and feloniously take certain property from the victim, while the jury instructions charged an attempt to take; according to the armed-robbery statute, a person could be convicted of armed robbery while attempting to complete the crime, and as such, the variance between the indictment and the jury instructions did not substantially alter the elements of proof necessary and defendant was not prejudiced in his defense. *Morton v. State*, 246 So. 3d 895, 2017 Miss. App. LEXIS 649 (Miss. Ct. App. 2017), cert. denied, 246 So. 3d 886, 2018 Miss. LEXIS 295 (Miss. 2018).

Indictment charging defendant juvenile with capital murder was not defective, even though it referenced this section and did not provide the essential elements of the underlying crime of robbery, since it put defendant on notice that he was being charged with capital murder based on a robbery and defendant was aware that the charged underlying felony was robbery

and not armed robbery. *Hye v. State*, 162 So. 3d 818, 2013 Miss. App. LEXIS 292 (Miss. Ct. App. 2013), *aff'd in part, vacated in part*, 162 So. 3d 750, 2015 Miss. LEXIS 69 (Miss. 2015).

In a case in which defendant, who pled guilty to armed robbery, appealed the dismissal of his motion for post-conviction relief, he argued unsuccessfully that the indictment was defective because Count IV charged him with attempted armed robbery, not armed robbery. Count IV basically tracked the language of Miss. Code Ann. § 97-3-79, but it included the phrase "attempt to take" instead of using the entire phrase of "take or attempt to take; however, because the act of armed robbery was complete upon the attempt, it was immaterial that the indictment only charged that defendant attempted to take the personal property of the victim. *Ewing v. State*, 34 So. 3d 612, 2009 Miss. App. LEXIS 661 (Miss. Ct. App. 2009), cert. denied, 34 So. 3d 1176, 2010 Miss. LEXIS 245 (Miss. 2010).

Defendant's indictment included the relevant language from Miss. Code Ann. § 97-3-79 and the evidence clearly showed that the armed robbery crimes were based on the same act or transaction. Thus, there was no defect in the indictment under Miss. Code Ann. § 99-7-2(1). *Thomas v. State*, 14 So. 3d 812, 2009 Miss. App. LEXIS 520 (Miss. Ct. App. 2009).

Indictment sufficiently charged the offense because it charged that defendant and her co-defendants acted with the intent to steal the property of the bank. The indictment also charged that they did so by exhibiting and firing a pistol – acts which put the employees of the bank in fear of immediate injury to their persons. *Glenn v. State*, 996 So. 2d 148, 2008 Miss. App. LEXIS 584 (Miss. Ct. App. 2008).

In an armed robbery case, there was a sufficient factual basis for the plea under Miss. Unif. Cir. & Cty. R. 8.04 based on a specific indictment that alleged that defendant and his associate took property from persons at a bank, and they were in fear of immediate injury due to the exhibition of deadly weapons; after a reading of the indictment during the plea hearing, defendant stated that he committed the crime. *Robinson v. State*, 964 So. 2d 609,

2007 Miss. App. LEXIS 607 (Miss. Ct. App. 2007).

Because defendant's indictment failed to charge the essential elements of armed robbery, the circuit court lacked subject matter jurisdiction over the offense of armed robbery, but the indictment properly charged defendant with the crime of simple robbery; however, defendant's guilty plea was involuntary because he was not informed of the true nature and consequences of the charge. *Garner v. State*, 944 So. 2d 934, 2006 Miss. App. LEXIS 921 (Miss. Ct. App. 2006), cert. dismissed, 951 So. 2d 563, 2007 Miss. LEXIS 534 (Miss. 2007).

Burglary conviction under Miss. Code Ann. § 97-17-23 was upheld where acquittal on armed robbery charges, brought under Miss. Code Ann. § 97-3-79, did not invoke the doctrine of merger because it was not, as alleged, impossible for defendant to have committed the armed robbery without first committing the burglary. *Smallwood v. State*, 930 So. 2d 448, 2006 Miss. App. LEXIS 399 (Miss. Ct. App. 2006).

Because the information did not sufficiently charge defendant with armed robbery, as it did not charge the overt act as the display of a weapon by another perpetrator and then the shooting of the victim, defendant's armed robbery conviction, the result of a guilty plea, was reversed; however, because there was a sufficient charge of simple robbery, if not for the word "attempt," the court affirmed a conviction of robbery, and remanded for sentencing on that count. *Neal v. State*, 936 So. 2d 463, 2006 Miss. App. LEXIS 589 (Miss. Ct. App. 2006).

Miss. Code Ann. § 97-3-79 punishes attempted armed robbery in the same way as armed robbery. Thus, it is irrelevant that an indictment only states that a defendant "attempts to take" because according to the statute, a person can be convicted of armed robbery while attempting to complete the act; the act of robbery is complete upon the attempt. *Calhoun v. State*, 881 So. 2d 308, 2004 Miss. App. LEXIS 708 (Miss. Ct. App. 2004).

Statement that defendant had used a handgun was an adequate substitute for the phrase "deadly weapon" in the indict-

ment. *Parisie v. State*, 848 So. 2d 880, 2002 Miss. App. LEXIS 873 (Miss. Ct. App. 2002).

Indictment against defendant as drawn did not fail to charge offense against State of Mississippi where: (1) indictment for attempted armed robbery was not vague, because it practically mimicked statute in setting out offense; (2) issue of intent was question for jury, and state had not failed to prove overt act to support attempted armed robbery charge by failing to prove intent to steal, where issue of intent was matter of which witness jury believed; (3) issue of whether attempt to steal was aborted by extraneous intervention or by defendant was question of which witness jury believed, where there was dispute as to whether or not police intervention frustrated attempt; and, (4) guilty verdict was not against overwhelming sufficiency and weight of evidence, because issues came down to which witness jury believed. *Burney v. State*, 515 So. 2d 1154, 1987 Miss. LEXIS 2905 (Miss. 1987), but see *McCarty v. State*, 554 So. 2d 909, 1989 Miss. LEXIS 499 (Miss. 1989).

Under former provisions, when defendant was tried and convicted of rape, robbery, and kidnapping under improper multicount indictment charging separate offenses, conviction and sentence under kidnapping offense would be affirmed and remaining charges reversed where entire proof in record was relevant to and admissible under kidnapping charge. *Brock v. State*, 483 So. 2d 358, 1986 Miss. LEXIS 2402 (Miss. 1986), but see *McCarty v. State*, 554 So. 2d 909, 1989 Miss. LEXIS 499 (Miss. 1989).

There is no legal impediment to the State's mounting of three separate prosecutions for armed robbery under this section, kidnapping, and forcible rape, even though the three offenses arise of a common nucleus of operative fact; accordingly, where the defendant affirmatively requested that the proceeding against him on all three charges be consolidated for pre-trial and trial purposes, the trial court properly held that the defendant had consciously waived any objections he may have had to the multi-count indictment. *Ward v. State*, 461 So. 2d 724, 1984 Miss. LEXIS 2052 (Miss. 1984).

An indictment that charged both attempted robbery and the completion of the offense was not fatally defective, since this section makes both an attempt to take and an actual taking of another's personal property against his will by violence or threat of violence the crime of robbery. *Harris v. State*, 445 So. 2d 1369, 1984 Miss. LEXIS 1599 (Miss. 1984).

The words "unlawfully" and "feloniously" in an indictment are sufficient to make the necessary charge of "intent to steal." *McFadden v. State*, 408 So. 2d 476, 1981 Miss. LEXIS 2462 (Miss. 1981).

An indictment charging the accused with robbery wherein it stated and charged the defendant with having taken from the person "and" from the presence of the owner personal property obtained in the robbery, was not defective because of the use of the word "and" rather than the statutory "or" and also was not defective as charging two separate offenses. *Payne v. State*, 215 Miss. 390, 61 So. 2d 146, 1952 Miss. LEXIS 578 (Miss. 1952).

Indictment charging robbery by assault by use of pistol with intent to take personal property of another included charge of assault. *Williamson v. State*, 167 Miss. 783, 149 So. 795, 1933 Miss. LEXIS 130 (Miss. 1933).

Where a record indicated defendant was aware he was being prosecuted under statute making robbery, or attempt at robbery, capital offense under certain conditions, indictment, though awkwardly worded, was sufficient. *Hall v. State*, 166 Miss. 331, 148 So. 793, 1933 Miss. LEXIS 399 (Miss. 1933).

8. Evidence; generally.

In an armed robbery case, a new trial was not warranted because defendant's conviction under this section was not contrary to the overwhelming weight of the evidence since a first witness testified unequivocally that defendant was the perpetrator of the crime, and the witness was able to pick defendant out of a photo line-up following the crime. Even though defendant argued that the testimony from a second witness was unreliable because she waited to contact police until after she realized that there was a reward, the jury apparently found her testimony reliable

regardless of that fact; moreover, the alibi witnesses offered by defendant seemed to be confused regarding timing. *Shinn v. State*, 2014 Miss. LEXIS 444 (Miss. Sept. 4, 2014), sub. op., 179 So. 3d 1006, 2015 Miss. LEXIS 633 (Miss. 2015).

Defendant's conviction for armed robbery and the denial of his motion for a new trial were both proper because the appellate court failed to see how the judge's decision to change his mind and sustain the State's objection on a ground not specified by the State had any effect on defendant's trial. Further, the exclusion of the victim's testimony concerning the officer's belief as to the victim's intoxication did not affect any substantial right of defendant, Miss. R. Evid. 103(a)(2). *McClendon v. State*, 17 So. 3d 184, 2009 Miss. App. LEXIS 550 (Miss. Ct. App. 2009).

Trial court did not abuse its discretion in sustaining the hearsay objection as to whether anyone stated that defendant or his accomplice were attempting to steal a car where defendant argued that the testimony would have constituted a hearsay exception as to the declarant's intent, plan, or motive to do something in the future under Miss. R. Evid. 803(3); however, the exclusion of that testimony was not grounds for reversal because it did not affect any of defendant's substantial rights as it was not necessary to his defense. *White v. State*, 969 So. 2d 72, 2007 Miss. App. LEXIS 247 (Miss. Ct. App.), cert. denied, 968 So. 2d 948, 2007 Miss. LEXIS 658 (Miss. 2007).

Trial court properly denied defendant's motions for judgment notwithstanding the verdict or, in the alternative, a new trial, where all of the evidence pointed to the fact that defendant committed the armed robbery; it was clear from the record and from defendant's statements that there was sufficient evidence for the jury to have convicted him and it was the job of the jury to determine which witnesses were credible and which were not. *Nason v. State*, 840 So. 2d 788, 2003 Miss. App. LEXIS 183 (Miss. Ct. App. 2003).

Application of the Biggers factors to defendant's case established that: (1) the victim of the armed robbery had ample opportunity to observe defendant; (2) while defendant was present in the store,

there was nothing to distract the victim's attention from him; (3) the victim phoned a description of the robber to the police department immediately after the robbery; (4) the victim did not express any uncertainty about the identification of defendant; and (5) the time between the robbery and the identification was short; thus, there were sufficient indicia of reliability to allow the identification of defendant and defendant's convictions for armed robbery and possession of a firearm by a convicted felon were affirmed. *Ferguson v. State*, 856 So. 2d 334, 2003 Miss. App. LEXIS 133 (Miss. Ct. App. 2003).

In a prosecution for robbery, evidence that the defendant threatened to rape one of the victims and that he committed two acts of sexual battery upon her was admissible to show a continuing scheme to terrorize his victims, thereby ensuring their continued passivity and guarding against the possibility of resistance as his associates continued the process of looting a business. *Weathersby v. State*, 769 So. 2d 857, 2000 Miss. App. LEXIS 373 (Miss. Ct. App. 2000).

A defendant who was convicted of armed robbery was entitled to an evidentiary hearing pursuant to §§ 99-39-13 through 99-39-23 on the issue of whether he was afforded ineffective assistance of counsel during the plea process, where the defendant alleged that his attorney erroneously informed him that if he accepted the prosecution's plea bargain offer of 15 years imprisonment he would be eligible for parole after serving 3 years and 9 months of his sentence, and that he would not have accepted the prosecution's plea bargain offer had he known that he would be ineligible for parole for 10 years pursuant to § 47-7-3(1)(d), which provides that a person convicted of robbery and sentenced to more than 10 years imprisonment shall not be eligible for parole until after serving at least 10 years of the sentence. *Alexander v. State*, 605 So. 2d 1170, 1992 Miss. LEXIS 573 (Miss. 1992).

Notwithstanding that the state failed to prove that a deadly weapon was displayed at the time motel operator was sprayed with mace, defendant's conviction of an attempt to commit armed robbery of the motel operator was supported by evidence

showing that defendant, along with others, planned the armed robbery, armed and transported themselves to the motel site, with the defendant and another hidden in the back seat of the automobile used in the commission of the crime, and by shooting at the motel operator to effectuate and escape. *Edwards v. State*, 500 So. 2d 967, 1986 Miss. LEXIS 2775 (Miss. 1986).

A money box stolen from the store by armed robbers was admissible in evidence at their trial where, prior to admission, the prosecution elicited a creditable chain of custody through the testimony of the store clerk who was on duty on the night of the robbery, and defense counsel for each of the robbers was afforded an opportunity to re-cross-examine the clerk following the introduction of the box. *Evans v. State*, 499 So. 2d 781, 1986 Miss. LEXIS 2825 (Miss. 1986).

Admission into evidence at an armed robbery trial of hearsay statements of 2 detectives not for the purpose of showing the information upon which those detectives acted, but in an effort to prove the truth of the matter asserted in the statements, and to bolster the state's case, constituted reversible error. *Bridgeforth v. State*, 498 So. 2d 796, 1986 Miss. LEXIS 2852 (Miss. 1986).

In a prosecution for armed robbery, evidence that the victim had been stabbed with a knife three times and shot through the chest during the course of the armed robbery was properly admitted, notwithstanding the contention that this was evidence of an entirely different crime from that for which defendant had been indicted, where the exhibition of a deadly weapon was a key element of the crime of armed robbery and a description of the crime could not be made adequately without describing the weapons used and what was done with those weapons. *Page v. State*, 369 So. 2d 757, 1979 Miss. LEXIS 1975 (Miss. 1979).

Jury issue was presented as to whether or not defendant took pistol and police car from policemen for the purpose of permanently depriving the owners of their property or whether or not he took the property with no intention of permanently depriving the owners of its possession but

merely for the purpose of resisting arrest. *Thomas v. State*, 278 So. 2d 469, 1973 Miss. LEXIS 1451 (Miss. 1973).

The admission of the testimony of the victim of an alleged robbery that cash money and checks had been taken from him was not error, even though the police seized the funds at the time when they captured the defendant and subsequently returned the funds to the victim, and, similarly, the admission of the victim's testimony that the police subsequently returned the funds to him was not prejudicial. *Gisch v. State*, 259 So. 2d 118, 1972 Miss. LEXIS 1521 (Miss. 1972).

In an armed robbery prosecution, where the defendant's only defense on the merits was his insanity at the time of the commission of the offense, the jury, in determining defendant's sanity at the time of the crime, could consider the fact that defendant had testified in an intelligent and perceptive manner. *Eslick v. State*, 238 Miss. 666, 119 So. 2d 355, 1960 Miss. LEXIS 454 (Miss. 1960).

In a robbery prosecution against a daughter, who had testified that she had grabbed her mother's metal box containing money and a pistol and fled to prevent the mother from obtaining the pistol, evidence that on several occasions the mother had shot at members of the accused's family should have been permitted to go to the jury as tending to show the bias and prejudice of the mother, who was a prosecuting witness, even though it was not part of the *res gestae*. *Hardin v. State*, 232 Miss. 470, 99 So. 2d 600, 1958 Miss. LEXIS 294 (Miss. 1958).

9. —Identification.

There was no abuse of discretion in the trial court's decision to exclude a videotape, which was not relevant; there was evidence implying that defendant did not necessarily wear a mask in the bank to conceal his identity, and thus it was inconsequential that he appeared to have the same mask and clothes on from the video during the robbery. *Chilton v. State*, 245 So. 3d 525, 2017 Miss. App. LEXIS 622 (Miss. Ct. App. 2017), cert. denied, 246 So. 3d 883, 2018 Miss. LEXIS 288 (Miss. 2018).

Evidence was sufficient to support defendant's armed robbery conviction be-

cause: (1) the victim made a positive pretrial identification of defendant when she picked his picture out of a photographic lineup three days after the robbery occurred; (2) an accomplice positively identified defendant as the perpetrator; (3) the officer told the jury about the search that was conducted at defendant's residence and where and how the gun was found; and (4) the accomplice stated that defendant owned a gun. *Trammell v. State*, 62 So. 3d 424, 2011 Miss. App. LEXIS 6 (Miss. Ct. App. 2011).

Trial court did not err in denying defendant's motion to suppress a robbery victim's pretrial identification of him there was substantial credible evidence supporting the trial court's ruling that there was not a substantial likelihood of irreparable misidentification when a six-pack photographic lineup was not impermissibly suggestive, the victim had ample opportunity to view defendant at the time of the crime, and from her testimony, it was clear that the victim paid a great deal of attention to defendant; throughout the case, including pretrial identification, the victim never wavered in her identification of defendant as her attacker, and she gave a detailed description of defendant, identified him from two photographs without hesitating, and positively identified him during trial more than once. *Williams v. State*, 40 So. 3d 630, 2010 Miss. App. LEXIS 67 (Miss. Ct. App. 2010).

Although a show-up identification was inappropriate where the defendant was already in custody and the eyewitness was not grievously injured nor was there any threat that he was unavailable for a later line-up, the trial court did not err in failing to suppress evidence of the show-up identification where the eyewitness had an excellent opportunity to view the defendant during the robbery and had made the identification within 24 hours of the robbery. *Outerbridge v. State*, 947 So. 2d 279, 2006 Miss. LEXIS 684 (Miss. 2006).

Defendant's argument on appeal was that there was no personal in-court identification of him as one of the men who participated in the robbery. However, the judge had recessed court for lunch and defendant failed to return to court on his

bond, and upon a motion by the State, trial proceeded in his absence; because defendant chose not to return for his trial, he could not complain that he was not personally identified in court, where it was a consequence of his own voluntary act. *McCoy v. State*, 881 So. 2d 312, 2004 Miss. App. LEXIS 864 (Miss. Ct. App. 2004).

Defendant was properly convicted of armed robbery where a convenience store clerk identified defendant in a photographic array as the person who entered the store, pulled the store gun on the clerk, and demanded money from the register. *Scott v. State*, 877 So. 2d 549, 2004 Miss. App. LEXIS 653 (Miss. Ct. App. 2004).

State's identification of defendant consisted of the victim's eyewitness identification from a photo line-up and in-court identification, and a videotape of the robbery which showed the robber; moreover, the trial court instructed the jury to consider *Neil v. Biggers* to determine whether the identification made by the victim was credible and reliable, and the jury resolved the issue of credibility in favor of the State's witnesses. Thus, the evidence was sufficient to sustain defendant's convictions for robbery with the use of a deadly weapon, and aggravated assault. *Houston v. State*, 887 So. 2d 808, 2004 Miss. App. LEXIS 451 (Miss. Ct. App.), cert. denied, 888 So. 2d 1177, 2004 Miss. LEXIS 1448 (Miss. 2004).

A robbery victim's in-court identification of the defendant was not tainted by her extensive observation of the defendant at a pre-trial parole revocation hearing where the victim testified at the suppression hearing concerning her ample opportunity to observe the defendant at the time of the robbery. *Saucier v. State*, 562 So. 2d 1238, 1990 Miss. LEXIS 244 (Miss. 1990), overruled in part, *White v. State*, 785 So. 2d 1059, 2001 Miss. LEXIS 44 (Miss. 2001).

At trial of charge of armed robbery of bank, the asking of a question of a fingerprint expert as to whether in the expert's opinion the defendant had touched a petty cash slip left at the crime scene, while overly broad, was not irreversible error in view of the fact that the defendant was

linked to the scene by his fingerprints on the door of the bank, and by the identification by 2 eyewitnesses. *Giles v. State*, 501 So. 2d 406, 1987 Miss. LEXIS 2261 (Miss. 1987).

Even though it was possible that the jury would infer from a FBI fingerprint card that defendant had been involved in prior criminal activity, the admission into evidence of such a card at a trial of a charge of armed robbery of a bank was not error, where it was essential to the state's establishment of the identity of fingerprints on the bank door and the petty cash receipts slip found in the bank and, moreover, among the exceptions to the rule limiting admissibility of evidence of other crimes is when the evidence is used for identification. *Giles v. State*, 501 So. 2d 406, 1987 Miss. LEXIS 2261 (Miss. 1987).

Sales clerk's in-court identification of armed robbery defendant was not tainted because prior to trial she had identified him from a photograph of a police lineup in which he was the only person wearing a fishing hat like the one worn by the jewelry store robber, where, on the day of the robbery, the sales clerk had furnished the police with a composite sketch of the robber, and in court she had repeated her identification of defendant with great conviction. *Foster v. State*, 493 So. 2d 1304, 1986 Miss. LEXIS 2631 (Miss. 1986).

A photograph lineup, held some 6 months after the armed robbery, consisting of 5, 3 inch by 5 inch, photographs of various men, including the defendant who was in no way conspicuously singled out, was not so unnecessarily suggestive as to taint positive in-court identification of defendant as the robber by the victim, who had also identified defendant at the photograph lineup. *Ex parte Baxley*, 496 So. 2d 688, 1986 Ala. LEXIS 3920 (Ala. 1986).

In court identification of defendant as person who committed armed robbery in drugstore is not impermissibly tainted by prior showup at drugstore or by newspaper article in which defendant's photograph has appeared where, under totality of circumstances, there is no substantial likelihood that witnesses have misidentified defendant due to fact that witnesses had ample opportunity and reason to remember defendant's faith, witnesses de-

scription of robber to police conform generally with defendant's actual appearance, and witnesses positively identified defendant at lineup held one month after crime. *Lannom v. State*, 464 So. 2d 492, 1985 Miss. LEXIS 1897 (Miss. 1985).

In a robbery prosecution, testimony of a deputy sheriff investigating the robbery that he took the prosecuting witness into a store and asked him if he saw the two men who had robbed him, whereupon the prosecuting witness pointed out the accused and another, was admissible for the purpose of showing that the accused was lawfully arrested upon a reasonable belief that he was the guilty person. *Reed v. State*, 232 Miss. 432, 99 So. 2d 455, 1958 Miss. LEXIS 290 (Miss. 1958).

Letter from the Federal Bureau of Identification, offered by defendant, to the effect that no fingerprints lifted on robbed premises matched defendant's was properly excluded since it contained no certificate or copies of the fingerprints compared. *Wooton v. Bethea*, 209 Miss. 374, 47 So. 2d 158, 1950 Miss. LEXIS 401 (Miss. 1950).

Admission of evidence of prior extrajudicial identification of defendant as a participant in the robbery by prosecuting witness who also identified defendant at the trial could not be complained of, where evidence of the earlier identification out of court was admitted without objection. *Flegg v. State*, 202 Miss. 179, 30 So. 2d 615, 1947 Miss. LEXIS 256 (Miss. 1947).

In prosecution for robbery with deadly weapon, where person robbed could not positively identify accused, evidence that witness reaching reported scene of robbery few minutes later saw accused fifty yards away armed with rifle and that accused shot witness, held competent as showing identity of robber and accused's guilt of robbery, though it was evidence of a separate crime. *Brown v. State*, 171 Miss. 157, 157 So. 363, 1934 Miss. LEXIS 231 (Miss. 1934).

10. —Prior to other offenses.

Corroborated testimony indicated that the incident began as a demand by defendant and his accomplice for the victim to give them some money, and the testimony

also indicated that when the victim refused to hand over any money, defendant and his accomplice threatened the victim, attacked him with weapons, and left his unconscious body on the street; there was sufficient evidence from which the jury could find the necessary elements of robbery, and the circuit court did not err in denying defendant's motion for a directed verdict. *Ames v. State*, 17 So. 3d 130, 2009 Miss. App. LEXIS 144 (Miss. Ct. App.), cert. denied, 17 So. 3d 99, 2009 Miss. LEXIS 433 (Miss. 2009).

In a prosecution for armed robbery, evidence of the defendant's prior conviction of attempted strong-armed robbery was properly admitted into evidence where the defendant had testified that he would not hurt anyone in order to obtain money. When the defendant injected his "character for peaceableness or violence" into the trial, the prosecution was entitled to rebut his protestations that he was not prone to violence; the prosecution was properly allowed to challenge the truthfulness of the defendant's statement that he would not threaten anyone by showing that in the past he had done exactly what he said he would not do. *Rowe v. State*, 562 So. 2d 121, 1990 Miss. LEXIS 276 (Miss. 1990).

Even though it was possible that the jury would infer from a FBI fingerprint card that defendant had been involved in prior criminal activity, the admission into evidence of such a card at a trial of a charge of armed robbery of a bank was not error, where it was essential to the state's establishment of the identity of fingerprints on the bank door and the petty cash receipts slip found in the bank and, moreover, among the exceptions to the rule limiting admissibility of evidence of other crimes is when the evidence is used for identification. *Giles v. State*, 501 So. 2d 406, 1987 Miss. LEXIS 2261 (Miss. 1987).

At an armed robbery trial, state's elicitation of testimony from the girl friend of defendant's accomplice which implicated defendant in the theft of cash, handguns and personal checks belonging to the witness's parents constituted a plain and reversible error, since the theft was wholly unrelated to the crime at issue, and prejudiced the minds of the jurors against the defendant. *Usry v. State*, 498 So. 2d 373, 1986 Miss. LEXIS 2830 (Miss. 1986).

At armed robbery trial, where defense counsel, on cross-examination of state's witness, elicited information concerning stolen guns, thus inviting prosecutor to follow-up on that line of questioning on re-direct, defendant was not in a position to complain that evidence of a crime or offense other than the one with which he was charged had erroneously been admitted into evidence. *Brown v. State*, 495 So. 2d 508, 1986 Miss. LEXIS 2693 (Miss. 1986).

Defendant charged with armed robbery is denied fair trial by introduction of detail surrounding prior conviction and evidence of other crimes not resulting in convictions; error may be raised on appeal notwithstanding defendant's failure to object at time of trial where development of inadmissible detail is lengthy and repetitious. *Gallion v. State*, 469 So. 2d 1247, 1985 Miss. LEXIS 2096 (Miss. 1985).

Where the prosecuting witness had denied that she had ever been convicted of any offenses other than driving without a driver's license and permitting gambling on premises occupied by her, the accused was entitled to show other convictions of the prosecuting witness by a deputy circuit clerk, whose office was a custodian of the docket of a man who was formerly a justice of the peace. *Hardin v. State*, 232 Miss. 470, 99 So. 2d 600, 1958 Miss. LEXIS 294 (Miss. 1958).

In prosecution for robbery with deadly weapon, where person robbed could not positively identify accused, evidence that witness reaching reported scene of robbery few minutes later saw accused fifty yards away armed with rifle and that accused shot witness, held competent as showing identity of robber and accused's guilt of robbery, though it was evidence of a separate crime. *Brown v. State*, 171 Miss. 157, 157 So. 363, 1934 Miss. LEXIS 231 (Miss. 1934).

In prosecution for robbery with deadly weapon, sheriff's testimony as to accused's flight and subsequent capture held admissible as against complaint that evidence was of flight from subsequent shooting of witness and not from robbery, where two crimes were so closely related in time that flight from one could not be shown without showing other unless evidence of second

crime were excluded. *Brown v. State*, 171 Miss. 157, 157 So. 363, 1934 Miss. LEXIS 231 (Miss. 1934).

11. —Confession of accused.

Post arrest confessions of 3 defendants charged with armed robbery were properly admitted into evidence via testimony of police officer where none of the confessions implicated one of the codefendants. *Evans v. State*, 499 So. 2d 781, 1986 Miss. LEXIS 2825 (Miss. 1986).

At the joint trial of 2 defendants charged with armed robbery, the admission of their confessions, found to have been otherwise admissible, in the state's case-in-chief, did not violate each defendant's right to confrontation of witnesses and was not improper, although both confessions incriminated each defendant and neither of them took the stand, where, upon the admission of the confessions; the trial judge instructed the jury that each confession could not be considered as evidence against the other defendant, that the confessions were almost identical in every detail, and that each defendant admitted his own guilt. *Seales v. State*, 495 So. 2d 475, 1986 Miss. LEXIS 2679 (Miss. 1986), overruled in part, *Smith v. State*, 986 So. 2d 290, 2008 Miss. LEXIS 339 (Miss. 2008).

Armed robbery defendant's confession was not inadmissible as product of illegal arrest where there was probable cause for the arrest. *Moore v. State*, 493 So. 2d 1295, 1986 Miss. LEXIS 2608 (Miss. 1986).

12. Sufficiency of evidence; generally.

Evidence was sufficient to convict defendant of two counts of armed robbery because he encouraged and assisted his uncle in the commission of armed robbery as he knew that his uncle had been planning to rob a bank for weeks; he was the driver of the getaway vehicle; the bank tellers testified to being robbed at gunpoint; and a bank customer testified to seeing two men waiting in the bank's parking lot in the uncle's car. *Grace v. State*, 281 So. 3d 986, 2019 Miss. App. LEXIS 181 (Miss. Ct. App. 2019).

Verdict finding defendant guilty of two counts of armed robbery and one count of

felony fleeing or eluding a law enforcement officer in a motor vehicle was not so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice because defendant knew that his uncle was going to rob the bank, and he rode with his uncle to a bank in another town with full knowledge of why they were going there; and, although defendant did not go into the bank, exhibit the pistol, and demand the money, he participated in the armed robbery by positioning the getaway vehicle outside the bank and driving his uncle away in an attempt to avoid apprehension and arrest. *Grace v. State*, 281 So. 3d 986, 2019 Miss. App. LEXIS 181 (Miss. Ct. App. 2019).

Evidence was sufficient to support defendant's conviction of armed robbery because the victim testified that defendant pointed a gun at him, and the victim's girlfriend testified that she did not see a gun but it was possible that defendant concealed the gun from her. The victim testified that defendant quickly pulled out a gun as he was still in the process of picking up the shoes and clothes and that he did not try to take his shoes and clothes back from defendant because he was in fear for his life. *Jones v. State*, 281 So. 3d 137, 2019 Miss. App. LEXIS 74 (Miss. Ct. App. 2019).

Evidence was sufficient to convict defendant of attempted armed-robbery because, while defendant strongly emphasized the fact that no money was taken from the store, he conceded that a taking was not mandated to establish attempted armed robbery; an illegal breaking and entering was not a required element of armed robbery; the facts showed that one of the victims had just returned from the bank with \$80,000 in cash, that she was in the process of handling the money and bank bag when defendant rushed toward her behind the counter with gloves on, his face masked, and a loaded pistol in hand; and defendant made a direct, but ineffectual act toward committing the armed robbery. *Thomas v. State*, 277 So. 3d 532, 2019 Miss. LEXIS 23 (Miss. 2019).

Circuit court properly convicted defendant of armed robbery because, while the victim had Alzheimer's disease and her

head was covered with an afghan, her husband (who was also a victim) testified that it was still possible to see what occurred because the afghan was knitted and had holes in it and that one of the assailants picked up an air rifle and held it to the husband's head, the police chief recalled that, while being interviewed by one of his officers, the victims described being in fear of death or serious bodily injury during the incident, and defendant's proposed jury instruction was fairly covered elsewhere in the instructions and fairly and accurately announced the rules of law applicable to the case. *McKeithan v. State*, 233 So. 3d 318, 2018 Miss. App. LEXIS 14 (Miss. Ct. App. 2018).

State presented sufficient evidence for fair-minded jurors to convict defendant of conspiracy to commit armed robbery because the evidence clearly showed two men working in agreement with each other to rob a store; the men entered the store together, held up the employees at gunpoint, took the money, and ran off at the same time. *Lenoir v. State*, 224 So. 3d 85, 2017 Miss. LEXIS 79 (Miss. 2017).

Verdicts finding defendant guilty of manslaughter and armed robbery were not contrary to the weight of the evidence because defendant's alleged former common-law wife testified that he told her of the robbery and murder that he and his former girlfriend committed together; the former girlfriend testified that she was with defendant on the day of the crime, helped him scout out the location of the crime, helped obtain a stolen car, placed the car in position for defendant to flee after executing the robbery, and returned the stolen car after defendant wiped it down with a grey or purple fabric, which was similar to one of the items recovered at the scene of a fire, which also included a metal cash box from the victim's convenience store. *Lyons v. State*, 237 So. 3d 763, 2017 Miss. App. LEXIS 218 (Miss. Ct. App. 2017), cert. denied, 236 So. 3d 817, 2018 Miss. LEXIS 99 (Miss. 2018).

State presented sufficient evidence for fair-minded jurors to convict defendant of conspiracy to commit armed robbery because the evidence clearly showed two men working in agreement with each other to rob a store; the men entered the

store together, held up the employees at gunpoint, took the money, and ran off at the same time. *Lenoir v. State*, 224 So. 3d 85, 2017 Miss. LEXIS 79 (Miss. 2017).

Evidence supported defendant's armed robbery conviction, given the witness's testimony that defendant said he was robbing the bank and that he had a gun, the witness collected bait money out of fear and gave it to defendant, and defendant took the money from the witness, exited the bank, and began to throw the money with the trackers out of the window. *Chilton v. State*, 245 So. 3d 525, 2017 Miss. App. LEXIS 622 (Miss. Ct. App. 2017), cert. denied, 246 So. 3d 883, 2018 Miss. LEXIS 288 (Miss. 2018).

Circuit court properly convicted defendant of armed robbery because, inter alia, two police officers testified that, as the victim lay dying, he accused two males of robbing and shooting at him, an accomplice testified that defendant pointed a gun at the victim and demanded everything in his pocket, as well as demanding the victim's gun, and any inconsistencies in the testimony presented at trial was insufficient to warrant a reversal of defendant's conviction. *Minor v. State*, 236 So. 3d 63, 2017 Miss. LEXIS 441 (Miss. 2017).

Though the victims' testimony about the armed robbery contained inconsistencies, these conflicts were not sufficient to warrant a reversal of the guilty verdicts, as their accounts corroborated each other on several material points. *Sims v. State*, 213 So. 3d 90, 2016 Miss. App. LEXIS 609 (Miss. Ct. App. 2016), cert. denied, 214 So. 3d 1058, 2017 Miss. LEXIS 154 (Miss. 2017).

Defendants' guilty verdict was not against the overwhelming weight of the evidence because the victim equivocally identified defendant in a photo lineup and at trial as the individual who pressed a pistol to the victim's head while an accomplice emptied the victim's pockets and a police officer testified that defendant made an unsolicited, voluntary statement during transport to the county jail that the cash found on defendant had come from the armed robbery and not from selling drugs. *Sims v. State*, 196 So. 3d 180, 2016 Miss. App. LEXIS 431 (Miss. Ct. App. 2016).

In an armed robbery case, sufficient evidence was presented to show that defendant intended to participate in the robbery. The codefendants testified that it was defendant's idea to rob the victim, and the victim identified defendant as the person who stole his cell phone. *Hoffman v. State*, 189 So. 3d 715, 2016 Miss. App. LEXIS 217 (Miss. Ct. App. 2016).

Evidence supported defendant's conspiracy to commit armed robbery conviction because, after defendant lost money to the victim in a dice game, defendant got in a truck with the victim, while defendant's coconspirators followed close behind as they planned on getting some money and dope from the victim, and, when the victim stopped in a driveway, a coconspirator pulled out a gun and demanded the victim's money. After the victim was shot in a struggle, one of the coconspirators fled with some cash, which the coconspirators later split. *Thomas v. State*, 180 So. 3d 756, 2015 Miss. App. LEXIS 609 (Miss. Ct. App. 2015).

There was sufficient evidence at trial to convict defendant of armed robbery of a pizza-delivery man (the victim) because the victim clearly testified at trial that defendant snatched pizzas from him, while the co-defendant held a gun to the his head and the victim clarified this point at trial at least three times. *Murrill v. State*, 171 So. 3d 591, 2015 Miss. App. LEXIS 405 (Miss. Ct. App. 2015).

Victim's testimony identifying defendant as the person who stuck a pistol in her face and grabbed her purse full of cash and evidence that defendant's cell phone was found on the passenger seat of the truck used in the robbery and his fingerprints were on the outside of the passenger handle of the truck was sufficient to support defendant's conviction for armed robbery. *Harris v. State*, 174 So. 3d 314, 2015 Miss. App. LEXIS 428 (Miss. Ct. App. 2015).

In a prosecution of defendant for attempted armed robbery and felon in possession of a firearm, the trial court did not abuse its discretion in denying defendant's motion for a new trial. Because the jury heard the testimony identifying defendant as the perpetrator, as well as alibi testimony, and weighed the credibility of

each witness in its determination of the verdicts, it could not be said the evidence weighed against the guilty verdicts. *Sanders v. State*, 162 So. 3d 868, 2015 Miss. App. LEXIS 199 (Miss. Ct. App. 2015).

Evidence was sufficient to support defendant's conviction for armed robbery because the armed robbery statute was not tethered to the statute that prohibited a convicted felon from possessing certain kinds of knives; even if it were, nothing in the statute that prohibited a convicted felon from possessing certain kinds of knives precluded a finding that the knives enumerated therein were deadly weapons within the meaning of the armed robbery statute; and the knife that the State submitted as evidence – whether it was a butcher knife, steak knife, paring knife, or some other kind of knife – could likely produce death or serious bodily harm to a human being if used as a weapon. *Harris v. State*, 172 So. 3d 191, 2014 Miss. App. LEXIS 490 (Miss. Ct. App. 2014), cert. denied, — So. 3d —, 2015 Miss. LEXIS 420 (Miss. 2015).

Evidence was sufficient to establish the elements of armed robbery beyond a reasonable doubt because defendant failed to show how a DNA analysis would aid his defense in any way, and both victims identified defendant as one of the two men who robbed them; in addition to the in-court identifications, on the night of the robbery, both victims identified defendant from a photo array as one of the robbers. *Lewis v. State*, 112 So. 3d 1092, 2013 Miss. App. LEXIS 220 (Miss. Ct. App. 2013).

Verdict convicting defendant of armed robbery was not contrary to the overwhelming weight of the evidence because a co-conspirator's testimony was corroborated in part by three witnesses; the testimony was not inherently unreliable or substantially impeached because a large part of it was corroborated by other evidence or testimony. *Foster v. State*, 148 So. 3d 1045, 2013 Miss. App. LEXIS 135 (Miss. Ct. App. 2013), *aff'd*, 148 So. 3d 1012, 2014 Miss. LEXIS 514 (Miss. 2014).

Conviction for armed robbery was not contrary to the weight of the evidence. An eyewitness testified that defendant stole a gun and backpack from the victim, the jury could draw the reasonable inference

from the evidence that defendant had motive to rob the victim, and the victim testified that defendant placed a gun at the back of the victim's head. *Renfro v. State*, 118 So. 3d 560, 2013 Miss. LEXIS 150 (Miss. 2013).

Evidence was sufficient to convict defendant of aggravated assault and armed robbery and the verdicts were not against the weight of the evidence as he was present, consenting, aiding, and abetting the commission of the robbery by one of the accomplices, and the two accomplices' testimony was more than slightly supported by corroborating eyewitness testimony and forensic evidence. *Grossley v. State*, 127 So. 3d 1143, 2013 Miss. App. LEXIS 384 (Miss. Ct. App. 2013), cert. denied, 131 So. 3d 577, 2014 Miss. LEXIS 26 (Miss. 2014).

Sufficient evidence supported defendant's conviction for armed robbery, Miss. Code Ann. § 97-3-79, because the victim's identification of defendant as the robber was based on, *inter alia*, defendant being a frequent customer of the store, defendant doing odd jobs at the store, and the victim recognizing defendant's voice and distinctive speech pattern; the victim stated several times she was one hundred percent sure that defendant had robbed her store. *Lewis v. State*, 110 So. 3d 814, 2013 Miss. App. LEXIS 105 (Miss. Ct. App. 2013), cert. denied, 131 So. 3d 577, 2014 Miss. LEXIS 22 (Miss. 2014).

Defendant's conviction for armed robbery was proper, as an eyewitness identified defendant, clothes matching those worn by a robber on a surveillance video were found at defendant's home, and defendant confessed. *Pinkston v. State*, 50 So. 3d 1027, 2010 Miss. App. LEXIS 664 (Miss. Ct. App. 2010).

Defendant's conviction for robbery by use of a deadly weapon was appropriate because the evidence was sufficient. There were surveillance videos documenting both of defendant's visits to the gas station; the jury heard the codefendants testify that defendant was involved with the planning and execution of the robbery, which included testimony that defendant was the lookout and that he was supposed to wave his hand if it was clear to rob the clerk; and surveillance video showed de-

fendant waiving his hand shortly before the clerk was robbed. *Pritchett v. State*, 32 So. 3d 545, 2010 Miss. App. LEXIS 155 (Miss. Ct. App. 2010).

Evidence was sufficient to support defendant's conviction for robbery because defendant pointed a gun at the victim and demanded money, which he ultimately got; the verdict was not against the overwhelming weight of the evidence because the victim consistently identified defendant as her attacker. *Williams v. State*, 40 So. 3d 630, 2010 Miss. App. LEXIS 67 (Miss. Ct. App. 2010).

Defendant's convictions for house burglary, aggravated assault, armed robbery, and auto theft were proper because the evidence was sufficient. In part, defendant severely beat the victim, demanded that she give him her purse, and then took her purse, a gun, and a set of keys to the victim's vehicle. The victim later identified defendant, based upon her own independent recollection, in a photographic lineup. *Brunner v. State*, 37 So. 3d 645, 2009 Miss. App. LEXIS 755 (Miss. Ct. App. 2009), cert. denied, 36 So. 3d 455, 2010 Miss. LEXIS 323 (Miss. 2010).

Evidence, including photographic procedure used to identify defendant and testimony of two victims that they were placed in fear of immediate injury as a gun was pointed at each of them in order to induce them to hand over money from each of their case registers, was sufficient to convict defendant of two counts of armed robbery in violation of Miss. Code Ann. § 97-3-79. *Conner v. State*, 26 So. 3d 383, 2009 Miss. App. LEXIS 329 (Miss. Ct. App. 2009), cert. denied, 24 So. 3d 1038, 2010 Miss. LEXIS 36 (Miss. 2010).

There was sufficient evidence to convict defendant of three counts of armed robbery. The jury was presented with testimony and evidence that defendant feloniously took money from three victims, against their will, by putting each man in fear of immediate injury by the exhibition of a deadly weapon, i.e., the gun. A rational jury could have found the essential elements of armed robbery beyond a reasonable doubt. *Johnson v. State*, 29 So. 3d 738, 2009 Miss. LEXIS 610 (Miss. 2009).

In defendant's trial on a charge of capital murder, the court rejected defendant's

claim that the prosecution failed to produce evidence sufficient to convict him of the underlying felony of robbery because defendant's possession of the deceased victim's wallet created a reasonable inference that the property was stolen; the State's theory of the case was that defendant went back to the motel where he and the victim had been staying to get back what was rightfully his—the money in the victim's wallet, and the evidence, although circumstantial, supported this theory. During the State's case-in-chief, evidence was presented to establish that, after defendant left the motel earlier in the day, the victim feared his return, and when defendant did return and was unable to access the room, a motel employee told him that the door was locked from the inside; additional evidence was presented that defendant had received a significant amount of money from his mother for a business that he planned to start and that defendant was supporting the victim and was the source of the cash found inside her wallet. *Goff v. State*, 14 So. 3d 625, 2009 Miss. LEXIS 273 (Miss. 2009), cert. denied, 559 U.S. 944, 130 S. Ct. 1513, 176 L. Ed. 2d 122, 2010 U.S. LEXIS 1251 (U.S. 2010).

Sufficient evidence existed to support defendant's conviction for capital murder when the evidence showed defendant was angry with the victim about his employment arrangement with the victim; defendant's girlfriend testified that defendant took the victim's money, credit cards, and car keys during the course of the murder. *Lima v. State*, 7 So. 3d 903, 2009 Miss. LEXIS 190 (Miss. 2009).

Evidence was sufficient to support defendant's convictions of murder and armed robbery where defendant's companions testified that they accompanied defendant to the victim's home seeking employment; that the victim told them that they could spend the night rather than driving all the way home; that defendant told them that he was going to rob the victim; that defendant headed toward the victim's bedroom after the victim retired; that as his companions left the home, they heard gunshots coming from the bedroom and that one looked back and saw defendant taking the victim's wallet

out of his pocket; and that defendant jumped into their vehicle as they were departing and he had blood on him and was carrying a gun. Further evidence was justified defendant's conviction was testimony that defendant was angry with the victim for docking his pay after finding him sleeping on the job and the testimony of defendant's brother that defendant admitted commission of the offenses. *Lewis v. State*, 997 So. 2d 1001, 2009 Miss. App. LEXIS 2 (Miss. Ct. App. 2009).

Trial court did not err in denying a defendant's motions for a directed verdict and a judgment notwithstanding the verdict because the evidence was sufficient to support a conviction of three counts of armed robbery, under Miss. Code Ann. § 97-3-79, where the defendant took money from an illegal dice game at gunpoint in an amount that was more than what he claimed rightfully belonged to him. *Croft v. State*, 992 So. 2d 1151, 2008 Miss. LEXIS 502 (Miss. 2008).

Evidence was sufficient to sustain a conviction for attempted armed robbery because defendant disguised himself as a woman, entered the bank with his co-defendants, and shuffled around nervously as another defendant attempted to hold up the teller with a handgun, all the while shielding his face from view. Thereafter, defendant was caught attempting to escape from the abandoned safe house and he was still wearing the same women's skirt that he wore during the attempted robbery. *Glenn v. State*, 996 So. 2d 148, 2008 Miss. App. LEXIS 584 (Miss. Ct. App. 2008).

Motion for a new trial was properly denied in an armed robbery case under Miss. Code Ann. § 97-3-79 because the verdict was not so contrary to the overwhelming weight of the evidence that it amounted to an unconscionable injustice where a victim identified defendant as the man who approached her in a store parking lot, demanded money, and tried to stab her. The victim testified that the parking lot was well lit, the victim had a lengthy encounter with defendant, she positively identified him from a photo lineup and later at trial, and a car matching the description given by the victim and registered to defendant's sister was located

nearby; moreover, the conviction was still proper, even if the State was unable to prove that defendant obtained money from the victim. *Lafont v. State*, 9 So. 3d 1143, 2008 Miss. App. LEXIS 549 (Miss. Ct. App. 2008), cert. denied, 12 So. 3d 531, 2009 Miss. LEXIS 236 (Miss. 2009).

Evidence was sufficient to convict defendant of armed robbery because (1) two eyewitnesses stated that they gave defendant a ride to the casino on the evening of the robbery and that he returned shortly thereafter with a woman's purse; (2) they saw him go through the contents of the purse, pull out a cash voucher, and then throw the purse out the window; (3) the victim was able to identify defendant as the man who robbed her of her purse at gunpoint; (4) the victim stated that there was a cash voucher in her purse; and (5) two police officers testified that defendant confessed to robbing the victim at a casino; thus, defendant's motion for a judgment notwithstanding the verdict was properly denied. *Carey v. State*, 4 So. 3d 370, 2008 Miss. App. LEXIS 521 (Miss. Ct. App. 2008), cert. denied, 11 So. 3d 1250, 2009 Miss. LEXIS 114 (Miss. 2009).

Defendant's motion for a new trial was properly denied where the evidence was sufficient to convict defendant of armed robbery, Miss. Code Ann. § 97-3-79; witness testimony identified defendant as one of the co-participants in the armed robbery and the accomplice testimony was reasonable and not improbable or self-contradictory. *Dorsey v. State*, 986 So. 2d 1080, 2008 Miss. App. LEXIS 428 (Miss. Ct. App. 2008).

Evidence was sufficient to sustain defendant's conviction for armed robbery because the State presented eyewitness testimony of the armed robbery and a positive identification of defendant as the perpetrator. The testimony of the store clerk was consistent with the evidence in the surveillance tape and photographs. *Jones v. State*, 993 So. 2d 386, 2008 Miss. App. LEXIS 232 (Miss. Ct. App.), cert. denied, 997 So. 2d 924, 2008 Miss. LEXIS 503 (Miss. 2008).

Where defendant and his cohort had been riding around discussing ways to make money, they approached the victims' house, knocked on the door, made up a

story about running out of gas, then shot two victims, and fled the house when one of the victims' did not go down after being shot multiple times. The State proved the essential elements of armed robbery in violation of Miss. Code Ann. § 97-3-79. *Hughes v. State*, 983 So. 2d 270, 2008 Miss. LEXIS 153 (Miss.), cert. denied, 555 U.S. 1052, 129 S. Ct. 633, 172 L. Ed. 2d 620, 2008 U.S. LEXIS 8544 (U.S. 2008).

There was sufficient evidence to prove defendant committed armed robbery where witnesses testified that a store manager had a purse and bank deposits in her hand when the suspect snatched them and ran away, that they interpreted the suspect's comments, such as telling them not to move and not to be a hero, as threats, and that they were afraid; further, the suspect was wearing a mask, was dressed all in black, and displayed a knife, and officers tracked defendant's scent around the rear of a building, discovered defendant lying on the ground in the woods in the same spot as the bank bags. *Denman v. State*, 964 So. 2d 620, 2007 Miss. App. LEXIS 604 (Miss. Ct. App. 2007).

Although victims could not positively identify defendant as a second gunman who entered their apartment, they were able to provide police with a description, a stocking cap, clothing, and a gun; a reasonable jury could have found defendant guilty of burglary and robbery beyond a reasonable doubt. *Guyton v. State*, 962 So. 2d 722, 2007 Miss. App. LEXIS 524 (Miss. Ct. App. 2007).

Trial court did not err by denying defendant's motions for judgment notwithstanding the verdict and for a new trial after he was convicted of rape, kidnapping, and armed robbery because the evidence, viewed in the light most favorable to the prosecution, showed that: (1) defendant bound the victim and forcibly raped her, threatening her with a knife; (2) DNA testing from the rape kit showed the presence of semen but no sperm in the victim's vagina, consistent with a male donor not reaching ejaculation; (3) defendant forced the victim into her car; and (4) defendant forced the victim to make an ATM withdrawal and give him the cash. *Taggart v. State*, 957 So. 2d 981, 2007 Miss. LEXIS 330 (Miss. 2007).

In an armed robbery case, where defendant challenged the weight of the evidence in his motion for a new trial, the evidence showed that: (1) there was detailed evidence from several sources establishing that three masked men effectuated a robbery of a store by threatening the cashier with a gun; (2) defendant was identified as the gunman by his two accomplices; and (3) defendant's general description was consistent with the description of the gunman given by the cashier; thus, the evidence did not preponderate so heavily against the verdict that an unconscionable injustice would result without a new trial and defendant's motion for a new trial was properly denied. *Evans v. State*, 957 So. 2d 430, 2007 Miss. App. LEXIS 375 (Miss. Ct. App. 2007).

Evidence was sufficient to convict defendant of armed robbery under Miss. Code Ann. § 97-3-79 because: (1) while the victim never testified that he was afraid or in fear, the evidence enabled a jury to find beyond a reasonable doubt that he anticipated that personal injury would result if he did not follow defendant's instructions; (2) the victim acknowledged that during the robbery he was nervous and worried about how his friends and relatives would fare without him; (3) an accomplice testified that, after a shot was fired, the victim prayed for forgiveness for his sins; and (4) the victim behaved compliantly when threatened with the gun. *Evans v. State*, 957 So. 2d 430, 2007 Miss. App. LEXIS 375 (Miss. Ct. App. 2007).

Defendant's convictions for murder, armed robbery, and shooting into an occupied dwelling were appropriate because the evidence was sufficient: two witnesses testified to seeing defendant shoot the victim; a witness further testified to observing defendant removing the victim's clothing and wallet; and a female testified to a shot being fired through her front door at approximately the time that the victim was shot. *Conner v. State*, 971 So. 2d 630, 2007 Miss. App. LEXIS 370 (Miss. Ct. App.), cert. denied, 973 So. 2d 244, 2007 Miss. LEXIS 682 (Miss. 2007).

Under Miss. Code Ann. § 97-3-79, the essential elements of armed robbery included: (1) a felonious taking or attempt to take; (2) from the person or from the

presence; (3) the personal property of another; (4) against his will; (5) by violence to his person or by putting such person in fear of immediate injury to his person by the exhibition of a deadly weapon; defendant's admission to accomplishing what the state intended to prove at trial was a sufficient factual basis for the trial judge to accept defendant's guilty plea for the crime of armed robbery. *Gladney v. State*, 963 So. 2d 1217, 2007 Miss. App. LEXIS 305 (Miss. Ct. App. 2007).

Defendant and his accomplice had consummated the act of armed robbery before they decided to return defendant's property to him because the offense was complete when they attempted the offense; thus, defendant was not entitled to a directed verdict, a peremptory instruction, or a judgment notwithstanding the verdict because abandonment could not occur after the crime had taken place. *White v. State*, 969 So. 2d 72, 2007 Miss. App. LEXIS 247 (Miss. Ct. App.), cert. denied, 968 So. 2d 948, 2007 Miss. LEXIS 658 (Miss. 2007).

Where defendant and his accomplice entered a food market with a gun, ordered the employee to lay down, and took money out of the safe, ample evidence supported the verdict convicting defendant of conspiracy to commit armed robbery. The jury heard testimony that there were phone calls between defendant and his accomplice the day before and the day of the robbery. *Herring v. State*, 938 So. 2d 1251, 2006 Miss. App. LEXIS 82 (Miss. Ct. App.), cert. denied, 939 So. 2d 805, 2006 Miss. LEXIS 752 (Miss. 2006).

There was sufficient evidence to uphold a conviction for conspiracy to commit armed robbery under Miss. Code Ann. § 97-1-1 where the evidence showed that defendant was in a casino with the other perpetrators, he stood behind one of them as a robbery took place, he ran out with them, and he received a portion of stolen money. *Quawrells v. State*, 938 So. 2d 370, 2006 Miss. App. LEXIS 689 (Miss. Ct. App. 2006).

Defendant's conviction for armed robbery was proper because a store supervisor identified defendant from the surveillance tape of the robbery, an employee and his friend identified the jacket that defen-

dant was wearing as the one the robber was wearing, and defendant was apprehended with the exact items stolen from the store as well as a gun. *McFarland v. State*, 936 So. 2d 960, 2006 Miss. App. LEXIS 587 (Miss. Ct. App. 2006).

In a capital murder case, the evidence was sufficient to sustain the underlying armed robbery because a witness testified that two males wearing ski masks and gloves and brandishing pistols entered the store, pointed their guns at the witness and the victim, ordered them to hand over the money, and the victim was shot and killed during the robbery. *Duncan v. State*, 939 So. 2d 772, 2006 Miss. LEXIS 408 (Miss. 2006).

Trial court did not err in denying defendant's motion for judgment notwithstanding the verdict or new trial where the evidence was overwhelmingly in favor of the guilty verdict convicting defendant of armed robbery; defendant was positively identified by two eyewitnesses, concealed money was found in his bed, and his alibi witness was inconsistent. *Williams v. State*, 923 So. 2d 990, 2006 Miss. LEXIS 19 (Miss. 2006).

Prosecution presented sufficient evidence to support the conviction of defendant as the second gunman in a robbery, where an officer testified that he positively identified defendant as the man who was driving the get-away car, co-defendant identified defendant as his partner in the robbery at the time of his arrest, and defendant failed to produce any witnesses or paperwork to corroborate his alibi. *Willis v. State*, 911 So. 2d 947, 2005 Miss. LEXIS 608 (Miss. 2005).

There was ample evidence to support the jury's verdict convicting defendant of capital murder because (1) an accomplice testified that he and defendant attempted to rob the victims and thus proved the underlying felony of robbery, Miss. Code Ann. § 97-3-79; (2) three detectives testified that defendant confessed to shooting the deceased victim; and (3) defendant's letters to the accomplice apparently expressed defendant's concern in the accomplice's testimony against him. Thus, the trial court did not err in denying defendant's motion to dismiss and for a judgment of acquittal. *Moore v. State*, 914 So.

2d 185, 2005 Miss. App. LEXIS 60 (Miss. Ct. App.), cert. denied, 921 So. 2d 344, 2005 Miss. LEXIS 745 (Miss. 2005).

There was sufficient evidence to convict defendant of capital murder under Miss. Code Ann. § 97-3-19 with armed robbery as the underlying felony under Miss. Code Ann. § 97-3-79 in that he confessed to and described the murder and the accounts matched the cashier's and other witnesses'. *Bush v. State*, 895 So. 2d 836, 2005 Miss. LEXIS 93 (Miss. 2005).

State presented testimony from witnesses who identified defendant as the person who committed both the crimes charged. The first victim testified that while working at the convenience store, an individual later identified as defendant, held a box cutter near her neck, and took money out of the cash register and in the burglary case, the victim testified that she was awakened by her cousins screaming and directly confronted defendant; defendant's motions for a directed verdict, judgment notwithstanding the verdict, and a new trial, were therefore properly denied. *Hill v. State*, 912 So. 2d 991, 2004 Miss. App. LEXIS 1129 (Miss. Ct. App. 2004), cert. denied, 921 So. 2d 344, 2005 Miss. LEXIS 680 (Miss. 2005).

Defendant was properly convicted of armed robbery because even if defendant did not actually go into store and commit armed robbery, one could logically conclude that defendant actively participated in the armed robbery as a lookout or driver of the getaway car for brother. Police also recovered a gun, cash, and food stamps located in a shoe box in defendant's girlfriend's apartment. *Smith v. State*, 904 So. 2d 1154, 2004 Miss. App. LEXIS 1001 (Miss. Ct. App. 2004).

One man, who the victim identified as defendant, held a silver handgun to her head, and she testified that although he was wearing pantyhose over his face, she could see right through to his face. Upon initial police response, she gave detailed physical descriptions of all three men and of their car, and when police apprehended the men at a local gas station, the victim was taken to the gas station, she immediately identified defendant and the other two men, and officers found a silver gun on the front seat of the subject vehicle, and

two other handguns in their car; the evidence was sufficient to support defendant's conviction for armed robbery. *McCoy v. State*, 881 So. 2d 312, 2004 Miss. App. LEXIS 864 (Miss. Ct. App. 2004).

Sufficient evidence existed to convict defendant of capital murder with an underlying felony of armed robbery as defendant confessed to the murder after twice waiving his Miranda rights, defendant was seen leaving the murder scene, and the victim's blood was on defendant's clothing. Further, defendant's confession that he attacked the victim when she would not lend him money was sufficient to support a finding of armed robbery under Miss. Code Ann. § 97-3-79. *Carr v. State*, 880 So. 2d 1079, 2004 Miss. App. LEXIS 849 (Miss. Ct. App. 2004).

An abundance of evidence supported the charge of armed robbery by the exhibition of a deadly weapon, including defendant's confession to the trial court that he had possessed a handgun during the robbery, the victim's testimony at the plea hearing, and two other witnesses who were available to testify that defendant had admitted to robbing the store with a handgun. Therefore, defendant's guilty plea was valid notwithstanding defendant's post-sentencing denial of possession of a handgun, and defendant's assertion that defendant only simulated having a weapon. *Ray v. State*, 876 So. 2d 1032, 2004 Miss. App. LEXIS 507 (Miss. Ct. App. 2004).

Trial court properly convicted defendant of armed robbery where defendant was identified on video brandishing a weapon in a store clerk's face and demanding money. This evidence was sufficient to prove all elements of the crime. *McDonald v. State*, 881 So. 2d 895, 2004 Miss. App. LEXIS 398 (Miss. Ct. App. 2004).

Evidence was sufficient to support defendant's armed robbery conviction, because the evidence fairly permitted an inference that defendant purposely took from the victim a cigarette pack believed to contain contraband crack cocaine rocks through the use of a deadly weapon in the form of a knife. *Woods v. State*, 883 So. 2d 583, 2004 Miss. App. LEXIS 371 (Miss. Ct. App. 2004).

Evidence was sufficient to convict defendants of robbery with a deadly weapon where, at trial, the defense presented no credible evidence tending to demonstrate the innocence of defendants and offered no reasonable explanation for their actions; the evidence in favor of defendants was not overwhelmingly contrary to the verdict. *Powell v. State*, 878 So. 2d 144, 2004 Miss. App. LEXIS 37 (Miss. Ct. App.), cert. denied, 878 So. 2d 67, 2004 Miss. LEXIS 962 (Miss. 2004).

Evidence that defendants broke into a hotel room, assaulted one of the occupants with a gun, but aborted their plans after encountering unexpected resistance, was sufficient to establish that they possessed the requisite intent to commit an armed robbery; a victim's watch was found on the floor, and the jury could have found that defendants removed the watch with the intent to take it. *Broomfield v. State*, 878 So. 2d 207, 2004 Miss. App. LEXIS 1182 (Miss. Ct. App.), cert. denied, 878 So. 2d 66, 2004 Miss. LEXIS 935 (Miss. 2004).

Defendants' conviction of armed robbery was not against the overwhelming weight of the evidence as (1) they were identified as the men who broke into a hotel room, assaulted one of the occupants with a gun, but fled when they encountered resistance; (2) duct tape found in the hotel room matched a roll of duct tape found in defendants' vehicle; and (3) they presented no credible evidence tending to demonstrate their innocence nor a reasonable explanation for their actions. *Broomfield v. State*, 878 So. 2d 207, 2004 Miss. App. LEXIS 1182 (Miss. Ct. App.), cert. denied, 878 So. 2d 66, 2004 Miss. LEXIS 935 (Miss. 2004).

Defendant and the first co-defendant entered the car, the first co-defendant took the victim's money at gunpoint which was divided equally, a second co-defendant then shot and killed the victim with the gun defendant had brought, and defendant and the first co-defendant testified that they had planned the robbery, thus, the evidence was sufficient to support defendant's convictions for conspiracy to commit robbery with a deadly weapon, robbery with a deadly weapon, and manslaughter. *Harrington v. State*, 859 So. 2d 1054, 2003 Miss. App. LEXIS 1084 (Miss. Ct. App. 2003).

In defendant's armed robbery prosecution, the cashier not only felt the weapon at her side (a tool-like object), but also saw the weapon, and unlike in prior precedents where the victim did not see the object thought to be a deadly weapon, the evidence was sufficient to sustain defendant's conviction for armed robbery while displaying or using a deadly weapon. *Brown v. State*, 859 So. 2d 1039, 2003 Miss. App. LEXIS 1085 (Miss. Ct. App. 2003).

Defendant's convictions of rape, Miss. Code Ann. § 97-3-71, and armed robbery, Miss. Code Ann. § 97-3-79, were affirmed; defendant's claims concerning the sufficiency and weight of the evidence were procedurally barred, as defendant failed to renew a motion for a directed verdict. *Collins v. State*, 858 So. 2d 217, 2003 Miss. App. LEXIS 1004 (Miss. Ct. App. 2003).

Although a witness was unable to testify about the correct color of a get-away car, there was sufficient evidence to support convictions for armed robbery and conspiracy to commit armed robbery based on the identification of witnesses and the testimony of another perpetrator. *Quinn v. State*, 873 So. 2d 1033, 2003 Miss. App. LEXIS 1006 (Miss. Ct. App. 2003), cert. denied, 873 So. 2d 1032, 2004 Miss. LEXIS 597 (Miss. 2004).

Circuit court correctly denied defendant's motions for a judgment notwithstanding the verdict and a new trial where the victim's statement, contradicting defendant's version of the facts, sustained the verdict; defendant's initial unrecorded statement was an admission of guilt and defendant had twice changed his story, such that the evidence was sufficient to convict defendant. *Moore v. State*, 858 So. 2d 190, 2003 Miss. App. LEXIS 981 (Miss. Ct. App. 2003).

Defendant's conviction for armed robbery was proper where the evidence was sufficient because the store clerk described defendant and the female clothing that he was wearing and identified the clothing found by police as the same that the robber was wearing; the driver likewise described the clothing and the geographic location where defendant had thrown them from her vehicle and the driver also admitted driving defendant, in

the woman's clothing, to the vicinity of the liquor store and a bottle of vodka of the same size and brand stolen from the store was found in the back seat of the driver's vehicle. *Peyton v. State*, 858 So. 2d 156, 2003 Miss. App. LEXIS 896 (Miss. Ct. App. 2003).

Defendants' convictions for armed robbery were proper where, at trial, the defense presented no credible evidence tending to demonstrate the innocence of defendants nor a reasonable explanation for their actions; further, the testimony concerning the manner in which defendants entered the room, their subsequent conduct, the fact that they fled and resisted arrest, and that a reasonably supported inference existed that there was an attempt to take one of the victim's watch all sustained a finding by a reasonable minded jury that defendants committed armed robbery. *Broomfield v. State*, 2003 Miss. App. LEXIS 914 (Miss. Ct. App. Oct. 7, 2003), op. withdrawn, sub. op., 878 So. 2d 207, 2004 Miss. App. LEXIS 1182 (Miss. Ct. App. 2004).

There was sufficient evidence to sustain defendant's armed robbery conviction where the evidence showed that defendant admitted to being present at the scene and was positively identified by a victim during the investigation and at trial; therefore, a trial court did not err by denying defendant's motion for judgment notwithstanding the verdict. *Weaver v. State*, 852 So. 2d 82, 2003 Miss. App. LEXIS 541 (Miss. Ct. App. 2003).

Evidence was sufficient to convict defendant of armed robbery pursuant to Miss. Code Ann. § 97-3-79, and the verdict was not against the manifest weight of the evidence; testimony of the codefendant and the driver of the getaway car established that defendant was a principal in both the planning and execution of the robbery, in which defendant and the codefendant stole the victim's jewelry at gunpoint. *Smith v. State*, 848 So. 2d 195, 2003 Miss. App. LEXIS 350 (Miss. Ct. App. 2003).

Because (1) two victims identified defendant as one of the robbers, (2) defendant's former girlfriend testified that defendant told her of the plans to rob someone and later showed her some of the

stolen items, (3) the police recovered some of the stolen items from the woods behind the girlfriend's house, and (4) defendant confessed to the crime, the evidence was sufficient to uphold defendant's conviction of armed robbery; thus, the trial court did not err in denying defendant's motion for a directed verdict, motion for judgment notwithstanding the verdict, and defendant's request for peremptory instructions. *Lott v. State*, 844 So. 2d 502, 2003 Miss. App. LEXIS 380 (Miss. Ct. App. 2003).

In reviewing the evidence presented to the jury, the appellate court found that the State presented evidence in accordance with Miss. Code Ann. § 97-3-79, which revealed that defendant intentionally exhibited a deadly weapon which placed the victim in fear of injury, and that defendant took funds from the store; thus, the trial court did not err in its denial of the motion for directed verdict and the appellate court did not find that the verdict was against the overwhelming weight of the evidence. *Ferguson v. State*, 856 So. 2d 334, 2003 Miss. App. LEXIS 133 (Miss. Ct. App. 2003).

Evidence that defendant shot the victim with a handgun while trying to take the victim's wallet but that defendant fled without taking anything was sufficient to support defendant's conviction for armed robbery because the attempt to take the wallet was sufficient by itself to support the charge; prior appellate ruling voiding defendant's attempt to plead guilty because of confusion over what crime was being charged did not preclude conviction on remand. *Stevens v. State*, 840 So. 2d 785, 2003 Miss. App. LEXIS 181 (Miss. Ct. App. 2003).

In a prosecution for attempted robbery, evidence that defendant attacked a man with a knife, was shot in the back by the man's brother, was found underneath a trailer with a bullet wound to the back, and that he twice confessed that this incident was part of an attempted robbery, was sufficient to justify denial of his motion for judgment notwithstanding the verdict. *Wimberly v. State*, 839 So. 2d 553, 2002 Miss. App. LEXIS 867 (Miss. Ct. App. 2002).

Evidence that defendant pointed a gun at two store clerks, demanded money, and

took money from the cash register drawer and the clerks' purses, was of sufficient weight and quality that a fair-minded jury could find defendant guilty on two counts of armed robbery despite defendant's arguments that the fact that defendant's fingerprints did not match any fingerprints found on items handled by the robber, that the victims stated that the robber had a scar under his eye while defendant did not have such a scar, that no weapon was recovered from defendant, and that neither victim testified that the robber had cursed at or touched them, fired any shots, or otherwise threatened the victims showed that the State had failed to carry its burden of proof. *Womack v. State*, 827 So. 2d 55, 2002 Miss. App. LEXIS 518 (Miss. Ct. App. 2002).

Evidence was sufficient to establish a causal connection between the victim's fear and his giving up his wallet where the victim testified that he parted with his wallet out of fear when the defendant pulled the hammer back on his gun. *Myles v. State*, 774 So. 2d 486, 2000 Miss. App. LEXIS 427 (Miss. Ct. App. 2000).

In a prosecution for aggravated assault and capital murder, the evidence was sufficient to establish that the defendant attempted to commit the underlying felony of armed robbery where the defendant confessed that a copetrator stated that he intended to rob a store, and the defendant accepted a gun from the copetrator, masked his face, and walked into the store wielding the gun. *Spann v. State*, 771 So. 2d 883, 2000 Miss. LEXIS 197 (Miss. 2000).

Evidence was sufficient to support a conviction for a violation of the statute where (1) testimony at trial by the defendant's witness concerning her role in the crime contradicted her sworn testimony from her plea bargain hearing, (2) an officer testified that the defendant's testimony regarding his whereabouts at the time of the robbery contradicted a statement he gave shortly after his arrest, and (3) two witnesses picked the defendant out of a line-up. *Grihim v. State*, 760 So. 2d 865, 2000 Miss. App. LEXIS 262 (Miss. Ct. App. 2000).

Because defendant forced his way into the victims' home brandishing a knife,

struck the husband with the knife, demanded money from the wife, who testified that she gave defendant a small amount of cash and wrote him a check for \$500 because she was afraid of him, there was sufficient evidence from which the jury could find that defendant committed armed robbery. *Thomas v. State*, 754 So. 2d 579, 2000 Miss. App. LEXIS 13 (Miss. Ct. App. 2000).

Though the defendant contended that he shot the victim in self-defense only, there existed substantial evidence upon which the jury could have found that he shot the victim in an effort to take his money; two different accounts of the incident were given by the defendant and the victim, but the jury was the sole judge of the weight and worth of their testimony. *Brown v. State*, 726 So. 2d 248, 1998 Miss. App. LEXIS 1119 (Miss. Ct. App. 1998).

Defendant's confession, coupled with witness' verification of defendant's story, was sufficient to support convictions of murder and armed robbery when coupled with other trial testimony, even though witness had made deal with state for lesser sentence if he testified against defendant; jury was made aware of deal. *Morgan v. State*, 681 So. 2d 82, 1996 Miss. LEXIS 429 (Miss. 1996).

Evidence that alleged victim of armed robbery was in fear of immediate injury was sufficient to support defendant's conviction for armed robbery, despite contention he was involved in the crime, where conflicting testimony was offered as to victim's state of mind and jury had opportunity to assess credibility of victim, police officer and accomplices to crime, though one accomplice gave pretrial statement that an additional person known to another accomplice was to be included in split of money obtained in robbery. *Jones v. State*, 669 So. 2d 1383, 1995 Miss. LEXIS 586 (Miss. 1995).

The evidence was insufficient to support a conviction for armed robbery as an accessory before the fact where none of the witnesses who testified at trial saw the defendant prior to or during the armed robbery, the first time anyone saw the defendant was approximately 20 minutes after the commission of the armed robbery, and there was no evidence showing

that the defendant was aware of his companions' activities prior to the actual commission of the armed robbery and no reasonable inference from other evidence to show any such knowledge by the defendant. *Gangl v. State*, 612 So. 2d 333, 1992 Miss. LEXIS 562 (Miss. 1992).

Evidence was sufficient to support guilty verdict of jury for armed robbery where defendant had been with victim in victim's truck, and had been seen by numerous people; defendant had come into store and said he was going to "clip" the white man; defendant had come back to store alone in victim's truck; and defendant had been identified as person who drove victim's truck into service station in Memphis some 4 to 5 hours after incident and used victim's credit card to buy gas and food. *Ratliff v. State*, 515 So. 2d 877, 1987 Miss. LEXIS 2874 (Miss. 1987).

Evidence sustained defendant's conviction for armed robbery of couple parked in automobile where defendant's fingerprints were found on automobile, hairs found on defendant's shirt came from male victim, defendants own witness exploded his explanation of why he possessed stocking and gloves similar to those used by the robber, and stories told by defendant's wife and brother-in-law to furnish him with an alibi were incredible. *Watkins v. State*, 500 So. 2d 462, 1987 Miss. LEXIS 2246 (Miss. 1987).

Armed robbery defendant's conviction was supported by evidence which positively identified him as being in the store shortly before the robbery at an early morning hour, and further showed that he had been found on the ground behind the building into which the other robber had fled, that he had fled upon being discovered by a police officer, that he refused to halt when informed he was a robbery suspect, that he resisted the police officers attempt to take him into custody and that merchandise of the kind sold in the store was found at the place where the defendant had been found lying down. *McGilveray v. State*, 497 So. 2d 67, 1986 Miss. LEXIS 3104 (Miss. 1986).

Notwithstanding inconsistencies in accomplice's testimony, jury verdict finding defendant guilty of armed robbery was supported by credible evidence, where one

witness testified that he had left the car with a gun and returned with a cigar box containing money, and 2 other witnesses gave identification testimony. *Arteigapiloto v. State*, 496 So. 2d 681, 1986 Miss. LEXIS 2714 (Miss. 1986).

Although an accomplice had actually robbed the store at gunpoint, defendant's guilt as a principal in the commission of the crime was clearly established by evidence that he had planned the crime, had cased the store prior to the robbery, had furnished the gun, had furnished camouflaged hat and coat worn by the accomplice while robbing the store, had supplied and driven the get-away car, and had taken the money bag when the accomplice got back into the car after the robbery. *Walker v. State*, 493 So. 2d 1323, 1986 Miss. LEXIS 2643 (Miss. 1986).

Evidence was sufficient to sustain conviction for armed robbery where defendant admitted that he was guilty of breaking and entering, stated that he had looked through a drawer for something to steal, and further stated that the whole time he was in the house he intended to steal, with other participants who were armed, and he had only changed his mind when he couldn't find anything to steal. *Kelly v. State*, 493 So. 2d 356, 1986 Miss. LEXIS 2575 (Miss. 1986).

Jury verdict finding defendant guilty of armed robbery as an accessory before the fact was amply supported by testimony of state's principal witness, the person who actually assaulted and wrestled jewels from the victim, that defendant masterminded the crime, which testimony was corroborated by another witness, and by testimony of the defendant placing himself with the co-defendants before the fact and with the stolen jewels on the evening of the crime. *Malone v. State*, 486 So. 2d 360, 1986 Miss. LEXIS 2419 (Miss. 1986).

Testimony of eyewitnesses identifying defendants as persons who committed armed robbery, together with facts surrounding identification, are sufficient basis upon which jury may reject alibi testimony and convict defendants. *Belino v. State*, 465 So. 2d 1043, 1985 Miss. LEXIS 1968 (Miss. 1985).

Identification of the accused by the robbery victim, together with corroborating

evidence, was sufficient to sustain conviction under this section [Code 1942, § 2367]. *Smith v. State*, 242 Miss. 728, 137 So. 2d 172, 1962 Miss. LEXIS 586 (Miss. 1962).

A charge that a stated amount of money was taken is supported by evidence that the exact amount was not known, but was approximately that charged. *Passons v. State*, 239 Miss. 629, 124 So. 2d 847, 1960 Miss. LEXIS 332 (Miss. 1960).

Evidence in robbery prosecution of resistance, outcry, complaint and immediate report by victim, is sufficient to warrant jury finding that the taking was against victim's will. *Littrell v. State*, 19 So. 2d 438 (Miss. 1944).

Where indictment charged taking of money from person and presence of certain parties, evidence that accused took money from presence of the named parties sustained conviction of robbery under statute defining robbery as feloniously taking from the person, or from the presence of another by violence. *Turner v. State*, 177 Miss. 272, 171 So. 21, 1936 Miss. LEXIS 273 (Miss. 1936).

13. — Exhibition or use of weapon.

Trial court did not err in accepting appellant's guilty plea because the indictment, the prosecutor's statement, and appellant's testimony all established a sufficient factual basis for the crimes of kidnapping, armed robbery, and attempted sexual battery; substantial evidence was presented that appellant committed the crimes to which he pleaded guilty, and the police report showed the victim reasonably believed a gun was real. *Green v. State*, — So. 3d —, 2019 Miss. App. LEXIS 73 (Miss. Ct. App. Feb. 19, 2019), cert. denied, 276 So. 3d 660, 2019 Miss. LEXIS 298 (Miss. 2019), cert. denied, — U.S. —, 140 S. Ct. 876, 205 L. Ed. 2d 494, 2020 U.S. LEXIS 324 (U.S. 2020).

Sufficient evidence was presented for a jury to find, beyond a reasonable doubt, all of the elements of armed robbery because the State presented evidence suggesting that defendant planned, committed, and confirmed the robbery; witnesses' testimony and videos showed that men took the witnesses cell phones and the store's money while brandishing a handgun, and

both witnesses testified that they became afraid after seeing the weapon. *Lenoir v. State*, 224 So. 3d 85, 2017 Miss. LEXIS 79 (Miss. 2017).

There was sufficient evidence to find defendant guilty of armed robbery because the State offered sufficient evidence to show that he used a gun during the robbery and that his use of the gun was intended to intimidate or cause fear in the victim; not only did defendant bring his own gun in preparation for the robbery, he also snatched the victim's gun away from him, and the victim testified that during the altercation he was in a state of shock. *Jenkins v. State*, 232 So. 3d 167, 2017 Miss. App. LEXIS 239 (Miss. Ct. App.), cert. denied, 229 So. 3d 121, 2017 Miss. LEXIS 500 (Miss. 2017), cert. denied, — U.S. —, 138 S. Ct. 1311, 200 L. Ed. 2d 492, 2018 U.S. LEXIS 1671 (U.S. 2018).

Because it was well-established that the jury determined whether an item was actually a deadly weapon under Miss. Code Ann. § 97-3-79 (Rev. 2014), and because the jury was properly instructed on the issue, defendant's contention that the State failed in its burden to prove the knife was a deadly weapon had no merit. *Jackson v. State*, 174 So. 3d 232, 2015 Miss. LEXIS 455 (Miss. 2015).

Despite the testimony from defendant's alibi witnesses, the jury verdict was supported by the evidence, including the testimony of two eyewitnesses to the armed robbery committed by defendant, as well as the testimony of defendant's two accomplices, which testimony was consistent with the testimony of the eyewitnesses. Whether the gun that was used to commit the crime was operable was irrelevant. *Flowers v. State*, 144 So. 3d 188, 2014 Miss. App. LEXIS 17 (Miss. Ct. App.), cert. denied, 145 So. 3d 674, 2014 Miss. LEXIS 399 (Miss. 2014).

Defendant's conviction for attempted armed robbery was supported by the evidence because the jury was presented with testimony and evidence that defendant attempted to feloniously take money from the victims against their will by putting them in fear of immediate injury by the exhibition of a deadly weapon, i.e., a gun. *Tugle v. State*, 68 So. 3d 691, 2010 Miss. App. LEXIS 668 (Miss. Ct. App.

2010), cert. denied, 69 So. 3d 767, 2011 Miss. LEXIS 416 (Miss. 2011).

Defendant's conviction for armed robbery and the denial of his motion for a new trial were both proper because his argument that he was only trying to get the money that he was owed was of no avail since there was no proposition that if a man collected a debt by force and threats, that he would not be guilty of robbery. Additionally, defendant admitted to pulling out a gun and pointing it at the victim. *McClendon v. State*, 17 So. 3d 184, 2009 Miss. App. LEXIS 550 (Miss. Ct. App. 2009).

Defendant's actions of entering the victim's home with a concealed pistol and shooting him once he learned that his accomplice failed to complete the robbery more than satisfied the requisite showing of an overt act in furtherance of his intent to rob the victim; there was abundant proof that defendant possessed the intent to rob the victim by placing him in fear through the exhibition of a deadly weapon. The evidence was sufficient to support defendant's conviction for attempted armed robbery and conspiracy to commit armed robbery under Miss. Code Ann. § 97-3-79. *Wallace v. State*, 9 So. 3d 433, 2008 Miss. App. LEXIS 707 (Miss. Ct. App. 2008), cert. denied, 12 So. 3d 531, 2009 Miss. LEXIS 223 (Miss. 2009).

Evidence was sufficient to convict defendant of armed robbery where a bank teller testified that she believed that defendant had a weapon, that his note indicated that he had a gun, and that she was in fear for her life. *Lyons v. State*, 942 So. 2d 247, 2006 Miss. App. LEXIS 501 (Miss. Ct. App. 2006), cert. denied, 957 So. 2d 1004, 2007 Miss. LEXIS 269 (Miss. 2007).

Defendant's motion for judgment notwithstanding the verdict was properly denied because a reasonable jury could have found from the bank teller's testimony that defendant exhibited a deadly weapon during the robbery, even though no gun was recovered when defendant was detained minutes after the robbery and no gun was visible on the videotape of the robbery. *Clayton v. State*, 946 So. 2d 796, 2006 Miss. App. LEXIS 482 (Miss. Ct. App. 2006), cert. dismissed, 947 So. 2d 960, 2007 Miss. LEXIS 64 (Miss. 2007).

Trial court did not err in denying defendant's motion for a directed verdict where a jury heard defendant admit to using a pellet gun in order to rob a clerk at a store of money, cigarettes, and a car; there was testimony that a pellet gun could inflict serious bodily injury; therefore, there was sufficient evidence to support his armed robbery conviction. *Thomas v. State*, 936 So. 2d 964, 2006 Miss. App. LEXIS 610 (Miss. Ct. App. 2006).

Defendant's conviction for armed robbery under Miss. Code Ann. § 97-3-79 (Rev. 2000) was affirmed as defendant held a hand behind his back when he first asked for the drugs and the victim later saw defendant's knife; thus, the evidence was sufficient to prove the robbery was procured through the exhibition of a deadly weapon. *Yucaitis v. State*, 909 So. 2d 166, 2005 Miss. App. LEXIS 578 (Miss. Ct. App. 2005).

Court properly denied defendant's motion for judgment notwithstanding the verdict after he was convicted of armed robbery because a store clerk identified defendant as one of her assailants. Clerk also testified as to the presence of a gun. *Young v. State*, 910 So. 2d 26, 2005 Miss. App. LEXIS 5 (Miss. Ct. App. 2005).

Where defendant entered a convenience store with a t-shirt partially covering his face and carrying a knife in his right hand, then stopped when he saw the store clerk on the phone, and fled, the evidence was sufficient to support his conviction for attempted armed robbery. The State failed to prove that the victim was placed in immediate fear by exhibition of a deadly weapon, an essential element of the crime of attempted armed robbery. *Dambrell v. State*, 905 So. 2d 655, 2004 Miss. App. LEXIS 479 (Miss. Ct. App. 2004), rev'd, 903 So. 2d 681, 2005 Miss. LEXIS 144 (Miss. 2005).

In reviewing the evidence presented to the jury, the appellate court found that the State presented evidence in accordance with Miss. Code Ann. § 97-3-79, which revealed that defendant intentionally exhibited a deadly weapon which placed the victim in fear of injury, and that defendant took funds from the store; thus, the trial court did not err in its denial of the motion for directed verdict and the appellate

court did not find that the verdict was against the overwhelming weight of the evidence. *Ferguson v. State*, 856 So. 2d 334, 2003 Miss. App. LEXIS 133 (Miss. Ct. App. 2003).

Defendant's conviction for armed robbery was reversed, as the State presented no objective evidence that defendant possessed a gun at the time of the robbery; assumptions made by the robbery victims that defendant was hiding a gun under a paper bag were not enough to support the conviction. *Blue v. State*, 827 So. 2d 721, 2002 Miss. App. LEXIS 524 (Miss. Ct. App. 2002).

Teller saw a gun and the jury's guilty verdict could be based on the uncorroborated testimony of a single witness as a reasonable and fair-minded juror could have found the robbery was committed with the aid of a handgun and the evidence was sufficient to convict defendants of armed robbery. *Collins v. State*, 817 So. 2d 644, 2002 Miss. App. LEXIS 313 (Miss. Ct. App. 2002).

Evidence was insufficient to support a conviction under this section since no deadly weapon was exhibited or the use of a deadly weapon threatened by the defendant; the defendant approached the victim in a store to make a purchase, the defendant handed the victim a bill, the victim opened the register to make change in response to the purchase, and the defendant grabbed \$60.00 dollars and ran, and the only evidence presented by the state with regard to a weapon was that the victim saw part of a kitchen knife in the defendant's pocket. *Clark v. State*, 756 So. 2d 730, 1999 Miss. LEXIS 274 (Miss. 1999).

The evidence did not establish that the defendant exhibited a knife in the course of stealing cash from a store where the state's only proof of the use of a deadly weapon was the clerk's testimony that he noticed what he thought was the handle of a kitchen knife, which was only briefly visible, and the state did not contend that the defendant ever threatened the clerk or brandished the knife in any fashion. *Clark v. State*, 1999 Miss. LEXIS 161 (Miss. Apr. 22, 1999), op. withdrawn, sub. op., 756 So. 2d 730, 1999 Miss. LEXIS 274 (Miss. 1999).

Evidence was insufficient to show that the defendant stole a truck by exhibiting a deadly weapon where the victim testified that the defendant told him to get out of the truck, that the defendant poked something hard through his jacket pocket into his ribs, and that he assumed that the hard object, which he could not see, was a gun since no imprint of a gun was seen; the defendant did not say to anyone, before or after, that he had a gun, and he did not threaten to shoot anyone. *Gibby v. State*, 744 So. 2d 244, 1999 Miss. LEXIS 112 (Miss. 1999), overruled, *Dambrell v. State*, 903 So. 2d 681, 2005 Miss. LEXIS 144 (Miss. 2005).

Evidence, along with reasonable inferences flowing therefrom, was sufficient to present jury question as to whether defendant exhibited deadly weapon in conjunction with robbery where defendant had under his shirt object which looked like gun and victim testified that she saw prints of gun. *Hughey v. State*, 512 So. 2d 4, 1987 Miss. LEXIS 2752 (Miss. 1987).

Testimony from store manager that manager did not touch or restrain person stealing meat from leaving store and area of store by physical force because manager was afraid of pocket knife exhibited by person to manager, apparently for purpose of instilling fear to stop apprehension and pursuit, is sufficient to support conviction for armed robbery. *Presley v. State*, 474 So. 2d 612, 1985 Miss. LEXIS 2190 (Miss. 1985).

Where evidence indicated that defendant addressed everyone in a church, demanding that personal valuables be brought down the aisle and placed in front of him, where he was waving and pointing a shotgun all around the church sanctuary, and where individual victims named in the indictment started to comply or intended to comply with the demand for their valuables, the trial court did not err in declining to grant a directed verdict as to five counts of attempted robbery in violation of this section. *Smith v. State*, 445 So. 2d 227, 1984 Miss. LEXIS 1592 (Miss. 1984).

In a prosecution for attempted armed robbery under this section, evidence was sufficient to prove specific intent to rob, within the meaning of the statute, where

the uncontradicted evidence indicated that defendant and a partner entered a bank, and defendant pointed a gun at an employee while his partner assaulted other employees, even though both fled before any demand was made for money. *Perry v. State*, 435 So. 2d 680, 1983 Miss. LEXIS 2725 (Miss. 1983).

Testimony establishing that defendant jerked bills out of victim's hand and at same time pulled pistol on him justified the jury in finding defendant guilty of armed robbery beyond reasonable doubt. *Sykes v. State*, 291 So. 2d 697, 1974 Miss. LEXIS 1734 (Miss. 1974).

Defendant's threat that he would cut victim's heart out, coupled with the menacing gestures with a knife, was enough to instill a disabling apprehension of great personal injury, and defendant's threat that a buddy would be watching in the bank was sufficient to prevent victim from seeking help, and jury was justified in returning a verdict of guilty of armed robbery. *Anderson v. State*, 285 So. 2d 748, 1973 Miss. LEXIS 1293 (Miss. 1973).

Proof of the threatening exhibition of a weapon which may be deadly if used is prima facie evidence that it can and will be so used. *Cittadino v. State*, 199 Miss. 235, 24 So. 2d 93, 1945 Miss. LEXIS 284 (Miss. 1945).

Proof that defendant was armed with a drawn pistol and that victim was thereby compelled to submit to surrender of his goods is sufficient to sustain conviction under this section [Code 1942, § 2367], without direct proof that the pistol was loaded or that its use as a bludgeon was threatened or attempted. *Cittadino v. State*, 199 Miss. 235, 24 So. 2d 93, 1945 Miss. LEXIS 284 (Miss. 1945).

14. Instructions; generally.

Circuit court did not abuse its discretion in defendant's armed robbery trial by allowing a jury instruction that when a defendant made an overt act and a person would believe that a deadly weapon was present, there was no requirement that a victim actually see the weapon, as defendant patted his pants leg to signal that he had a gun, plus he said he had a gun. *Chilton v. State*, 245 So. 3d 525, 2017 Miss. App. LEXIS 622 (Miss. Ct. App.

2017), cert. denied, 246 So. 3d 883, 2018 Miss. LEXIS 288 (Miss. 2018).

Absence of the words "felonious intent" had no effect on the State's burden of proof in defendant's armed robbery trial, and the jury was properly instructed as to the State's burden of proof, plus the challenged instruction tracked the language of the statute. *Chilton v. State*, 245 So. 3d 525, 2017 Miss. App. LEXIS 622 (Miss. Ct. App. 2017), cert. denied, 246 So. 3d 883, 2018 Miss. LEXIS 288 (Miss. 2018).

There was no error in the instruction on accomplice testimony; although the circuit court found that the record contained corroborating testimony to connect defendant to the armed robbery and burglary, the circuit court gave the proffered instruction out of an abundance of caution, and the instruction mirrored language in case law. *Lathan v. State*, 164 So. 3d 484, 2014 Miss. App. LEXIS 569 (Miss. Ct. App. 2014), cert. denied, 163 So. 3d 301, 2015 Miss. LEXIS 247 (Miss. 2015).

Trial court did not err by refusing a proposed theory-of-the-case instruction because the instruction was redundant. *James v. State*, 146 So. 3d 985, 2014 Miss. App. LEXIS 66 (Miss. Ct. App.), cert. denied, 146 So. 3d 981, 2014 Miss. LEXIS 463 (Miss. 2014).

Because the record provided evidence corroborating an accomplice's testimony, the trial court was not required to instruct the jury to regard the accomplice's testimony with great caution and suspicion. *James v. State*, 146 So. 3d 985, 2014 Miss. App. LEXIS 66 (Miss. Ct. App.), cert. denied, 146 So. 3d 981, 2014 Miss. LEXIS 463 (Miss. 2014).

Trial court properly refused a requested instruction because, reading all the given instructions together, the jury was fairly, fully, and accurately instructed regarding its duty to consider and weigh the credibility of witness testimony. *James v. State*, 146 So. 3d 985, 2014 Miss. App. LEXIS 66 (Miss. Ct. App.), cert. denied, 146 So. 3d 981, 2014 Miss. LEXIS 463 (Miss. 2014).

Trial court properly instructed the jury on the law regarding the use of a deadly weapon element of armed robbery. Furthermore, whether the gun that was used to commit the crime was operable was

irrelevant. *Flowers v. State*, 144 So. 3d 188, 2014 Miss. App. LEXIS 17 (Miss. Ct. App.), cert. denied, 145 So. 3d 674, 2014 Miss. LEXIS 399 (Miss. 2014).

In defendant's trial on a charge of armed robbery, Miss. Code Ann. § 97-3-79, the trial court properly refused defendant's requested circumstantial evidence instruction because there was direct evidence presented, and the case was not a circumstantial-evidence case; the requested instruction was a two-theory instruction. *Lewis v. State*, 110 So. 3d 814, 2013 Miss. App. LEXIS 105 (Miss. Ct. App. 2013), cert. denied, 131 So. 3d 577, 2014 Miss. LEXIS 22 (Miss. 2014).

Three defendants' capital-murder convictions were appropriate because, although a limiting instruction given to the jury regarding confessions by defendants was not sufficient, no prejudice or manifest injustice resulted as to any defendant; each of the defendants gave sufficient evidence of his individual participation in the robbery of a gun store in his separate statements to support a capital-murder charge. *Anderson v. State*, 5 So. 3d 1088, 2007 Miss. App. LEXIS 677 (Miss. Ct. App. 2007), cert. denied, 11 So. 3d 1250, 2009 Miss. LEXIS 171 (Miss. 2009), cert. denied, 11 So. 3d 1250, 2009 Miss. LEXIS 184 (Miss. 2009), cert. denied, 11 So. 3d 1250, 2009 Miss. LEXIS 177 (Miss. 2009).

Defendant and his accomplice had consummated the act of armed robbery before they decided to return defendant's property to him because the offense was complete when they attempted the offense; thus, defendant was not entitled to a jury instruction on abandonment of the offense because it was already completed. *White v. State*, 969 So. 2d 72, 2007 Miss. App. LEXIS 247 (Miss. Ct. App.), cert. denied, 968 So. 2d 948, 2007 Miss. LEXIS 658 (Miss. 2007).

There was no factual basis to support an instruction that a robbery without a deadly weapon occurred; even if defendant was not the person who actually was holding the weapon, defendant participated in the robbery, and the trial court did not err in denying an instruction for simple robbery. *Harrington v. State*, 859 So. 2d 1054, 2003 Miss. App. LEXIS 1084 (Miss. Ct. App. 2003).

A trial court's failure to instruct the jurors in an armed robbery prosecution to view accomplices' testimony with caution and suspicion constituted reversible error where there was no physical evidence corroborating the accomplices' testimony, the armed robbery went unsolved for over 5 years, one of the accomplices who testified as a witness was granted absolute immunity in exchange for his testimony and also admitted to committing at least 25 felonies, and the other accomplice had entered a plea of not guilty to the charge of armed robbery, which he confessed to committing in his testimony, and had not yet gone to trial. An instruction given by the trial court directing the jury to consider accomplice testimony with "great care and caution" was insufficient since the difference between being told to exercise "great care" and to regard with "suspicion" is a difference of vast degree; in deleting the requirement to view accomplices' testimony with suspicion, the trial judge effectively diluted the instruction. *Wheeler v. State*, 560 So. 2d 171, 1990 Miss. LEXIS 197 (Miss. 1990).

An instruction that was tantamount to telling the jury that the defendant was present and participated in the robbery was erroneous, because it assumed as true a material fact which the jury alone could find, and the instruction, in its existing form, should not be given at a new trial. *Bridgeforth v. State*, 498 So. 2d 796, 1986 Miss. LEXIS 2852 (Miss. 1986).

In a prosecution for being an accessory before the fact of armed robbery, use of terms usually associated with "conspiracy" in one of the state's instructions was not fatal, especially where any alleged deficiency in the matter of advising the jury of the concepts of aiding and abetting and specific intent was cured by 2 other instructions, as the reviewing court does not examine jury instructions in isolation but, rather, reads all instructions as a whole to determine whether the jury has been correctly instructed. *Malone v. State*, 486 So. 2d 360, 1986 Miss. LEXIS 2419 (Miss. 1986).

Instruction to jury on issue of whether gun used in robbery is deadly weapon need not mention that gun is blank starter pistol; such mention would constitute im-

permissible comment by court on evidence. *Duckworth v. State*, 477 So. 2d 935, 1985 Miss. LEXIS 2455 (Miss. 1985).

Robbery defendant is not entitled to jury instruction to effect that eyewitness testimony should be viewed with caution. *Robinson v. State*, 473 So. 2d 957, 1985 Miss. LEXIS 2164 (Miss. 1985).

In a prosecution for armed robbery pursuant to this section, the trial court did not err in charging the jury that it could find defendant guilty if it concluded that he had "attempted" to take property from the victim where the statute also prohibited an attempt to commit the crime of robbery, unlike § 97-3-73, relied upon by defendant, which does not include an attempt in the definition of robbery and was not the statute under which defendant was charged. *Cooper v. State*, 386 So. 2d 1115, 1980 Miss. LEXIS 2057 (Miss. 1980).

Although defendant's instruction was unartfully drawn, it should have been granted since there was no other instruction clearly showing the required element of asportation essential to prove the crime of robbery. *Thomas v. State*, 278 So. 2d 469, 1973 Miss. LEXIS 1451 (Miss. 1973).

Where there was testimony showing that three persons including the accused, acted in concert in committing a robbery, each was responsible and accountable for the wrongful actions of the other two, including the use of a knife during the armed robbery by one of the codefendants, and the trial court was justified in refusing an unarmed robbery instruction requested by the defendant, who did not himself use a knife during the incident. *Ivey v. State*, 232 So. 2d 368, 1970 Miss. LEXIS 1626 (Miss. 1970).

Instruction in prosecution for robbery with firearms which makes effort to define reasonable doubt is bad, but not harmful error when by other instructions defendant has obtained fair and full statement of law applicable to case. *Passons v. State*, 208 Miss. 545, 45 So. 2d 131, 1950 Miss. LEXIS 273 (Miss. 1950), overruled, *Simmons v. State*, 568 So. 2d 1192, 1990 Miss. LEXIS 605 (Miss. 1990).

In robbery prosecution charging defendant with taking a pistol from the person of the prosecuting witness against her

will, by putting her in fear of immediate injury to her person by the exhibition of a deadly weapon, trial court erred in not granting defendant's instruction that he could not be convicted of robbery by means of a deadly weapon, where evidence showed that he took pistol from victim by physical force. *Newsome v. State*, 203 Miss. 449, 35 So. 2d 441, 1948 Miss. LEXIS 292 (Miss. 1948).

Failure of court to grant instruction directing jury to find defendant not guilty in robbery prosecution charging him with taking a pistol from victim by the exhibition of a deadly weapon, where evidence showed that he took pistol by physical force, did not constitute error where the evidence would justify defendant's conviction under Code 1942, § 2362. *Newsome v. State*, 203 Miss. 449, 35 So. 2d 441, 1948 Miss. LEXIS 292 (Miss. 1948).

While it is improper for the court to instruct the jury as to the court's sentence should the jury fail to assess the death penalty, it is not reversible error where it does not appear that but for such instruction the jury would not have fixed the penalty at death. *Boyd v. State*, 202 Miss. 509, 32 So. 2d 452, 1947 Miss. LEXIS 308 (Miss. 1947).

Instruction authorizing jury to convict if accused used a pistol and a large dirk knife in perpetrating a robbery was not prejudicial where accused had confessed that he was armed with a pistol, notwithstanding state's attempt to introduce evidence that a specific pistol was used in the robbery was abandoned during the course of the trial. *White v. State*, 201 Miss. 556, 29 So. 2d 650, 1947 Miss. LEXIS 419 (Miss. 1947).

Court's statement to jury, in prosecution for robbery with deadly weapon, to exclude testimony concerning guns which nobody can identify positively and to consider only testimony concerning dollar bills that have been identified positively as the property of the victim, was held not to be prejudicial error as constituting a commentary upon the weight of the evidence. *Cittadino v. State*, 199 Miss. 235, 24 So. 2d 93, 1945 Miss. LEXIS 284 (Miss. 1945).

Instruction, in trial for robbery with firearms, to "find the defendant guilty as

charged,” unless jury fixed punishment at death, held proper. *Williamson v. State*, 167 Miss. 783, 149 So. 795, 1933 Miss. LEXIS 130 (Miss. 1933).

15. —Intent.

Defendant specifically argued that the indictment made no mention of the intent required for the offense, as it failed to mention that robbery was a specific intent crime. However, use of the word “feloniously” in the indictment under which defendant was charged was sufficient to allege the necessary element of intent. *Calhoun v. State*, 881 So. 2d 308, 2004 Miss. App. LEXIS 708 (Miss. Ct. App. 2004).

In an armed robbery prosecution arising from the defendant’s taking of guns from 2 law enforcement officers, the defendant was not entitled to a jury instruction on self-defense, even though the sum and substance of the defendant’s defense was that he took the guns with the purpose of disarming the officers in the midst of what had become a dangerous and heated confrontation in order to extricate himself from harm rather than with the intent to steal, where the jury received no fewer than 5 explanations that the “intent to steal” meant the intent to permanently deprive another of personal property, and therefore a self-defense instruction would have added nothing new to the defendant’s theory of the case. *Williams v. State*, 590 So. 2d 1374, 1991 Miss. LEXIS 801 (Miss. 1991).

Armed robbery instruction need not state that taking of property was done with intent to steal, particularly where defendant does not request intent instruction and does not object to instruction actually given. *Lannom v. State*, 464 So. 2d 492, 1985 Miss. LEXIS 1897 (Miss. 1985).

Where, after his efforts to return recently purchased shoes were unavailing, defendant drew a pistol and directed the store cashier to give him an amount equal to the purchase price, defendant’s alleged good faith in taking the money did not entitle him to a peremptory instruction on the basis that he lacked felonious intent. *Wilson v. Wilson*, 317 So. 2d 425, 1975 Miss. LEXIS 1763 (Miss. 1975).

Trial court was correct in refusing defendant’s instruction to the effect that the particular intent of the defendant must be one in which substantial gain in money or property was the dominant or primary purpose; the word “substantial” has no place in an instruction on armed robbery, and was calculated to mislead jury. *Sykes v. State*, 291 So. 2d 697, 1974 Miss. LEXIS 1734 (Miss. 1974).

16. —Lesser offenses.

Trial court erred by refusing to give a jury instruction on petit larceny as a lesser-included offense of armed robbery, and therefore defendant’s conviction was reversed, because the victim’s girlfriend testified that she never saw defendant with a gun on display. The evidence was sufficient for a jury to have found that defendant obtained the victim’s property by trick when he tossed the victim a bag of cheap jeans and then fled with the victim’s sneakers, shirt, and belt. *Jones v. State*, 281 So. 3d 137, 2019 Miss. App. LEXIS 74 (Miss. Ct. App. 2019).

Trial court did not err in denying defendant’s request for lesser-included-offense instructions as no factual basis supporting an instruction that a simple robbery, a robbery without a deadly weapon, occurred or that a mere larceny occurred because, during the trial, no conflicting testimony was adduced about whether a robbery occurred, whether the victims were held at gunpoint, and who was involved - the accomplices and defendant; and participation in an armed robbery was sufficient to make one a principal in the crime regardless of whether the participant was the person holding the weapon. *Sharkey v. State*, 265 So. 3d 151, 2019 Miss. LEXIS 86 (Miss. 2019).

Defendant pointed to no evidence by which a jury could find him not guilty of armed robbery and yet guilty of robbery or assault; having found that defendant did not abandon the crime of armed robbery until after its consummation, a lesser-included offense instruction was not warranted. *White v. State*, 969 So. 2d 72, 2007 Miss. App. LEXIS 247 (Miss. Ct. App.), cert. denied, 968 So. 2d 948, 2007 Miss. LEXIS 658 (Miss. 2007).

Defendant in armed robbery case was not entitled to an instruction for the lesser

offense of attempted larceny by trick even though he claimed that he was attempting to trick the drug dealer out of the money by delivering counterfeit cocaine. *Smothers v. State*, 761 So. 2d 887, 2000 Miss. App. LEXIS 4 (Miss. Ct. App. 2000).

Trial court did not err in denying request for lesser included offense instructions on simple and aggravated assault where defendant was indicated for armed robbery, jury was instructed concerning lesser-included offenses of robbery and petite larceny, and no rational or reasonable juror could have convicted defendant of merely simple or aggravated assault. *Monroe v. State*, 515 So. 2d 860, 1987 Miss. LEXIS 2764 (Miss. 1987).

Armed robbery defendant was properly denied a lesser included offense instruction, in view of his uncontradicted statement regarding his participation in the armed robbery which made him a principal regardless of whether or not he was actually holding a gun. *Moore v. State*, 493 So. 2d 1295, 1986 Miss. LEXIS 2608 (Miss. 1986).

17. — Alibi defense.

Where the accused's defense to an armed robbery charge was an alibi, the court did not err in failing to give an instruction which would have placed upon the state the burden of proving that the alibi was untrue. *Newton v. State*, 229 Miss. 267, 90 So. 2d 375, 1956 Miss. LEXIS 606 (Miss. 1956).

Where the accused's alibi defense to an armed robbery charge was supported by strong testimony of apparently disinterested witnesses while the state's evidence that the accused was the perpetrator was weak, being the testimony of the victim, who, under the circumstances, had only a limited opportunity to observe at the time of the crime, the trial court committed reversible error in failing to instruct that if there was a probability of the accused's innocence, the jury should acquit him; such instruction should have been to the effect that the evidence in support of the alibi need only raise in the minds of the jury reasonable doubt as to the accused's presence at the time and the place of the crime. *Newton v. State*, 229 Miss. 267, 90 So. 2d 375, 1956 Miss. LEXIS 606 (Miss. 1956).

Accused was entitled to a peremptory instruction where his alibi thoroughly impeached the state's evidence consisting solely of the uncorroborated testimony of an alleged accomplice, a habitual criminal who had not been sentenced although he had plead guilty of the robbery. *Pegram v. State*, 228 Miss. 860, 89 So. 2d 846, 1956 Miss. LEXIS 575 (Miss. 1956).

18. Conviction of lesser offense.

Where a bank teller testified that defendant went through the bank line, placed a knife on the counter, and demanded money from two tellers, defendant was indicted for armed robbery in violation of Miss. Code Ann. § 97-3-79; the evidence was sufficient to support the jury's verdict convicting him of the lesser-included offense of robbery, as when police apprehended defendant he had a steak knife on his person. *Wilson v. State*, 935 So. 2d 945, 2006 Miss. LEXIS 303 (Miss. 2006), cert. denied, 549 U.S. 1348, 127 S. Ct. 2047, 167 L. Ed. 2d 780, 2007 U.S. LEXIS 4088 (U.S. 2007).

Sequestration of the jury was not mandatory in a case where the defendant was indicted for armed robbery, was found guilty by the jury of robbery, as opposed to armed robbery, and was sentenced to 15 years in prison. *Griffin v. State*, 492 So. 2d 587, 1986 Miss. LEXIS 2551 (Miss. 1986).

Under the provisions of Code 1942, § 2523, a defendant indicted for armed robbery may properly be tried and convicted for robbery. *Auman v. State*, 271 So. 2d 427, 1973 Miss. LEXIS 1508 (Miss. 1973).

In prosecution under indictment charging robbery with deadly weapon accused could be found guilty of robbery without firearms under statute providing accused may be found guilty of lesser offense or other offense necessarily included in offense charged. *Bogan v. State*, 176 Miss. 655, 170 So. 282, 1936 Miss. LEXIS 166 (Miss. 1936).

In robbery prosecution under indictment charging robbery with deadly weapon, accused could be found guilty of robbery without firearms under statute. *Bogan v. State*, 176 Miss. 655, 170 So. 282, 1936 Miss. LEXIS 166 (Miss. 1936).

19. Bail.

Both attempted armed robbery and

armed robbery constitute the crime of “robbery” under this section, and, therefore, a defendant convicted of attempted armed robbery was not entitled to bail pending appeal as a matter of right, but rather, was subject to the discretion of the court as to bail after the conviction. *State v. Maples*, 445 So. 2d 540, 1984 Miss. LEXIS 1617 (Miss. 1984).

In light of the legislative withdrawal of the death penalty from the robbery statute, denial of bail to a defendant charged with armed robbery was improper; denial is appropriate only for capital offenses, and “capital offenses” consist only of those for which the death penalty is permitted. *Ex parte Dennis*, 334 So. 2d 369, 1976 Miss. LEXIS 1924 (Miss. 1976).

A defendant charged with armed robbery should be granted bail where the proof of his guilt was not evident or the presumption thereof great on the record. *Wooton v. Bethea*, 209 Miss. 374, 47 So. 2d 158, 1950 Miss. LEXIS 401 (Miss. 1950).

20. Sentence.

Circuit court properly dismissed appellant’s motion for post-conviction relief because appellant’s sentence for armed robbery was legal under supreme court precedent holding that statutes that permitted the trial court to sentence a defendant to “any term” of incarceration included life sentences; although the supreme court opinion involved the rape statute, the rape and armed robbery statutes employed identical operative language and were inexorably linked. *Young v. State*, 245 So. 3d 510, 2017 Miss. App. LEXIS 590 (Miss. Ct. App. 2017), cert. denied, 246 So. 3d 886, 2018 Miss. LEXIS 287 (Miss. 2018).

Appellant’s sentence for armed robbery was legal because supreme court precedent held that statutes that permitted the trial court to sentence a defendant to “any term” of incarceration included life sentences; appellant’s challenge to the supreme court’s opinion as an *ex post facto* law was without merit because judicial decisions were not subject to *ex post facto* challenges. *Young v. State*, 245 So. 3d 510, 2017 Miss. App. LEXIS 590 (Miss. Ct. App. 2017), cert. denied, 246 So. 3d 886, 2018 Miss. LEXIS 287 (Miss. 2018).

Defendant failed to show any plain error as the trial court based his 40-year sentence for armed robbery on the seriousness of the crime, the armed robbery of two bank tellers, the impact on the victims, defendant’s prior conviction for aggravated assault, and his age of 35. *Foster v. State*, 148 So. 3d 1012, 2014 Miss. LEXIS 514 (Miss. 2014).

Trial court did not abuse its discretion by sentencing defendant to 40 years because it conformed to this section as the trial court did not sentence defendant to life and the term was more than three years. *Foster v. State*, 148 So. 3d 1012, 2014 Miss. LEXIS 514 (Miss. 2014).

Sentence of 20 years received by defendant, a multiple recidivist of violent crimes sentenced as a habitual offender, was not constitutionally infirm, nor did it exceed the trial court’s sentencing authority and thus, there existed no basis to accept defendant’s argument that his sentence was illegal. *Hampton v. State*, 148 So. 3d 992, 2014 Miss. LEXIS 513 (Miss. 2014).

Defendant’s thirty-five year sentences were not constitutionally disproportionate because they fit well within the statutory limits; the fact that defendant was a first-time offender did not preclude the trial court from imposing up to the maximum sentence. *McCoy v. State*, 147 So. 3d 333, 2014 Miss. LEXIS 470 (Miss. 2014).

Defendant failed to demonstrate that the trial court imposed any sentence upon his convictions for armed robbery that exceeded the statutory maximum, because the trial court was not required to consider whether he had time to serve on another sentence any more than it was required to consider the sentences imposed on separate counts within the same conviction. *Myers v. State*, 153 So. 3d 581, 2014 Miss. LEXIS 446 (Miss. 2014).

Where defendant was convicted of one count of armed robbery as a habitual offender, the trial court did not err under Miss. Code Ann. § 97-3-79 by imposing a 19.5 year sentence because it did not exceed his life expectancy of 20.2 years. *Hampton v. State*, 148 So. 3d 1038, 2013 Miss. App. LEXIS 73 (Miss. Ct. App. 2013), *aff’d*, 148 So. 3d 992, 2014 Miss. LEXIS 513 (Miss. 2014).

Circuit court did not err in sentencing defendant to forty years in prison for armed robbery in violation of Miss. Code Ann. § 97-3-79 because when the circuit judge announced the sentence, it simultaneously gave defendant credit for all of his pretrial custody time pursuant to Miss. Code Ann. § 99-19-23, which ultimately shortened defendant's announced sentence to under forty years. *Foster v. State*, 148 So. 3d 1045, 2013 Miss. App. LEXIS 135 (Miss. Ct. App. 2013), *aff'd*, 148 So. 3d 1012, 2014 Miss. LEXIS 514 (Miss. 2014).

In a post-conviction relief case in which a pro se inmate had pled guilty to armed robbery, he argued unsuccessfully that constitutional rights were violated because he was sentenced to serve a mandatory 10-year sentence without the benefit of earned time. Pursuant to Miss. Code Ann. § 47-5-139(1)(e), an inmate was not eligible for earned-time credit when the inmate had not served the mandatory time required for parole eligibility for a conviction of robbery or attempted robbery with a deadly weapon, and, pursuant to Miss. Code Ann. § 47-7-3(1)(d)(ii), he was not eligible for parole since he had been convicted of armed robbery after October 1, 1994. *Diggs v. State*, 46 So. 3d 361, 2010 Miss. App. LEXIS 55 (Miss. Ct. App.), *cert. denied*, 49 So. 3d 636, 2010 Miss. LEXIS 561 (Miss. 2010).

Trial court did not err in denying an inmate's motion for post-conviction collateral relief because the inmate's sentence was not excessive since it was within the limits of the sentencing guidelines; because the inmate did in fact admit to aiding and abetting an armed robbery with a pistol in his plea colloquy, the trial judge stated that the minimum sentence was three years, and the maximum sentence was life imprisonment for the charge. *Cherry v. State*, 24 So. 3d 1048, 2010 Miss. App. LEXIS 4 (Miss. Ct. App. 2010).

The record justified the trial court in giving defendant, a habitual offender, 41 years without parole for three counts of armed robbery; the fact that defendant's actuarial life-expectancy was 41.7 years did not render the sentence grossly disproportionate in violation of his constitutional rights. *Johnson v. State*, 29 So. 3d 738, 2009 Miss. LEXIS 610 (Miss. 2009).

Where appellant pled guilty to two counts of capital murder and two counts of armed robbery in 1979, he filed several motions for post-conviction relief; the circuit court did not err by dismissing his 2007 motion for post-conviction relief as a successive writ barred by res judicata under Miss. Code Ann. § 99-39-21(1). Appellant's claim that he had a fundamental right to be free from an illegal sentence was not good cause for an exception to the bar, because his twenty-four year sentence for armed robbery was within the range set forth in Miss. Code Ann. § 97-3-79 and therefore not illegal. *Rowland v. State*, 42 So. 3d 545, 2009 Miss. App. LEXIS 310 (Miss. Ct. App. 2009), *rev'd*, 42 So. 3d 503, 2010 Miss. LEXIS 386 (Miss. 2010).

In an armed robbery case, defendant was improperly sentenced to life imprisonment as a habitual offender under Miss. Code Ann. § 99-19-81 because a life sentence had to be, but was not, set by a jury. *Carey v. State*, 4 So. 3d 370, 2008 Miss. App. LEXIS 521 (Miss. Ct. App. 2008), *cert. denied*, 11 So. 3d 1250, 2009 Miss. LEXIS 114 (Miss. 2009).

Where a defendant pleaded guilty to aggravated assault under Miss. Code Ann. § 97-3-7(2) and armed robbery under Miss. Code Ann. § 97-3-79 and was sentenced to consecutive incarcerations of 30 years for the robbery and 10 years for the assault, the trial court properly (1) summarily dismissed the defendant's petition for postconviction relief from the sentence without holding an evidentiary hearing because the defendant was aware that the trial court was not required to follow the State's recommended sentence, and the sentence imposed by the trial court was within statutory guidelines; or (2) finding that the defendant's plea was voluntary because the defendant had read and understood his guilty plea petition, which stated that the trial judge was not required to follow the State's sentencing recommendation. *Owens v. State*, 996 So. 2d 85, 2008 Miss. App. LEXIS 206 (Miss. Ct. App.), *cert. denied*, 999 So. 2d 374, 2008 Miss. LEXIS 685 (Miss. 2008), *cert. denied*, 556 U.S. 1212, 129 S. Ct. 2060, 173 L. Ed. 2d 1140, 2009 U.S. LEXIS 3181 (U.S. 2009).

Where defendant was convicted of armed robbery after he and a cohort approached a home, shot two victims, and fled the scene, his sentence of thirty years' was within the statutory limitations set forth in Miss. Code Ann. § 97-3-79. Defendant failed to prove that the sentence was unconstitutional, because it did not punish him for exercising his right to trial nor was the sentence disproportionate to his role in the crime. *Hughes v. State*, 983 So. 2d 270, 2008 Miss. LEXIS 153 (Miss.), cert. denied, 555 U.S. 1052, 129 S. Ct. 633, 172 L. Ed. 2d 620, 2008 U.S. LEXIS 8544 (U.S. 2008).

Because a sentence of 15 years with no eligibility for parole, imposed for armed robbery, was within the statutory limits, no error could be found in the trial court's alleged failure to weigh mitigating factors, nor could there be any inference of gross disproportion. *Waddell v. State*, 999 So. 2d 375, 2008 Miss. App. LEXIS 93 (Miss. Ct. App. 2008).

In an armed robbery case, a motion for post-conviction relief was properly denied because defendant's plea was not involuntary or coerced in violation Miss. Unif. Cir. & Cty. R. 8.04 merely because counsel advised defendant to plead guilty or because defendant feared that he would get a life sentence under Miss. Code Ann. § 97-3-79. *Robinson v. State*, 964 So. 2d 609, 2007 Miss. App. LEXIS 607 (Miss. Ct. App. 2007).

Where defendant, who was 17 years of age at the time of his conviction and sentence, was sentenced to a 30-year term of imprisonment for armed robbery in accordance with what the state had recommended, and what defendant expected the state to recommend, the trial judge had statutory discretion to sentence defendant to a definite term reasonably expected to be less than life; in challenging his sentence, it was necessary for defendant to make some showing that his sentence exceeded the limits of Miss. Code Ann. § 97-3-79, but the sentence defendant received did not exceed the statutory maximum sentence allowed and was therefore legal. *Gladney v. State*, 963 So. 2d 1217, 2007 Miss. App. LEXIS 305 (Miss. Ct. App. 2007).

Motion for post-conviction relief was denied in case challenging the legality of a

life sentence imposed for two counts of robbery with a deadly weapon because this was a permissible sentence where a jury did not impose the death penalty; the motion was timely, despite being filed about 30 years after the conviction, because an illegal sentence could have been challenged at any time. *McLeod v. State*, 952 So. 2d 302, 2007 Miss. App. LEXIS 141 (Miss. Ct. App. 2007).

Defendant's sentence for armed robbery was proper; 20 years in prison, with 12 years suspended, followed by five years of post-release supervision, was within the sentencing range. *Williams v. State*, 922 So. 2d 853, 2006 Miss. App. LEXIS 157 (Miss. Ct. App. 2006).

Explanations given to defendant about the nature of the charge, the possible sentences and other consequences of the plea, and the plea bargaining process all pertained to armed robbery, not to simple robbery, and for this reason, defendant's guilty plea was not voluntary in a constitutional sense; nor was defendant accurately informed of the consequences of a guilty plea to robbery where the maximum sentence for armed robbery was life if fixed by the jury, Miss. Code Ann. § 97-3-79, and the maximum sentence for simple robbery was 15 years, Miss. Code Ann. § 97-3-75; when defendant evaluated the state's plea recommendation and made his decision to plead guilty, he was under the erroneous belief that he could be sentenced to life imprisonment were he to proceed to trial and be found guilty, when in fact he could have received only 15 years. *Garner v. State*, 944 So. 2d 934, 2006 Miss. App. LEXIS 921 (Miss. Ct. App. 2006), cert. dismissed, 951 So. 2d 563, 2007 Miss. LEXIS 534 (Miss. 2007).

Post-conviction relief was denied in a case where defendant pled guilty to two counts of armed robbery, in violation of Miss. Code Ann. § 97-3-79, because his attorney did not give erroneous advice since a life sentence was a possible sentence if a jury had convicted him of both counts; the record showed that defendant actively participated in the robbery, and he knew that people were going to be robbed. *Wortham v. State*, 952 So. 2d 968, 2006 Miss. App. LEXIS 787 (Miss. Ct. App. 2006).

Appellate court affirmed the denial of an inmate's petition for post-conviction relief pursuant to Miss. Code Ann. § 99-39-3 as the inmate was properly advised before pleading guilty, he was not deprived of effective assistance of counsel, and his 30 year sentence for armed robbery with 15 years suspended was proper under Miss. Code Ann. § 97-3-79. *Steen v. State*, 933 So. 2d 1052, 2006 Miss. App. LEXIS 529 (Miss. Ct. App. 2006).

Circuit court did not err in dismissing a petitioner's request for post-conviction relief because the petitioner's 25-year sentence for armed robbery was within the range prescribed by Miss. Code Ann. § 97-3-79. *Wells v. State*, 936 So. 2d 479, 2006 Miss. App. LEXIS 596 (Miss. Ct. App. 2006).

In defendant's capital murder case, a court did not err by not ordering a bifurcated sentencing hearing on the armed robbery because the decision whether or not to order a bifurcated trial rested within the trial court's discretion. *Duncan v. State*, 939 So. 2d 772, 2006 Miss. LEXIS 408 (Miss. 2006).

Inmate's petition for post-conviction relief was denied because the denial of the possibility of parole for an armed robbery conviction came from Miss. Code Ann. § 47-7-3(1)(d)(ii), not from a trial judge. *Hinton v. State*, 947 So. 2d 979, 2006 Miss. App. LEXIS 381 (Miss. Ct. App. 2006), cert. denied, 947 So. 2d 960, 2007 Miss. LEXIS 94 (Miss. 2007).

Because defendant did not address the third prong of the *Solem v. Helm*, 463 U.S. 277, inquiry, regarding sentences imposed in other jurisdictions, his claim that his 20 year sentence for robbery was excessive was barred *Willis v. State*, 911 So. 2d 947, 2005 Miss. LEXIS 608 (Miss. 2005).

Penalties set forth in the armed robbery statute, Miss. Code Ann. § 97-3-79, and the controlled substances statute, Miss. Code Ann. § 41-29-139, were clearly distinguishable where the specific requirement that a trial court's sentence be limited to a definite term, reasonably expected to be less than life, was applicable to an armed robbery conviction but did not apply to all crimes; therefore, the trial court did not have to consider defendant's life expectancy for the conviction of

unlawful delivery of methamphetamine and unlawful possession of more than thirty grams of methamphetamine with intent to distribute. *Cannon v. State*, 919 So. 2d 913, 2005 Miss. LEXIS 764 (Miss. 2005).

During the plea hearing, defendant acknowledged that he was a participant in the armed robbery, and described the events of the robbery; the court interlined the simple robbery petition indicating "armed" robbery and initialed the modification. Defendant was sentenced to a term of fifteen years with ten years to serve, five years suspended and post-release supervision of five years in the custody of the Mississippi Department of Correction. *Baldwin v. State*, 923 So. 2d 218, 2005 Miss. App. LEXIS 513 (Miss. Ct. App. 2005), cert. denied, 927 So. 2d 750, 2006 Miss. LEXIS 141 (Miss. 2006).

Defendant's robbery sentence was appropriate pursuant to Miss. Code Ann. § 97-3-79 because it was within the statutory limit. Further, it was not grossly disproportionate to the crime of which he was convicted. *White v. State*, 919 So. 2d 1029, 2005 Miss. App. LEXIS 470 (Miss. Ct. App. 2005).

Defendant contended that his sentence was excessive because his cohorts to the armed robbery were given lesser sentences, and the sentence that he received exceeded the punishment prescribed for the crime of accessory after the fact. However, his sentence was well within the statutory guidelines for the offense he pled guilty to (armed robbery), and it was not subject to review. *Sykes v. State*, 895 So. 2d 191, 2005 Miss. App. LEXIS 150 (Miss. Ct. App. 2005).

Defendant's 35-year sentence after he was convicted of armed robbery was proper under Miss. Code Ann. § 97-3-79 where the sentence was within the statutory guidelines and the trial court had not abused its discretion in considering pending charges during sentencing. *Banks v. State*, 912 So. 2d 1061, 2005 Miss. App. LEXIS 305 (Miss. Ct. App.), cert. denied, 921 So. 2d 344, 2005 Miss. LEXIS 681 (Miss. 2005).

Upon appellant's plea of guilty to one count of armed robbery, the trial court did not err in sentencing him to fourteen

years in the custody of the Mississippi Department of Corrections, with seven years suspended. The circuit court properly considered appellant's age, lack of criminal history, and similar cases. *Edmond v. State*, 906 So. 2d 798, 2004 Miss. App. LEXIS 1135 (Miss. Ct. App. 2004).

Where appellant pled guilty to the armed robbery of a fast food restaurant, and his accomplice pled guilty to conspiracy to commit armed robbery for driving the "getaway car," the trial court did not err in sentencing appellant to seven years while his accomplice only received an effective sentence of one year. The men performed different tasks in the crime. *Edmond v. State*, 906 So. 2d 798, 2004 Miss. App. LEXIS 1135 (Miss. Ct. App. 2004).

Pursuant to Miss. Code Ann. § 97-3-79, a person found guilty of armed robbery had to be imprisoned for life in the state penitentiary if the penalty was so fixed by the jury. Defendant, however, was sentenced by the circuit judge after entering a plea of guilty, and Miss. Code Ann. § 97-3-79 did not provide for a maximum sentence of life for armed robbery when the sentence was imposed by a judge rather than a jury; thus, where defendant had no prior felonies, and contrary to the State's argument that defendant's sentence was illegal, the circuit judge had the statutory authority, pursuant to Miss. Code Ann. § 47-7-33, to suspend defendant's sentence (in the case at bar, 9 years of defendant's 10 year sentence was suspended, subject to a term of supervised probation), to the extent that the ends of justice and the best interest of the public, as well as defendant, would be served thereby. *State v. Hayes*, 887 So. 2d 184, 2004 Miss. App. LEXIS 863 (Miss. Ct. App. 2004).

Under Miss. Code Ann. § 97-3-79, the trial judge had the authority to impose any sentence but life imprisonment. Thus, defendant's sentence of 40 years was within the limits prescribed by statute and did not constitute cruel and inhuman treatment; further, the sentence was within the purview of the trial judge to impose, since he had adjudged defendant's remaining life expectancy to be 42 years. *Calhoun v. State*, 881 So. 2d 308, 2004 Miss. App. LEXIS 708 (Miss. Ct. App. 2004).

Where jury could not reach an agreement on a sentence for defendant whom they had found guilty of armed robbery, the trial judge did not demonstrate any bias by sentencing defendant to 25 years, as Miss. Code Ann. § 97-3-79 provided the judge could fix the sentence for any term not less than three years. *Jack v. State*, 878 So. 2d 1078, 2004 Miss. App. LEXIS 696 (Miss. Ct. App. 2004).

Inmate's sentence after pleading guilty to a charge of armed robbery was proper where the record constituted sufficient evidence to show that the inmate was properly advised as to the minimum and maximum sentence prior to entering his plea; further, three years was the minimum sentence for armed robbery and a person convicted of armed robbery could not receive a wholly suspended sentence as the inmate alleged that his attorney told him. *Mullins v. State*, 859 So. 2d 1082, 2003 Miss. App. LEXIS 1078 (Miss. Ct. App. 2003).

Defendant's convictions for armed robbery and arson were proper but defendant's robbery sentence was reversed; the State agreed with defendant's contention that his life expectancy was not 39.6 years because the life expectancy for a 43-year-old black male was 30.6 years. *Payton v. State*, 897 So. 2d 921, 2003 Miss. LEXIS 602 (Miss. 2003).

Consecutive sentences of 30 and 45 years for armed carjacking and armed robbery were within the statutory limits for those offenses and were not excessive despite the length of the sentences and regardless of the fact that defendant chose to go to trial rather than accept a plea bargain for 10 years on each count as his co-defendants elected to do. *McCline v. State*, 856 So. 2d 556, 2003 Miss. App. LEXIS 460 (Miss. Ct. App.), cert. denied, 860 So. 2d 315, 2003 Miss. LEXIS 722 (Miss. 2003).

Evidence that defendant pointed a gun at two store clerks, demanded money, and took money from the cash register drawer and the clerks' purses, supported imposition of consecutive sentences of 30 years and 10 years against a defendant convicted of two counts of armed robbery; sentences were within the maximum range set forth in Miss. Code Ann. § 79-

3-79 [Repealed] and were neither cruel or unusual under either the Eighth Amendment to the Constitution of the United States or Miss. Const. art. 3, § 28 nor disproportionate to the offenses committed. *Womack v. State*, 827 So. 2d 55, 2002 Miss. App. LEXIS 518 (Miss. Ct. App. 2002).

There was no indication in the record that the trial judge enhanced the sentence of one defendant over the other, and the sentences were all well within the statutory limits for armed robbery, aggravated assault and accessory after the fact. *Birkley v. State*, 750 So. 2d 1245, 1999 Miss. LEXIS 370 (Miss. 1999).

The defendant's 25 year sentence fell within the guidelines of this section, was not excessive, and did not violate his Sixth and Fourteenth amendment rights, notwithstanding the defendant's assertion that he was merely an accessory after the fact; the trial judge found no reason to suspend any of the sentence and the defendant had a previous conviction for burglary of an occupied dwelling. *Lawson v. State*, 748 So. 2d 96, 1999 Miss. LEXIS 289 (Miss. 1999).

The sentence imposed by the trial judge was within the statutory limits of the statute and was not disturbed on appeal where the jury was unable to agree on the penalty of imprisonment for life and the trial court thus considered the actuarial tables and used his authority to sentence the defendant to serve 35 years in the state penitentiary, one year less than his life sentence. *Lenox v. State*, 727 So. 2d 753, 1998 Miss. App. LEXIS 1064 (Miss. Ct. App. 1998).

The court rejected the contention that the defendant's 15 year sentence was an illegal life sentence because it was handed down by a judge, not a jury, and the judge had no knowledge of the defendant's HIV status or his life expectancy. *Lindsay v. State*, 720 So. 2d 182, 1998 Miss. LEXIS 383 (Miss. 1998).

Sentence for crime of armed robbery of 20 years with 11 years suspended was within guidelines of statute requiring sentence of any term not less than 3 years, and was not subject to Supreme Court review, despite asserted presence of mitigating factors. *Jones v. State*, 669 So. 2d 1383, 1995 Miss. LEXIS 586 (Miss. 1995).

In a prosecution for armed robbery, it was not error for the trial judge to fail to accept the State's sentencing recommendation, even though the State agreed to make the recommendation in exchange for a guilty plea and the defendant's agreement to testify against his co-indictees, where the judge did not participate in the plea bargaining discussion between the defendant and the State, and the judge and the defense attorney informed the defendant that the State's sentence recommendation was not binding on the court. *Martin v. State*, 635 So. 2d 1352, 1994 Miss. LEXIS 37 (Miss. 1994).

The fact that a defendant pled guilty to armed robbery in exchange for a 7-year sentence did not broaden the circuit court's sentencing authority; it was still statutorily limited. *Mitchell v. State*, 561 So. 2d 1037, 1990 Miss. LEXIS 258 (Miss. 1990).

Judge acted within his discretion when he modified defendant's 25 year sentence to 3 years in prison followed by 5 years probation; contention was rejected that § 47-7-33 provided exclusive procedure in that suspension of sentence under its term could not be combined with requirement that any part of same sentence be served. *Marshall v. Cabana*, 835 F.2d 1101, 1988 U.S. App. LEXIS 540 (5th Cir. Miss. 1988).

Upon a prima facie showing of the existence of an advance plea agreement between the state and a codefendant who was state's principal witness, whereby in exchange for testifying for the state the codefendant would receive a lenient sentence for armed robbery, a defendant, who had been convicted for the same robbery as accessory before the fact, may be entitled to post-conviction relief where the agreement had not been disclosed prior to his trial, although the defense had made a general discovery request for exculpatory material, and the existence of any such agreement had been denied by the codefendant while testifying at the defendant's trial. Case would be remanded to circuit court for evidentiary hearing. *Malone v. State*, 486 So. 2d 367, 1986 Miss. LEXIS 3139 (Miss. 1986).

Three years imprisonment is the most lenient lawful sentence for armed robbery.

Malone v. State, 486 So. 2d 367, 1986 Miss. LEXIS 3139 (Miss. 1986).

Imposition of 40 years imprisonment under habitual offender statute (§ 99-19-81), which cannot be reduced or suspended and for which defendant cannot be eligible for probation or parole, upon conviction for armed robbery based on theft of meat during which defendant displayed pocket knife to avoid apprehension will be vacated, and additional sentence hearing and resentencing required, where adequate presentencing hearing was not held, even though trial judge afforded every opportunity to defendant and counsel to present mitigating evidence at that hearing. Presley v. State, 474 So. 2d 612, 1985 Miss. LEXIS 2190 (Miss. 1985).

In a prosecution for armed robbery in which the jury failed to fix the penalty at life imprisonment, the trial court did not exceed its authority in imposing a sentence of 40 years where the defendant had an actuarial life expectancy of 40.51 years. Ware v. State, 410 So. 2d 1330, 1982 Miss. LEXIS 1890 (Miss. 1982).

Where it appeared that the trial court, in sentencing a 16-year-old defendant convicted of armed robbery to a term of 14 years in state prison, had been under the misapprehension that this section and § 47-7-3, read together, mandated a sentence of at least 10 years in the state penitentiary, absent a jury verdict of life imprisonment, the case would be remanded to the court for a clarification of the sentencing since there was no way to ascertain whether the trial court had considered the statutory alternative for sentencing minor offenders under the provisions of § 43-21-159(3). Bougon v. State, 405 So. 2d 101, 1981 Miss. LEXIS 2240 (Miss. 1981).

In a prosecution for armed robbery, a sentence of 12 years in prison, without eligibility of parole for 10 years, imposed upon a 14-year-old mentally retarded defendant did not constitute cruel and unusual punishment; however, the case would be remanded to the trial court for consideration of alternative sentencing under § 43-21-159 where the trial judge should have placed in the record the sources and facts of his sentence study and should have permitted the defen-

dant's attorney to introduce evidence of the presence of absence of facilities at the Mississippi State Penitentiary for the care of the defendant, and the availability of other institutions or facilities which could be utilized by the defendant. May v. State, 398 So. 2d 1331, 1981 Miss. LEXIS 2021 (Miss. 1981).

The trial court in an armed robbery prosecution erred in sentencing defendant to a 75 year term of imprisonment where the jury did not fix the penalty at imprisonment for life; under this section, a trial court cannot impose a sentence of life when the jury has failed to do so. Stewart v. State, 372 So. 2d 257, 1979 Miss. LEXIS 2013 (Miss. 1979).

The imposition of a life sentence is within the sole province of the jury, and it was thus error for the trial court to impose a life sentence on defendant, convicted of armed robbery, where the jury returned a verdict finding defendant "guilty as charged," but did not fix penalty as life imprisonment. Parker v. State, 367 So. 2d 456, 1979 Miss. LEXIS 2223 (Miss. 1979).

Where the jury fails to fix the penalty at death, the sentence of the court is an exercise of discretion, and a sentence of life imprisonment is within his discretion. Flegg v. State, 202 Miss. 179, 30 So. 2d 615, 1947 Miss. LEXIS 256 (Miss. 1947).

21. Miscellaneous.

Armed robbery is a capital offense. Horton v. State, 253 So. 3d 334, 2018 Miss. App. LEXIS 42 (Miss. Ct. App.), cert. denied, 252 So. 3d 595, 2018 Miss. LEXIS 390 (Miss. 2018).

Defendant's handing an employee a note saying she had a gun was an overt act that led to at least one of the employees to reasonably believe that defendant had a deadly weapon, and based on the note, the pharmacist acted to restrain defendant, and thus there was a factual basis for defendant's guilty plea to armed robbery. Williams v. State, 163 So. 3d 993, 2015 Miss. App. LEXIS 258 (Miss. Ct. App. 2015).

Circuit court did not err in denying a petition for post-conviction relief because there was an adequate factual basis supporting petitioner's guilty pleas; at least twice during the plea hearing, the trial

court outlined, and petitioner assented to, the factual basis for each charge of armed robbery. *Mosley v. State*, 150 So. 3d 127, 2014 Miss. App. LEXIS 613 (Miss. Ct. App. 2014), cert. dismissed, 158 So. 3d 1153, 2015 Miss. LEXIS 155 (Miss. 2015).

Defendant was properly convicted of armed robbery because the evidence supported the jury's finding that defendant was the man who robbed a bank despite misinformation regarding the robber's color, the search of defendant's house and seizure of a gun fell within the Fourth Amendment's protective-sweep exception, and the trial court properly refused defendant's insanity-defense instruction. *Hutto v. State*, 114 So. 3d 802, 2013 Miss. App. LEXIS 315 (Miss. Ct. App. 2013).

Motion for a new trial was denied in a case where defendant was identified as the perpetrator in an armed robbery by the victim and another witness; defendant was picked from a photo lineup after a description was given to police of a robber, the victim had observed the robber's face for four minutes, and the victim testified that he would not forget the face of the robber. *Brownlee v. State*, 972 So. 2d 31, 2008 Miss. App. LEXIS 15 (Miss. Ct. App. 2008).

Motion for a directed verdict or judgment notwithstanding the verdict was denied in an armed robbery case under Miss. Code Ann. § 97-3-79 because the photo lineup was not impermissibly suggestive where other men could have had the same hairstyle, the victim had four minutes to look at the perpetrator's face during the crime, and the victim testified that he would never forget the perpetrator's face. Moreover, the evidence from the identification was for the jury to weigh. *Brownlee v. State*, 972 So. 2d 31, 2008 Miss. App. LEXIS 15 (Miss. Ct. App. 2008).

Testimony of accomplice, which was partially corroborated by fellow inmate of defendant and by state's ballistics expert, presented question of fact to be determined by jury as to whether defendant was guilty of robbery and subsequent shooting of store clerk. *Brown v. State*, 682 So. 2d 340, 1996 Miss. LEXIS 427 (Miss. 1996), cert. denied, 520 U.S. 1127, 117 S. Ct. 1271, 137 L. Ed. 2d 348, 1997 U.S. LEXIS 1821 (U.S. 1997).

Although a special venire could have been demanded in an armed robbery prosecution if the demand had been timely made, the trial court did not abuse its discretion in overruling the defendant's motion for a special venire where the motion was made just prior to the start of trial. *Williams v. State*, 590 So. 2d 1374, 1991 Miss. LEXIS 801 (Miss. 1991).

Initiation of criminal proceedings in justice court did not preclude circuit court in another county retaining jurisdiction and conducting case to conclusion after dismissal by justice court; courts in both counties had concurrent jurisdiction, since portion of crimes occurred in each county. *Simmons v. State*, 568 So. 2d 1192, 1990 Miss. LEXIS 605 (Miss. 1990).

The prosecution of a defendant for robbery with a deadly weapon after a prior conviction for kidnapping arising from the same incident was not barred by double jeopardy since the crimes of armed robbery and kidnapping required different elements of proof. *Brock v. State*, 530 So. 2d 146, 1988 Miss. LEXIS 361 (Miss. 1988).

Absent a recommendation of the jury for a life sentence, imposition of such sentence on the defendant convicted of armed robbery, and sentenced as an habitual criminal, was error. *Watkins v. State*, 500 So. 2d 462, 1987 Miss. LEXIS 2246 (Miss. 1987).

Armed robbery conviction and sentence was affirmed on certificate of appeal, where the defendant, who had escaped from jail during pendency of the appeal, failed to file a transcript, and the return day had long since passed. *Nealy v. State*, 493 So. 2d 1294, 1986 Miss. LEXIS 2607 (Miss. 1986).

Trial court committed reversible error by preventing armed robbery defendant, who contended another had committed the crime, from asking questions, in jury's presence, concerning such other person's description and characteristics, of a witness, an accused accessory, who, out of jury's presence, had refused, on self-incrimination grounds, to answer questions concerning the robbery, but had answered questions concerning the description of the other person. *Hall v. State*, 490 So. 2d 858, 1986 Miss. LEXIS 2488 (Miss. 1986).

Trial court may refuse to grant motion for severance filed by defendant in prosecution for robbery with deadly weapon where there does not appear to be conflict of interest among codefendant and evidence introduced at trial does not go more to guilt of one defendant than to other. *Duckworth v. State*, 477 So. 2d 935, 1985 Miss. LEXIS 2455 (Miss. 1985).

Comment by prosecuting attorney in argument that he will read defendant's confession "as this statement is the only way we hear from him" is harmless comment on failure of defendant to testify when there is no dispute about facts in connection with crime or who committed it. *Bramlett v. State*, 37 So. 2d 305 (Miss. 1948).

Refusal to grant mistrial in prosecution for robbery with a deadly weapon on ground that one of the arresting officers stated on direct examination that they already had defendant "under investigation before this," whereupon prosecutor interposed question calling for repetition of such statement, did not constitute reversible error, where objection to prosecutor's question was promptly sustained. *Cittadino v. State*, 199 Miss. 235, 24 So. 2d 93, 1945 Miss. LEXIS 284 (Miss. 1945).

Where defendant, who was indicted on charge of robbery with a deadly weapon, before case was called for trial, filed motion for issuance of special venire facias, overruling of motion, if erroneous, was rendered harmless by subsequent reduction of grade of offense to one of mere felonious robbery, upon district attorney's motion, and subsequent trial of defendant on that charge, since mere felonious robbery is not a capital offense. *Mosley v. State*, 174 So. 240 (Miss. 1937).

In robbery prosecution, defendants' guilt of assault held for jury. *Anderson v. State*, 168 Miss. 424, 151 So. 558, 1934 Miss. LEXIS 336 (Miss. 1934).

22. Double jeopardy.

No double-jeopardy violation was found in defendant's convictions for armed robbery because defendant committed four offenses, simultaneously, that arose from a common nucleus of operative fact, in that defendant took property from four separate individuals, thus committing

four separate crimes. *Miller v. State*, 192 So. 3d 383, 2016 Miss. App. LEXIS 315 (Miss. Ct. App. 2016).

Issue was never framed for the jury to determine appellant's guilt or lack thereof as to the charge of conspiracy. Appellant's contention that the crime of conspiracy to commit armed robbery was presented to the jury and subsequently dismissed by the jury in his first trial such that double jeopardy and collateral estoppel would attach was unfounded. *Newell v. State*, 180 So. 3d 701, 2015 Miss. App. LEXIS 236 (Miss. Ct. App. 2015).

Trial court did not err in denying petitioner post-conviction relief because he was not subjected to double jeopardy since the two crimes for which petitioner was indicted and to which he pleaded guilty, armed robbery and aggravated assault, required proof of an element which the other did not; petitioner could have been found guilty of armed robbery without having shot the victim, and he could have been found guilty of aggravated assault without taking the victim's property. *Owens v. State*, 150 So. 3d 114, 2014 Miss. App. LEXIS 608 (Miss. Ct. App. 2014).

Defendant was placed in double jeopardy when he was convicted on two counts of armed robbery and two counts of capital murder for killing while engaged in the commission of those same two armed robberies; although there were several other armed robbery victims present, only the two murder victims were named in the indictment. *Rowland v. State*, 98 So. 3d 1032, 2012 Miss. LEXIS 484 (Miss. 2012), overruled in part, *Carson v. State*, 212 So. 3d 22, 2016 Miss. LEXIS 473 (Miss. 2016).

In a case in which defendant appealed the dismissal of his motion for post-conviction relief, he argued unsuccessfully that he was subjected to double jeopardy because he was charged with armed robbery on three occasions: (1) in Count II of his indictment, (2) in Count IV of his indictment, and (3) when he pled guilty to the charge of armed robbery. The State filed an Order of Nolle Prosequi on Counts I, II, III, and V; therefore, the burglary charge in Count II was passed to the file, and defendant was no longer charged with nor convicted of Count II. *Ewing v. State*, 34 So. 3d 612, 2009 Miss. App. LEXIS 661

(Miss. Ct. App. 2009), cert. denied, 34 So. 3d 1176, 2010 Miss. LEXIS 245 (Miss. 2010).

Offenses of kidnapping under Miss. Code Ann. § 97-3-53 and armed robbery under Miss. Code Ann. § 97-3-79 were clearly separate and distinct, with each requiring proof of additional facts the other did not; kidnapping, for example, required proof of intent to cause such person to be secretly confined or imprisoned against their will, whereas armed robbery did not, and armed robbery required the taking of personal property of another, but kidnapping did not. Thus, the crimes were separate and distinct regardless of their temporal overlap or their arising from a common nucleus of operative facts, and defendant's double jeopardy rights were not violated through being convicted of both kidnapping and armed robbery. *Moore v. State*, 938 So. 2d 1254, 2006 Miss. App. LEXIS 86 (Miss. Ct. App. 2006), cert. denied, 2006 Miss. LEXIS 750 (Miss. Oct. 5, 2006), cert. denied, 939 So. 2d 805, 2006 Miss. LEXIS 749 (Miss. 2006).

Burglary conviction was upheld where acquittal on armed robbery charges did not invoke double jeopardy concerns because defendant was not previously tried for either of the charges and because the burglary charge did not contain the same elements, such as exhibiting a deadly weapon and putting the victim in fear; similarly, the burglary included elements not found in armed robbery, such as breaking and entering. *Smallwood v. State*, 930 So. 2d 448, 2006 Miss. App. LEXIS 399 (Miss. Ct. App. 2006).

Inmate's convictions for aggravated assault and aggravated robbery did not violate his Fifth Amendment right to be free from double jeopardy because even though the charges arose from the same set of facts, the two charges had different elements that the State needed to prove and one was not a lesser-included offense of the other. *Thomas v. State*, 930 So. 2d 1264, 2005 Miss. App. LEXIS 993 (Miss. Ct. App. 2005).

Where defendant robbed the victim, a store clerk, at gunpoint, and pistol whipped the victim numerous times, the offenses of robbery with the use of a

deadly weapon, and aggravated assault clearly required different elements of proof, and double jeopardy did not apply. *Houston v. State*, 887 So. 2d 808, 2004 Miss. App. LEXIS 451 (Miss. Ct. App.), cert. denied, 888 So. 2d 1177, 2004 Miss. LEXIS 1448 (Miss. 2004).

Conspiracy to commit armed robbery required only agreement among two or more people to commit the crime, while armed robbery, required the use of a deadly weapon which placed an individual in fear of immediate injury. Actual robbery required the establishment of several different facts than the agreement to commit the act; thus, the offenses were two separate crimes and defendant was not subjected to double jeopardy by convictions for both. *Stovall v. State*, 873 So. 2d 1056, 2004 Miss. App. LEXIS 454 (Miss. Ct. App. 2004).

Convictions for armed carjacking and armed robbery occurring during the same episode did not constitute double jeopardy where the carjacking charge was based on the taking of a delivery truck and the robbery charge was based on the theft of money from one of the occupants of the truck. *McCline v. State*, 856 So. 2d 556, 2003 Miss. App. LEXIS 460 (Miss. Ct. App.), cert. denied, 860 So. 2d 315, 2003 Miss. LEXIS 722 (Miss. 2003).

23. Verdict.

Evidence against defendant did not preponderate so heavily against the verdict that the failure to grant a new trial would sanction an unconscionable injustice because the weight of the evidence suggested that store employees should have recognized defendant's voice during the commission of the robbery; though the employees knew defendant from prior encounters, the robber alleged to be defendant wore a hooded sweatshirt partially covering his face when he entered the dimly lit store. *Lenoir v. State*, 224 So. 3d 85, 2017 Miss. LEXIS 79 (Miss. 2017).

Defendants were properly convicted of armed robbery because the form of the verdict constituted an intelligent answer to the issues submitted to the jury and allowed the jury's intent to be understood in a reasonably clear manner. *James v. State*, 146 So. 3d 985, 2014 Miss. App.

LEXIS 66 (Miss. Ct. App.), cert. denied, 146 So. 3d 981, 2014 Miss. LEXIS 463 (Miss. 2014).

24. Jury.

Defendants were properly convicted of

armed robbery because defendants did not fail to receive a fair and impartial trial due to juror misconduct. *James v. State*, 146 So. 3d 985, 2014 Miss. App. LEXIS 66 (Miss. Ct. App.), cert. denied, 146 So. 3d 981, 2014 Miss. LEXIS 463 (Miss. 2014).

RESEARCH REFERENCES

ALR.

Admissibility, in robbery prosecution, of evidence of other robberies. 42 A.L.R.2d 854.

Gambling or lottery paraphernalia as subject of larceny, burglary, or robbery. 51 A.L.R.2d 1396.

Robbery by means of toy or simulated gun or pistol. 61 A.L.R.2d 996.

Fact that gun was unloaded as affecting criminal responsibility. 79 A.L.R.2d 1412.

Robbery by means of toy or simulated gun or pistol. 81 A.L.R.3d 1006.

Robbery, attempted robbery, or assault to commit robbery, as affected by intent to collect or secure debt or claim. 88 A.L.R.3d 1309.

Pocket or clasp knife as deadly or dangerous weapon for purposes of statute aggravating offenses such as assault, robbery, or homicide. 100 A.L.R.3d 287.

Dog as deadly or dangerous weapon for purposes of statutes aggravating offenses such as assault and robbery. 7 A.L.R.4th 607.

Walking cane as deadly or dangerous weapon for purpose of statutes aggravating offenses such as assault and robbery. 8 A.L.R.4th 842.

Parts of the human body, other than feet, as deadly or dangerous weapons for purposes of statutes aggravating offenses such as assault and robbery. 8 A.L.R.4th 1268.

Fact that gun was unloaded as affecting criminal responsibility. 68 A.L.R.4th 507.

Fact that gun was broken, dismantled, or inoperable as affecting criminal responsibility under weapons statute. 81 A.L.R.4th 745.

Dog as deadly or dangerous weapon for purposes of statutes aggravating offenses such as assault and robbery. 124 A.L.R.5th 657.

Cigarette Lighter as Deadly or Dangerous Weapon. 22 A.L.R. 6th 533.

Parts of Human Body, other than Feet, as Deadly or Dangerous Weapons or Instrumentalities for Purposes of Statutes Aggravating Offenses such as Assault and Robbery. 67 A.L.R.6th 103.

Am. Jur.

67 Am. Jur. 2d, Robbery §§ 4, 5.

2 Am. Jur. Trials, Investigating Particular Crimes §§ 32-36 (robbery).

4 Am. Jur. Proof of Facts 2d, Criminal Acts Committed under Duress, §§ 6 et seq. (proof of duress excusing commission of robbery and kidnapping).

CJS.

77 C.J.S., Robbery §§ 42,43.

Law Reviews.

1978 Mississippi Supreme Court Review: Criminal Law and Procedure. 50 Miss. L. J. 59, March, 1979.

Practice References.

Ronald L. Schoenberg, Criminal Law Deskbook (Matthew Bender).

§ 97-3-81. Robbery; threatening letter demanding money, property.

Every person who shall knowingly send or deliver, or shall make, and, for the purpose of being sent or delivered, shall part with the possession of any letter or writing with or without a name subscribed thereto, or signed with a fictitious name, or with any letter, mark, or other designation, threatening therein to accuse any person of a crime or to do any injury to the person or

property of any one, with a view or intent to extort or gain money or property of any description belonging to another, shall be guilty of an attempt to rob, and shall, on conviction be punished by imprisonment in the penitentiary not exceeding five years.

HISTORY: Codes, Hutchinson's 1848, ch. 64, art. 12, Title 4 (58); 1857, ch. 64, art. 223; 1871, § 2677; 1880, § 2947; 1892, § 1287; 1906, § 1364; Hemingway's 1917, § 1100; 1930, § 1129; 1942, § 2365.

Cross References — Robbery by threats to injure person or relatives at another time, see § 97-3-77.

Threatening letter or notice, see § 97-3-85.

Threats or coercion to prevent lawful conduct of business, see § 97-23-83.

Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see § 97-43-1 et seq.

Enhancement of offenses listed in 99-19-401(2) if the instrumentality used in the commission of the 99-19-401(2) offense was initially obtained in the course of the commission of the crime(s) provided for in this section, see § 99-19-401.

JUDICIAL DECISIONS

1. In general.

An action seeking to recover for the use of threats of criminal prosecution, in a letter, to enforce the payment of a purported civil debt, which the plaintiff charged was in violation of Code § 1942, § 2365, was barred by the statute of limitations applicable to an action for menace, the complaint having been filed more than a year after the letter was received. *Dennis v. Travelers Ins. Co.*, 234 So. 2d 624, 1970 Miss. LEXIS 1414 (Miss. 1970).

Under statute making it an offense for one to knowingly part with possession of letter threatening to accuse any person of a crime or to do any injury to the person or property of anyone, with view or intent to extort or gain money or property, indictment

charging that defendant wrote instrument informing addressee to leave house and place money under front doorstep, and not to return until certain time, and stating that addressee would be watched from time she left home until she returned, held defective, since it failed to charge that defendant parted with writing and writing did not contain threat. *Smith v. State*, 177 Miss. 731, 172 So. 132, 1937 Miss. LEXIS 160 (Miss. 1937).

Creditor is entitled to demand payment of honest debts, and a threat to charge the debtor with an offense committed in connection with the debt or obligation is not within the statute. *State v. Ricks*, 108 Miss. 7, 66 So. 281, 1914 Miss. LEXIS 159 (Miss. 1914).

RESEARCH REFERENCES

ALR.

Criminal liability of corporation for extortion, false pretenses, or similar offenses. 49 A.L.R.3d 820.

What constitutes "property" obtained within extortion statute. 67 A.L.R.3d 1021.

Pocket or clasp knife as deadly or dangerous weapon for purposes of statute aggravating offenses such as assault, robbery, or homicide. 100 A.L.R.3d 287.

When is act of extortion performed "un-

der color of official right" so as to be in violation of Hobbs Act (18 USCS § 1951). 74 A.L.R. Fed. 199.

Am. Jur.

31A Am. Jur. 2d, Extortion, Blackmail, and Threats §§ 19-41, 43-59.

67 Am. Jur. 2d, Robbery §§ 22, 23.

2 Am. Jur. Trials, Investigating Particular Crimes §§ 32-36 (robbery).

CJS.

77 C.J.S., Robbery §§ 32-28.

86 C.J.S., Threats and Unlawful Communications §§ 1 et seq.

Practice References.

Ronald L. Schoenberg, Criminal Law Deskbook (Matthew Bender).

§ 97-3-82. Extortion; definitions; offense and penalties.

(1) For the purposes of this section the following words and phrases shall have the meanings ascribed herein, unless the context clearly indicates otherwise:

(a) “Obtain” means: (i) in relation to property, to bring about a transfer or purported transfer of a legal interest in, or physical possession of, the property, whether to the obtainer or another; or (ii) in relation to labor or service, or any reward, favor, or advantage of any kind, to secure performance thereof; or attempt to do (i) or (ii).

(b) “Property” means anything of value, including, but not limited to, real estate, tangible and intangible personal property, contract rights, choses-in-action, reputation of a person and other interests in or claims to wealth, admission or transportation tickets, captured or domestic animals, food and drink, electric or other power.

(c) “Property of another” includes property in which any person other than the actor has an interest which the actor is not privileged to infringe, regardless of the fact that the actor also has an interest in the property and regardless of the fact that the other person might be precluded from civil recovery because the property was used in an unlawful transaction or was subject to forfeiture as contraband. Property in possession of the actor shall not be deemed property of another who has only a security interest therein, even if legal title is in the creditor pursuant to a conditional sales contract or other security agreement.

(d) “Public official” means any person elected or appointed to any office, position or employment whereby the person is paid a fee or salary by the State of Mississippi or any political subdivision thereof or any agency or subdivision of the government of the United States, regardless of the source or sources of the funds for the payment.

(2) A person is guilty of extortion if he purposely obtains or attempts to obtain property of another or any reward, favor, or advantage of any kind by threatening to inflict bodily injury on any person or by committing or threatening to commit any other criminal offense, violation of civil statute, or the public or private revelation of information not previously in the public domain for the purpose of humiliating or embarrassing the other person, without regard to whether the revelation otherwise constitutes a violation of a specific statute.

(3)(a) Except as provided in paragraph (d) of this subsection, any person, whether a public official or not, who commits the offense of extortion of property or things of value of another under the value of Five Hundred Dollars (\$500.00) shall be guilty of a misdemeanor and, upon conviction

thereof, shall be punished by imprisonment in the county jail not to exceed six (6) months.

(b) Except as provided in paragraph (d) of this subsection, any person, whether a public official or not, who commits the offense of extortion of property or things of value of another of the value of Five Hundred Dollars (\$500.00) or more shall be guilty of a felony and, upon conviction thereof, shall be punished by commitment to the custody of the Department of Corrections for a term not to exceed fifteen (15) years.

(c) Except as provided in paragraph (d) of this subsection, any person, whether a public official or not, who commits the offense of extortion in order to obtain any intangible reward, favor or advantage to which no monetary value is normally given shall be guilty of a felony and, upon conviction thereof, shall be punished by commitment to the custody of the Department of Corrections for a term not to exceed fifteen (15) years.

(d) Any public official acting in his official capacity or under color of his office who commits the offense of extortion in order to obtain any intangible reward, favor or advantage to which no monetary value is normally given, or who commits the offense of extortion of tangible property, regardless of the value of the property, shall be guilty of a felony and, upon conviction thereof, shall be punished by commitment to the custody of the Department of Corrections for a term not less than two (2) nor more than twenty (20) years.

HISTORY: Laws, 1994, ch. 466, §§ 1, 2; Laws, 2001, ch. 384, § 1; Laws, 2005, ch. 538, § 2, eff from and after July 1, 2005.

RESEARCH REFERENCES

ALR.

Injury to Reputation or Mental Well-Being as Within Penal Extortion Statutes Requiring Threat of "Injury to the Person." 87 A.L.R.5th 715.

Am. Jur.

31A Am. Jur. 2d, Extortion, Blackmail, and Threats §§ 20-38.

CJS.

35 C.J.S., Extortion §§ 1 et seq.

Practice References.

Ronald L. Schoenberg, Criminal Law Deskbook (Matthew Bender).

§ 97-3-83. Robbery; bonds, bills, notes, etc., cotton receipts and railroad tickets.

Robbery of obligations or bonds, bill obligatory, bank bills or bills of exchange, promissory notes for the payment of any money or specific property, paper bills of credit, cotton receipts, railroad passenger tickets, certificates granted by or under authority of this state or the United States, or any state, territory, or district therein, or of any foreign country, shall be punished in the same manner, both as to the principal and accessory, as robbery of goods and chattels.

HISTORY: Codes, 1857, ch. 64, art. 224; 1871, § 2678; 1880, § 2948; 1892, § 1290; 1906, § 1365; Hemingway's 1917, § 1101; 1930, § 1130; 1942, § 2366.

Cross References — Penalty for robbery, see § 97-3-75.

Theft of bonds, notes, etc., see § 97-17-45.

Theft of railroad tickets, see § 97-25-11.

Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see § 97-43-1 et seq.

JUDICIAL DECISIONS

1. In general.

First Amendment precluded imposition of liability on participants in economic boycott, even though some of them engaged in violence and threats contributed to success of boycott, because boycott was otherwise nonviolent, politically motivated, and designed to force governmental and economic change and to effectuate

rights guaranteed by Constitution itself; however, First Amendment did not bar recovery from those who engaged in violence or threats of violence for losses proximately caused by their unlawful conduct. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 102 S. Ct. 3409, 73 L. Ed. 2d 1215, 1982 U.S. LEXIS 49 (U.S. 1982).

RESEARCH REFERENCES

CJS.

77 C.J.S., Robbery § 5.

Practice References.

Ronald L. Schoenberg, *Criminal Law Deskbook* (Matthew Bender).

§ 97-3-85. Threats and intimidation; by letter or notice.

If any person shall post, mail, deliver, or drop a threatening letter or notice to another, whether such other be named or indicated therein or not, with intent to terrorize or to intimidate such other, he shall, upon conviction, be punished by imprisonment in the county jail not more than six months, or by fine not more than five hundred dollars, or both.

HISTORY: Codes, 1892, § 1303; 1906, § 1377; Hemingway's 1917, § 1117; 1930, § 1147; 1942, § 2384.

Cross References — Robbery by threats demanding money or property, see § 97-3-81.

Threats or coercion to prevent lawful conduct of business, see § 97-23-83.

JUDICIAL DECISIONS

1. In general.

Letter held not a "threatening letter."

State v. Jamison, 99 Miss. 248, 54 So. 843, 1911 Miss. LEXIS 200 (Miss. 1911).

RESEARCH REFERENCES

ALR.

Validity and construction of terroristic threat statutes. 45 A.L.R.4th 949.

CJS.

86 C.J.S., Threats and Unlawful Communications §§ 1 et seq.

Am. Jur.

31A Am. Jur. 2d, Extortion, Blackmail, and Threats §§ 20-23, 28, 30.

Practice References.

Ronald L. Schoenberg, Criminal Law Deskbook (Matthew Bender).

§ 97-3-87. Threats and intimidation; whitecapping.

Any person or persons who shall, by placards, or other writing, or verbally, attempt by threats, direct or implied, of injury to the person or property of another, to intimidate such other person into an abandonment or change of home or employment, shall, upon conviction, be fined not exceeding five hundred dollars, or imprisoned in the county jail not exceeding six months, or in the penitentiary not exceeding five years, as the court, in its discretion may determine.

HISTORY: Codes, 1906, § 1398; Hemingway's 1917, § 1141; 1930, § 1173; 1942, § 2416.

Cross References — Conspiracy to prevent persons from engaging in lawful work, see § 97-23-41.

Threats or coercion to prevent lawful conduct of business, see § 97-23-83.

RESEARCH REFERENCES

ALR.

Danger to reputation as within penal extortion statute requiring threat of "injury to the person". 74 A.L.R.3d 1255.

Recovery for discharge from employment in retaliation for filing workers' compensation claim. 32 A.L.R.4th 1221.

Unemployment compensation: harassment or other mistreatment by co-worker as "good cause" justifying abandonment of employment. 40 A.L.R.4th 304.

State criminal prosecutions of union officer or member for specific physical threats to employer's property or person, in connection with labor dispute – modern cases. 43 A.L.R.4th 1141.

Punitive damages for interference with contract or business relationships. 44 A.L.R.4th 1078.

Liability of employer, supervisor, or manager for intentionally or recklessly causing employee emotional distress. 52 A.L.R.4th 853.

Am. Jur.

25 Am. Jur. 2d, Duress and Undue Influence §§ 18, 19, and 21-23.

44B Am. Jur. 2d, Interference § 46.

CJS.

86 C.J.S., Threats and Unlawful Communications § 15.

§ 97-3-89. Timber, trees and saw logs; tampering with to injure or harass the owner prohibited.

Any person who shall maliciously and knowingly drive, force, place, or otherwise insert, or cause to be driven, forced, placed or otherwise inserted any piece or kind of iron, steel, or metallic spike, nail, bar, rod, explosive, or other

substance of any kind whatsoever into any kind of saw timber, trees, logs, or timber or logs, standing or fallen, which are not his own, and which are, or may be classed as commercial, or merchantable timber, logs or trees, from which lumber may be produced, with the intent and purpose of annoying, harassing, injuring or damaging the owner of same, in his person or property, or any other person, or for any other unauthorized purpose whatsoever, without the consent of the owner of such timber, logs, or trees, shall be guilty of a misdemeanor, and upon conviction shall be punished by imprisonment in the county jail not less than three months nor more than six months, or by a fine not exceeding five hundred dollars, or both.

HISTORY: Codes, Hemingway's 1917, § 1120; 1930, § 1150; 1942, § 2387; Laws, 1914, ch. 143.

Cross References — Salvage, generally, see §§ 89-17-1 et seq.

Imposition of standard state assessment in addition to all court imposed fines or other penalties for any misdemeanor violation, see § 99-19-73.

RESEARCH REFERENCES

Am. Jur.

52 Am. Jur. 2d, Logs and Timber
§§ 120, 121.

§ 97-3-91. Timber, trees and saw logs; penalty for tampering when injury occurs.

When any person shall be physically injured in handling, sawing, squaring, or otherwise manufacturing such trees, logs, or timber into lumber, or other sawmill products, by reason of such metallic or explosive substances having been driven, inserted or placed in such timber, trees, or logs, the person so offending shall be guilty of a felony and on conviction shall be imprisoned in the penitentiary for a period of not more than ten years.

HISTORY: Codes, Hemingway's 1917, § 1121; 1930, § 1151; 1942, § 2388; Laws, 1914, ch. 143.

RESEARCH REFERENCES

Am. Jur.

52 Am. Jur. 2d, Logs and Timber
§§ 120, 121.

§ 97-3-93. Timber, trees and saw logs; penalty for tampering when death results.

Whenever the death of any person shall be caused by reason of such metallic or explosive substances having been driven, placed or inserted in such merchantable timber as provided in Section 97-3-89, the person so offending

shall be guilty of manslaughter, and upon conviction shall be punished as the law directs.

HISTORY: Codes, Hemingway's 1917, § 1122; 1930, § 1152; 1942, § 2389; Laws, 1914, ch. 143.

RESEARCH REFERENCES

Am. Jur.

52 Am. Jur. 2d, Logs and Timber
§§ 120, 121.

§ 97-3-95. Sexual battery.

(1) A person is guilty of sexual battery if he or she engages in sexual penetration with:

(a) Another person without his or her consent;

(b) A mentally defective, mentally incapacitated or physically helpless person;

(c) A child at least fourteen (14) but under sixteen (16) years of age, if the person is thirty-six (36) or more months older than the child; or

(d) A child under the age of fourteen (14) years of age, if the person is twenty-four (24) or more months older than the child.

(2) A person is guilty of sexual battery if he or she engages in sexual penetration with a child under the age of eighteen (18) years if the person is in a position of trust or authority over the child including without limitation the child's teacher, counselor, physician, psychiatrist, psychologist, minister, priest, physical therapist, chiropractor, legal guardian, parent, stepparent, aunt, uncle, scout leader or coach.

HISTORY: Laws, 1980, ch. 450, § 1; Laws, 1983, ch. 429, § 3; Laws, 1985, ch. 389, § 6; Laws, 1993, ch. 512, § 2; Laws, 1998, ch. 549, § 3, eff from and after July 1, 1998.

Cross References — Applicability of certain evidentiary rules in criminal prosecutions for child abuse, see § 13-1-401.

Notification of Department of Education that certificated person has been convicted of sex offense, see § 37-3-51.

Prohibition of person convicted of crimes affecting children or other violent crimes from being licensed as foster parent or a foster home, see § 43-15-6.

Sexual battery of a vulnerable person, see § 43-47-18.

Sexual battery, as provided in this section, defined as crime of violence, see § 97-3-2.

Rape, see §§ 97-3-65 and 97-3-71.

Touching or handling a child for lustful purposes, see § 97-5-23.

Crime of condoning felonious child abuse, see § 97-5-40.

Carnal knowledge of step or adopted child or child of cohabitating partner, see § 97-5-41.

Mandatory reporting of offense under this section relating to sexual battery when committed by an adult against a minor under the age of sixteen, see § 97-5-51.

Time limitation for prosecuting an offense under this section, see § 99-1-5.

Testing for HIV and AIDS of any person convicted under this section, see §§ 99-19-201 and 99-19-203.

JUDICIAL DECISIONS

ANALYSIS

1. In general; construction.
2. Validity; constitutionality.
3. Applicability.
4. Elements.
5. Defenses.
6. Indictment.
7. Evidence; generally; admissibility.
8. —Past sex crimes.
9. — Sufficiency.
10. —Other; miscellaneous.
11. Practice and procedure; jury instructions.
12. Sentence.
13. Other, miscellaneous.
14. Lesser included offenses.
15. Double jeopardy.
16. New trial.
17. Speedy trial.

1. In general; construction.

Defendant was properly convicted of sexual battery of a child while in a position of trust or authority because, while his first trial ended in a mistrial, there was no double jeopardy violation where it was granted on defendant's motion and there was nothing to support a conclusion that the prosecutor did not interview the victim prior to defendant's first trial in order to goad the motion, and there was sufficient evidence to find defendant guilty where the variance between the indictment and the evidence at trial did not impact defendant's defense that there was no inappropriate contact between him and the victim and there was evidence of sexual penetration, the parties' ages, and defendant's status as the victim's great uncle. *Blake v. State*, 271 So. 3d 685, 2018 Miss. App. LEXIS 610 (Miss. Ct. App. 2018).

Defendant's conviction and sentence for the sexual battery of a minor child in violation of Miss. Code Ann. §§ 97-3-95(1)(d) and 97-3-97(a) was proper where his motion to suppress was rightfully denied since intoxication did not automatically render his confession involuntary. He failed to show symptoms of being under the influence and the record indicated that he was given his Miranda warnings

and asked questions. *Morris v. State*, 913 So. 2d 432, 2005 Miss. App. LEXIS 307 (Miss. Ct. App. 2005).

Defendant's conviction for capital murder was proper where the trial court did not abuse its discretion in denying defendant's motion for funds because his argument that DNA testing could have shown consent or lack of force was without merit. The evidence would not have been at all probative on the issue of consent, Miss. Code Ann. § 97-3-95(1)(a) *Brink v. State*, 888 So. 2d 437, 2004 Miss. App. LEXIS 559 (Miss. Ct. App.), cert. denied, 888 So. 2d 1177, 2004 Miss. LEXIS 1475 (Miss. 2004), cert. denied, 544 U.S. 986, 125 S. Ct. 1858, 161 L. Ed. 2d 744, 2005 U.S. LEXIS 3129 (U.S. 2005).

Lack of consent is essential fact necessary to constitute crime of sexual battery. *Peterson v. State*, 671 So. 2d 647, 1996 Miss. LEXIS 54 (Miss. 1996).

This section creates three separate classes of victims. Thus, in a prosecution for sexual battery of a child under the age of 14, the defendant was not entitled to an instruction containing the element "without her consent." *Ryan v. State*, 525 So. 2d 799, 1988 Miss. LEXIS 251 (Miss. 1988).

Although, on its face, the definition of sexual penetration announced in § 97-3-97 encompasses any penetration, the parameters of the definition of sexual penetration are logically confined to activities which are the product of sexual behavior or libidinal gratification, not merely the product of clinical examination or domestic, parental functions. *Roberson v. State*, 501 So. 2d 398, 1987 Miss. LEXIS 2267 (Miss. 1987).

Attempted sexual battery is a criminal offense by virtue of Mississippi Code § 97-1-7. *Gill v. State*, 485 So. 2d 1047, 1986 Miss. LEXIS 2378 (Miss. 1986).

2. Validity; constitutionality.

Miss. Code Ann. § 97-3-95 was held not to be unconstitutionally vague in a sexual battery case where the inmate admitted that he knew that raping an 11-year-old girl was wrong, but he did it anyway. *Calhoun v. State*, 849 So. 2d 892, 2003 Miss. LEXIS 233 (Miss. 2003).

This section is not unconstitutionally vague since, as applied to a male adult who allegedly stuck his finger into the vagina of a 10-year-old girl, the statute gives fair notice to a person of ordinary intelligence that the defendant's alleged conduct is forbidden, and there are no indications that the statute encourages erratic arrest and convictions. *Roberson v. State*, 501 So. 2d 398, 1987 Miss. LEXIS 2267 (Miss. 1987).

The absence of explicit mens rea language in this section does not render the statute unconstitutional, since the legislature may define a crime which depends on no mental elements and consists only of forbidden acts or omissions. *Roberson v. State*, 501 So. 2d 398, 1987 Miss. LEXIS 2267 (Miss. 1987).

3. Applicability.

A teacher in a school that a child of the required age attends has a position of trust or authority over the child sufficient to fit within the meaning of the statute, and there is nothing in the statute that would limit the meaning to a student who is in a specific class of the teacher. *Carter v. State*, 775 So. 2d 91, 1999 Miss. LEXIS 374 (Miss. 1999).

Statute was not applied ex post facto to defendant where subsection (c), under which he was prosecuted, was added to statute to be effective from and after March 29, 1983, and incident giving rise to prosecution occurred in August, 1983. *Cantrell v. State*, 507 So. 2d 325, 1987 Miss. LEXIS 2478 (Miss. 1987).

Where defendant's 19-year-old daughter testified at trial that she and defendant had engaged in acts of fellatio and cunnilingus, defendant was properly indicted under § 97-29-59, and not § 97-3-95 et seq., which were enacted subsequent to the violation for which he was convicted, in that § 97-3-103 expressly provides that the sexual battery statutes do not repeal, modify or amend any other criminal statute. *Contreras v. State*, 445 So. 2d 543, 1984 Miss. LEXIS 1612 (Miss. 1984).

4. Elements.

Since the age of the victim was not an essential element of this section, the State

did not have to set forth proof as to the victim's age. *Gilmore v. State*, 282 So. 3d 601, 2019 Miss. App. LEXIS 323 (Miss. Ct. App. 2019).

Defendant's motion for postconviction relief was properly denied because trial counsel was not ineffective as he did not show that he would not have pled guilty had his attorney informed him of the "facts" about whether the victim was emancipated and had the ability to consent, and whether he was in a position of authority or trust over the victim because he admitted in his guilty-plea petition that he did in fact have a sexual relationship with a minor, and he understood the matters set forth in the indictment identifying him as a person in a position of authority and trust over the victim; and the sexual-battery statute made no exception for emancipated minors, and the list of positions of authority and trust was without limitation. *Shoemake v. State*, 222 So. 3d 339, 2017 Miss. App. LEXIS 328 (Miss. Ct. App. 2017).

Defendant's motion for postconviction relief was properly denied as his motion was time-barred and without merit because his motion was not filed within three years after entry of the judgment of conviction; and, notwithstanding the time-bar, defendant did not show that he entered his guilty plea involuntarily as the plea-hearing transcript affirmatively demonstrated that the trial court ensured defendant had knowledge of the elements of sexual battery; defendant informed the court that he understood the charge against him; the trial court had the indictment read aloud, which included each element of defendant's charge; and the State showed how it would prove its case had it gone to trial. *Shoemake v. State*, 222 So. 3d 339, 2017 Miss. App. LEXIS 328 (Miss. Ct. App. 2017).

Marriage can be an affirmative defense to sexual battery, yet it is not an absolute defense; once the defense of marriage is raised, it will apply, unless the State proves beyond a reasonable doubt that the two were separated or living apart at the time of the attack or that force was involved, and proof of force negates the affirmative defense. *Burgess v. State*, 178 So. 3d 1266, 2015 Miss. LEXIS 570 (Miss. 2015).

Force is not an element of sexual battery, and force is not required to be established in sexual-battery cases unless the affirmative defense of marriage is raised; if it is raised, the State is required to prove the use of force beyond a reasonable doubt, to overcome the marital-defense exception. *Burgess v. State*, 178 So. 3d 1266, 2015 Miss. LEXIS 570 (Miss. 2015).

Trial court did not err in approving jury instructions that included the requirement of force for sexual battery because defendant raised the issue of force; in asserting the affirmative defense of marriage, defendant was not surprised because he introduced the issue, and once he raised the defense, the jury was properly instructed to consider force. *Burgess v. State*, 178 So. 3d 1266, 2015 Miss. LEXIS 570 (Miss. 2015).

For purposes of a new trial, a guilty verdict in a sexual battery case was not against the overwhelming weight of the evidence because it was up to a jury to assess the reliability of a victim's sister, who testified on the issue of penetration; moreover, even though defendant's seminal fluid on the victim's body did not prove penetration, the testimony of the sister and of police detectives regarding defendant's admission of other instances of oral sex established that element of the crime. *Singleton v. State*, 16 So. 3d 742, 2009 Miss. App. LEXIS 169 (Miss. Ct. App. 2009).

In a sexual battery case under Miss. Code Ann. § 97-3-95(2) where penetration was an issue, a judgment notwithstanding the verdict was properly denied because it was up to a jury to determine the credibility of a victim's sister, who testified that she saw defendant sticking his tongue in between the victim's vagina; also, defendant admitted to other instances of oral sex performed by the victim. *Singleton v. State*, 16 So. 3d 742, 2009 Miss. App. LEXIS 169 (Miss. Ct. App. 2009).

Court of appeals erred when it reversed defendant's conviction for molestation where molestation was a lesser included offense of sexual battery; defendant's actions were done with the purpose of gratifying his lust, and the victim was under the age of 14 at the time of the incident, and defendant's acts of grabbing the vic-

tim, touching her genital area, and touching himself, demonstrated that he was gratifying his lust, and intent could be inferred from a defendant's actions. *Friley v. State*, 879 So. 2d 1031, 2004 Miss. LEXIS 1010 (Miss. 2004).

Court properly denied defendant's motion for post-conviction relief after defendant pled guilty to sexual battery; trial counsel did not provide erroneous advice in advising defendant that the 14-year-old victim's consent was not an issue for the jury to address. Under the plain language of Miss. Code Ann. § 97-3-95(1)(c), the State would not have had to address the issue of consent; State would have only had to show that the victim was between the ages of 14 and 16, that defendant was more than 36 months older than the victim, and that defendant had engaged in sexual penetration with the victim. *Bates v. State*, 879 So. 2d 519, 2004 Miss. App. LEXIS 728 (Miss. Ct. App. 2004).

State provided proof of sexual penetration of a child victim where the victim testified that she performed oral sex on defendant after defendant bought her some candy and defendant's niece testified that she saw the victim put defendant's penis in her mouth. *Williams v. State*, 859 So. 2d 1046, 2003 Miss. App. LEXIS 1075 (Miss. Ct. App. 2003).

The requirement of evidence of libidinal gratification or sexual behavior relates only to subsection (1)(c) of this section, which deals with sexual penetration of a child, and does not relate to sexual penetration without consent under subsection (1)(a) of this section. *Puckett v. State*, 737 So. 2d 322, 1999 Miss. LEXIS 122 (Miss. 1999).

Lustful intent is not an element of sexual battery that needs to be proven under subsection (1)(c) of this section. *Watts v. State*, 733 So. 2d 214, 1999 Miss. LEXIS 45 (Miss. 1999), overruled in part, *Rubenstein v. State*, 2005 Miss. LEXIS 789 (Miss. Dec. 1, 2005).

Contact between person's mouth, lips, or tongue and genitals of person's body, whether by kissing, licking, or sucking, is "sexual penetration," regardless of gender of victim or perpetrator. *Hennington v. State*, 702 So. 2d 403, 1997 Miss. LEXIS 637 (Miss. 1997).

Force or reasonable apprehension of force are not necessary elements of the crime of sexual battery under this section. *Sanders v. State*, 586 So. 2d 792, 1991 Miss. LEXIS 644 (Miss. 1991).

The absence of explicit mens rea language in this section does not render the statute unconstitutional, since the legislature may define a crime which depends on no mental elements and consists only of forbidden acts or omissions. *Roberson v. State*, 501 So. 2d 398, 1987 Miss. LEXIS 2267 (Miss. 1987).

The testimony of the 10-year-old female sexual battery victim, and the admission of the defendant of inserting his finger into the victim's vagina under circumstances suggesting a lustful or licentious state of mind, represents sufficient evidence of the defendant's intent to violate the statute. *Roberson v. State*, 501 So. 2d 398, 1987 Miss. LEXIS 2267 (Miss. 1987).

Conviction for sexual battery will be reversed on appeal where appellate court's study of record discloses no evidence of penetration as charged in indictment and required by this section. *Thompson v. State*, 468 So. 2d 852, 1985 Miss. LEXIS 1948 (Miss. 1985).

5. Defenses.

Defendant was not prejudiced by the amendment of an indictment for Miss. Code Ann. § 97-3-95(1)(d) sexual battery that deleted the words "without her consent," because a child under the age of 14 had no legal ability to consent to such an act thus the language had no legal meaning as it was not an element of the crime and its removal had not deprived defendant of a valid defense. *Lee v. State*, 944 So. 2d 56, 2005 Miss. App. LEXIS 918 (Miss. Ct. App. 2005), *aff'd*, 944 So. 2d 35, 2006 Miss. LEXIS 680 (Miss. 2006).

Defendant's motion for a new trial after a conviction for sexual battery without consent was properly denied because the verdict was not against the great weight of the evidence; a victim's testimony was adequately corroborated by another person present in the room, and the question of whether the victim's inaction constituted consent (the minor victim was intoxicated and was afraid to object) was a question for the jury. *Seigfried v. State*,

869 So. 2d 1040, 2003 Miss. App. LEXIS 958 (Miss. Ct. App. 2003), *cert. denied*, 870 So. 2d 666, 2004 Miss. LEXIS 352 (Miss. 2004).

That 15-year-old victim's character was less than sterling was not a defense to sexual battery under Miss. Code Ann. § 97-3-95(1)(c), and was therefore neither relevant nor material. *Kearley v. State*, 843 So. 2d 66, 2002 Miss. App. LEXIS 560 (Miss. Ct. App. 2002), *cert. denied*, 842 So. 2d 578, 2003 Miss. App. LEXIS 410 (Miss. Ct. App. 2003).

The defense of mistake of age is not available to a charge of sexual battery. *Todd v. State*, 806 So. 2d 1086, 2001 Miss. LEXIS 305 (Miss. 2001).

Consent is a defense to a charge of sexual battery committed with a person 14 years of age and over. *Coates v. State*, 495 So. 2d 464, 1986 Miss. LEXIS 2662 (Miss. 1986).

While consent is a defense to a charge of sexual battery committed with a person 14 years of age and over, jury had before it substantial credible evidence upon which to base its finding that the prosecutrix had been threatened and did not voluntarily consent. *Coates v. State*, 495 So. 2d 464, 1986 Miss. LEXIS 2662 (Miss. 1986).

6. Indictment.

Use of the words "engaged in sexual penetration" in combination with a description of the specific means of sexual penetration was sufficient to charge the crime of sexual battery in the indictment and whether the term "to" or "into" was used with respect to the alleged form of penetration in the victim's mouth or defendant's anus was immaterial because the method of achieving sexual penetration was not an element of the offense. *Luis Felipe Torres Mendez v. State*, — So. 3d —, 2020 Miss. App. LEXIS 464 (Miss. Ct. App. Aug. 18, 2020).

Defendant's indictment contained the essential elements of the crime of sexual battery and he was provided sufficient facts to fairly inform him of the charge against which he must defend, as well as sufficient facts to enable him to plead double jeopardy in the event of a future prosecution for the same offense and thus, the indictment was not defective. *Luis*

Felipe Torres Mendez v. State, — So. 3d —, 2020 Miss. App. LEXIS 464 (Miss. Ct. App. Aug. 18, 2020).

Indictment against defendant, for counts of sexual battery of a child under the age of fourteen, was sufficient because, although defendant claimed that the indictment failed to allege the specific type of penetration that occurred, the indictment was sufficient to notify defendant of the charge against defendant and empowered defendant to plead double jeopardy if defendant were ever prosecuted again for the same offense of sexually penetrating the same victim during the same time frame provided for in the indictment. *Harris v. State*, 289 So. 3d 742, 2019 Miss. App. LEXIS 551 (Miss. Ct. App. 2019).

There was no variance between the indictment charging defendant with sexual battery and a jury instruction that included “and/or object” because the jury unanimously convicted defendant of sexually penetrating the victim, which was the essence of the offense of sexual battery. *Metcalf v. State*, 265 So. 3d 1242, 2019 Miss. App. LEXIS 66 (Miss. Ct. App.), cert. dismissed, 265 So. 3d 181, 2019 Miss. LEXIS 117 (Miss. 2019).

Trial court did not err in refusing to dismiss the indictment because the indictment tracked the language of the statute; while the indictment added facts not necessary to convict defendant under § 97-3-95(1)(a), the language of the indictment tracked the language of the statute as a whole that the State alleged defendant violated. *Spears v. State*, 2019 Miss. App. LEXIS 500 (October 15, 2019).

Trial court did not err in refusing to dismiss the indictment because the indictment charged defendant with “having sexual intercourse with the victim against her will,” satisfying the statutory language in § 97-3-95(1)(a); the additional subsections were within the elements instruction given to the jury, thereby guaranteeing the jury found that which was alleged by the State in the indictment. *Spears v. State*, 294 So. 3d 637, 2019 Miss. App. LEXIS 500 (Miss. Ct. App. 2019), cert. denied, — So. 3d —, 2020 Miss. LEXIS 122 (Miss. 2020), cert. denied, 291 So. 3d 1112, 2020 Miss. LEXIS 172 (Miss. 2020).

Trial court did not err in refusing to dismiss the indictment because the additional element that the victim was a “vulnerable person” did not make the indictment defective, but rather it only served to increase the burden of proof the State placed upon itself; there was ample proof that the victim was a vulnerable person, and the jury was instructed in the elements instruction to make that finding of fact. *Spears v. State*, 294 So. 3d 637, 2019 Miss. App. LEXIS 500 (Miss. Ct. App. 2019), cert. denied, — So. 3d —, 2020 Miss. LEXIS 122 (Miss. 2020), cert. denied, 291 So. 3d 1112, 2020 Miss. LEXIS 172 (Miss. 2020).

Trial court did not err in refusing to dismiss the indictment because the indictment gave defendant clear and adequate notice of the charges he faced at trial and inured to his benefit by demanding more proof than any single subsection; the State did meet its burden of proof under § 97-3-95(2) as the jury was instructed because the victim testified she was seventeen at the time Spears had sex with her against her will, and the evidence showed that defendant was the victim’s stepfather. *Spears v. State*, 294 So. 3d 637, 2019 Miss. App. LEXIS 500 (Miss. Ct. App. 2019), cert. denied, — So. 3d —, 2020 Miss. LEXIS 122 (Miss. 2020), cert. denied, 291 So. 3d 1112, 2020 Miss. LEXIS 172 (Miss. 2020).

Trial court did not err in refusing to dismiss the indictment because it gave defendant clear and adequate notice of the charges he faced and inured to his benefit by demanding more proof than any single subsection; since the State included the language “between the age of thirteen and seventeen” in the indictment, it carried the burden of proving that self-created age category, and there was sufficient testimony by the victim that the touching and sex occurred during that period of her life. *Spears v. State*, 294 So. 3d 637, 2019 Miss. App. LEXIS 500 (Miss. Ct. App. 2019), cert. denied, — So. 3d —, 2020 Miss. LEXIS 122 (Miss. 2020), cert. denied, 291 So. 3d 1112, 2020 Miss. LEXIS 172 (Miss. 2020).

Although defendant claimed that the indictment was defective because of the broad date ranges identified, the date

range was narrowed to two years and the State of Mississippi could not narrow the date range provided in the indictment counts any more than it already did as the alleged acts were recurrent over a period of years, which prevented the minor victim from recalling exact dates and times. *Shoemaker v. State*, 256 So. 3d 604, 2018 Miss. App. LEXIS 105 (Miss. Ct. App.), cert. denied, 256 So. 3d 593, 2018 Miss. LEXIS 449 (Miss. 2018).

Indictment against defendant for sexual battery and fondling was sufficient to put defendant on notice of the charges against defendant because the indictment tracked the statutory language for each offense, provided the time range and location of each offense, identified the victim and the ages of defendant and the victim, and alleged that the acts were committed willfully, unlawfully, and feloniously. *Walker v. State*, 262 So. 3d 560, 2018 Miss. App. LEXIS 302 (Miss. Ct. App. 2018), cert. denied, 260 So. 3d 798, 2019 Miss. LEXIS 42 (Miss. 2019).

Trial court did not err in dismissing appellant's motion for postconviction relief because the indictment was not defective for failing to allege the essential elements of sexual battery of a child under fourteen years old when the charged offense in the indictment tracked the language set forth in the statute; the element of consent is not an essential element of the charged crime. *Carter v. State*, 204 So. 3d 791, 2016 Miss. App. LEXIS 762 (Miss. Ct. App. 2016).

Indictment charged defeneant with a crime; the statute does not discuss sexual penetration "of" the victim, but the statute criminalizes sexual penetration "with" the victim. *Dowden v. State*, 203 So. 3d 743, 2016 Miss. App. LEXIS 717 (Miss. Ct. App. 2016).

Defendant's indictment was not defective because each count tracked the language of the statutes under which he was convicted, fondling and sexual battery; therefore, the indictment provided a clear description of the charges from which defendant could prepare his defense. *Graves v. State*, 216 So. 3d 1152, 2016 Miss. LEXIS 150 (Miss. 2016).

Indictment charging Miss. Code Ann. § 97-5-23(1) fondling and Miss. Code Ann.

§ 97-3-95(1)(d) sexual battery was not defective, under Miss. Unif. Cir. & Cty. R. 7.06, because statutory language was tracked. *Graves v. State*, — So. 3d —, 2015 Miss. LEXIS 542 (Miss. Oct. 29, 2015), op. withdrawn, sub. op., 216 So. 3d 1152, 2016 Miss. LEXIS 150 (Miss. 2016).

Even if defendant had timely objected to the indictment alleging the expiration of the statute of limitations for the first two years of the indictment's time span, the circuit court's solution would have been to amend the indictment to reflect a time period not in conflict with any alleged statute of limitations issues, which was essentially done when defense counsel requested and was granted jury instructions that limited the time span for the offenses to 15 months that were within the statute of limitations. *Hines v. State*, 126 So. 3d 985, 2013 Miss. App. LEXIS 819 (Miss. Ct. App. 2013).

In a case where defendant was convicted of statutory rape and of sexual battery of a child, although the indictment listed a four-year time span in which the offenses occurred, because defense counsel requested and was granted jury instructions limiting that time span to 15 months during which defendant was in contact with the children, the 15-month time span in which the offenses allegedly occurred was not unreasonably large for defendant to be on notice as to the crimes charged and was not unreasonably large so as to prevent defendant from defending himself. *Hines v. State*, 126 So. 3d 985, 2013 Miss. App. LEXIS 819 (Miss. Ct. App. 2013).

Defendant's indictment was sufficient even though the sexual battery counts initially tracked the wrong subsection of the sexual battery statute because the indictment specifically alleged that defendant abused his fourteen-year-old daughter and included his birthday, the daughter's birthday, and the dates of the alleged crimes; the amendment to the indictment to reflect the appropriate subsection was one of form. *Weeks v. State*, 123 So. 3d 373, 2013 Miss. LEXIS 427 (Miss. 2013).

Indictment charged defendant with one count of touching a child for lustful purposes pursuant to Miss. Code Ann. § 97-5-23(1) and one count of sexual battery

pursuant to Miss. Code Ann. § 97-3-95(1)(d), and the crimes formed a common scheme of sexual misconduct and all the crimes occurred over a period of time against the same victim in a similar manner; thus, the court rejected defendant's claim that it was error for him to be tried on a multi-count indictment, for purposes of Miss. Code Ann. § 99-7-2, plus the court noted that the trial court instructed the jury to evaluate each count separately and return separate verdicts. *Wilson v. State*, 990 So. 2d 798, 2008 Miss. App. LEXIS 572 (Miss. Ct. App. 2008).

Where each count of the indictment specifically stated that defendant did willfully, unlawfully, and feloniously commit sexual battery by some form of sexual penetration or performing cunnilingus on the victim while defendant was above the age of eighteen and the victim was under the age of sixteen, the indictment was not fatally flawed because it tracked the language of both subsections (c) and (d) of Miss. Code Ann. § 97-3-95(1). The indictment included the birth date of both defendant and the victim as well as the time of the alleged offense; the fact that it mistakenly referred to the victim as being under the age of sixteen instead of fourteen was irrelevant. *Smith v. State*, 989 So. 2d 973, 2008 Miss. App. LEXIS 255 (Miss. Ct. App. 2008).

Indictment for fondling and sexual battery was not defective for failing to provide the specific dates that the offenses occurred, as the state had narrowed the time frame sufficiently to put defendant on notice of the nature and cause of the charges against him. *Hodgin v. State*, 964 So. 2d 492, 2007 Miss. LEXIS 406 (Miss. 2007).

Denial of the inmate's motion for post-conviction relief was proper in part because the indictment was sufficient to charge a crime since it alleged that he engaged in sexual penetration with the victim against her will; thus, the indictment was sufficient to charge the crime of sexual battery. *Knight v. State*, 959 So. 2d 598, 2007 Miss. App. LEXIS 444 (Miss. Ct. App.), cert. denied, 964 So. 2d 508, 2007 Miss. LEXIS 538 (Miss. 2007).

Defendant was properly convicted of sexually battery by digital penetration

where sufficient proof showed that defendant was provided notice that he was being charged with sexual battery, and the variance between the language of the indictment and proof at trial was not a fatal error under Miss. Const. art. 3, § 26. *Burrows v. State*, 961 So. 2d 701, 2007 Miss. LEXIS 341 (Miss. 2007).

Although rape required forcible sexual intercourse, and sexual battery required sexual penetration without consent, the indictment specifically put defendant on notice that he was charged with forcibly inserting his sexual organ inside the victim's rectum; his defense to that charge was not that it happened and was consensual, but that it did not happen, and therefore his defense to the original indictment was equally applicable to amended indictment, which changed a charge from rape to sexual battery. *Goodin v. State*, 977 So. 2d 353, 2007 Miss. App. LEXIS 298 (Miss. Ct. App. 2007), aff'd in part and rev'd in part, 977 So. 2d 338, 2008 Miss. LEXIS 143 (Miss. 2008).

Although defendant argued that the indictment failed to expressly charge that he penetrated the victim with lustful intent, neither Miss. Code Ann. § 97-3-95 nor Miss. Code Ann. § 97-3-97(a) required proof of lustful intent; defendant's claim as to the sufficiency of the dates alleged in the indictment was waived for failure to demur the indictment in the court below. *Frei v. State*, 934 So. 2d 318, 2006 Miss. App. LEXIS 196 (Miss. Ct. App. 2006).

In a sexual battery case, the indictment was properly amended by the removal of the phrase "without her consent," because the defense to the charge did not change, and although defendant might have asserted that he was surprised, his surprise could not be characterized as unfair; the net effect of the amendment was that defendant only had to defend one claim, rather than two. *Lee v. State*, 944 So. 2d 35, 2006 Miss. LEXIS 680 (Miss. 2006).

Where the state dismissed one indictment for sexual battery in exchange for defendant's guilty plea to gratification of lust, it was not a dismissal based on it being defective; however, even if it had been, the second indictment was sufficient to charge a crime where it alleged that defendant engaged in sexual penetration

with a child under the age of 14 against her will. *Knight v. State*, 956 So. 2d 264, 2006 Miss. App. LEXIS 663 (Miss. Ct. App. 2006), sub. op., 959 So. 2d 598, 2007 Miss. App. LEXIS 444 (Miss. Ct. App. 2007).

Defendant argued that his indictment should have stated that the penetration was knowingly or intentionally committed; however, sexual battery was not a specific intent crime and thus the indictment did not have to refer to a specific intent, and the indictment was valid. *Jones v. State*, 936 So. 2d 993, 2006 Miss. App. LEXIS 619 (Miss. Ct. App. 2006).

Trial court properly refused to merge two counts of an indictment charging defendant with sexual battery because the two counts alleged two separate acts of penetration; the first count charged that defendant inserted his tongue into the victim's vagina, while the second count charged that defendant inserted his penis into the victim's vagina. *Hill v. State*, 929 So. 2d 375, 2006 Miss. App. LEXIS 390 (Miss. Ct. App. 2006).

Denial of the inmate's petition for post-conviction relief was proper where, although the indictment was defective for failing to allege the inmate's age, he suffered no prejudice from that defect. Clearly he was more than 24 months older than the victim of the sexual battery when the offenses were committed and he knew that he was 24 months older than she was when he read the indictment and entered his guilty plea. *Robinson v. State*, 904 So. 2d 203, 2005 Miss. App. LEXIS 396 (Miss. Ct. App. 2005).

Where consent was not an element of sexual battery of a girl under the age of 14 under Miss. Code Ann. § 97-3-95(1)(c), the indictment was not fatal for failing to state that the 11-year-old victim had not consented to the offense; thus, the indictment did not present grounds for post-conviction relief. *Bryant v. State*, 879 So. 2d 530, 2004 Miss. App. LEXIS 756 (Miss. Ct. App. 2004).

An indictment for sexual battery was inadequate where there were no words relating to consent and no overt act was alleged indicating the manner in which the defendant attempted the crime. *Hawthorne v. State*, 751 So. 2d 1090, 1999

Miss. App. LEXIS 457 (Miss. Ct. App. 1999).

Whether fellatio by defendant was penetration of or with victim was irrelevant to sexual battery, and, thus, indictment could charge sexual penetration of male person under age of fourteen, even though statute prohibits sexual penetration with victim. *Hennington v. State*, 702 So. 2d 403, 1997 Miss. LEXIS 637 (Miss. 1997).

Indictment for sexual battery was insufficient where it failed to notify defendant that he was being charged with sexually penetrating victim without victim's consent; indictment did not include without consent in its charge. *Peterson v. State*, 671 So. 2d 647, 1996 Miss. LEXIS 54 (Miss. 1996).

Amendment of indictment from sexual battery to attempted sexual battery during trial did not prejudice defendant; by virtue of attempt statute, defendant had notice that he could be convicted of attempt charge. *Eakes v. State*, 665 So. 2d 852, 1995 Miss. LEXIS 555 (Miss. 1995).

Charges of 2 counts of sexual battery and one count of attempted sexual battery were properly combined in indictment, where transactions upon which offenses were based occurred over period of 5 months, and offenses were committed only against one child even when other children were present and available targets, which showed common plan. *Eakes v. State*, 665 So. 2d 852, 1995 Miss. LEXIS 555 (Miss. 1995).

A trial court committed reversible error in allowing an indictment to be amended to charge the defendant with a violation of subsection (2) of this section for sexual battery of a female "over" the age of 14 years, instead of subsection (1) of this section for sexual battery of a female "under the age of 14 years, since the defendant's defense that the victim was not under 14 years of age but was 26 years old would have required the jury to return a verdict of acquittal; the amendment was "of substance" and was therefore beyond the power of the trial court to authorize. *Rhymes v. State*, 638 So. 2d 1270, 1994 Miss. LEXIS 321 (Miss. 1994).

Indictment tracking statutory language was sufficient to inform accused of charge against him, and no ambiguity existed

where lone reference to defendant being beyond age 18 did not track statutory language. *Cantrell v. State*, 507 So. 2d 325, 1987 Miss. LEXIS 2478 (Miss. 1987).

Where indictment charged defendant engaged in sexual battery on prosecutrix on or about or before a specified date, it was not reversible error for prosecution to prove, at trial, that defendant committed the act on the date specified in the indictment, and to prove, over defense's objections, that similar acts had occurred on numerous occasions for several years prior thereto. *Coates v. State*, 495 So. 2d 464, 1986 Miss. LEXIS 2662 (Miss. 1986).

Indictment which charges sexual penetration of identified victim on specified date in specified geographical location, including charge that acts were committed unlawfully, willfully and feloniously and typed label at top reading "SEXUAL BATTERY MCA 97-3-95(a)" is sufficient to charge accused with criminal offense of sexual battery. *Hines v. State*, 472 So. 2d 386, 1985 Miss. LEXIS 2131 (Miss. 1985).

7. Evidence; generally; admissibility.

One victim's testimony that defendant began sexually abusing her when she was seven and that it occurred every day, and the victim's statement during the forensic interview that the last time it occurred was a few days earlier was sufficient for the jury to find that defendant committed the crimes on or about December 2017, which was the month prior to the victim's disclosure. *Ross v. State*, 288 So. 3d 317, 2020 Miss. LEXIS 13 (Miss. 2020).

Trial court did not err in denying defendant's judgment notwithstanding the verdict motion because a reasonable jury could find beyond a reasonable doubt that his contact with the victim included some slight penetration of the labia, which was all that was required to sustain the conviction for sexual battery; the victim's testimony was sufficient for the jury to infer that defendant at least slightly penetrated the victim's vulva or labia, and other evidence supported a finding of penetration. *Austin v. State*, 282 So. 3d 545, 2019 Miss. App. LEXIS 297 (Miss. Ct. App. 2019).

While both victims at various points made a statement or statements that de-

fendant did not penetrate them, they mother statements that he did penetrate them, including their sworn testimony at trial and thus, the evidence was sufficient for the jury to find defendant guilty of sexual battery. *Portis v. State*, 245 So. 3d 457, 2018 Miss. LEXIS 273 (Miss. 2018).

Evidence presented at trial sufficiently supported defendant's convictions for fondling and sexual battery because the victim testified in detail regarding the two times defendant fondled and sexually assaulted her; the victim's testimony was not substantially contradicted, and witnesses corroborated her testimony. *Graves v. State*, 216 So. 3d 1152, 2016 Miss. LEXIS 150 (Miss. 2016).

In a sexual battery prosecution, the trial court erred in allowing a forensic psychologist to testify about a child's statement that defendant had put his mouth on the child's penis, as the trial court made no finding as to the reliability of the hearsay statement and did not conduct a hearing outside the presence of the jury as required by Miss. R. Evid. 803(25). *Rogers v. State*, 95 So. 3d 623, 2012 Miss. LEXIS 399 (Miss. 2012).

Denial of defendant's motion for judgment of acquittal notwithstanding the verdict and, in the alternative, motion for a new trial, after he had been convicted of sexual battery in violation of Miss. Code Ann. § 97-3-95(1)(a) was appropriate because the evidence was sufficient to support the conviction. The case consisted largely of the victim's word against defendant's and that presented a factual dispute to be resolved by a jury; the supreme court was unable to determine that any rational trier of fact could not have found the essential elements of the crime beyond a reasonable doubt after the evidence was viewed in the light most favorable to the State. *Abernathy v. State*, 30 So. 3d 320, 2010 Miss. LEXIS 103 (Miss. 2010).

At trial for fondling and sexual battery, it was not error under the circumstances presented to accept a witness as an expert in the field of child abuse, allow an unredacted videotape of the child victim's interview to be admitted into evidence, or to allow the victim's mother to testify as to statements that the victim made to her. *Hodgin v. State*, 964 So. 2d 492, 2007 Miss. LEXIS 406 (Miss. 2007).

Where defendant was found guilty of the sexual battery of a child, the verdict was not against the weight of the evidence because the victim's testimony was corroborated by her knowledge of the pink vibrator, the thong underwear, and the appearance of defendant's genital area. His attempt to explain that knowledge simply created an issue of fact for the jury to resolve and the fact that the jury believed the victim gave defendant no basis for a valid complaint on appeal. *Lee v. State*, 944 So. 2d 56, 2005 Miss. App. LEXIS 918 (Miss. Ct. App. 2005), *aff'd*, 944 So. 2d 35, 2006 Miss. LEXIS 680 (Miss. 2006).

Circuit judge did not err in refusing to allow defendant's attorneys to question his former wife about the man to whom she was now married, because the circuit court found that that testimony had no relevance where defense counsel had made a number of ambiguous statements about the relevancy of the line of questioning to aid in the establishment that other men or youth could have caused the child victim's injuries. *Foley v. State*, 914 So. 2d 677, 2005 Miss. LEXIS 586 (Miss. 2005).

Where defendant was convicted of felonious sexual intercourse with a child under the age of 14, felonious sexual penetration with a child less than 18, and possession of materials depicting children under the age of 18 engaging in sexually explicit conduct, the circuit had not erred in not granting his pretrial motion to suppress evidence obtained by a search warrant based on the statements of the child victim, because she specifically stated that defendant had showed her pictures of nude people on his computer screen doing things she described as "gross." She used language to describe acts performed on her and by her in relation to defendant in such sexually explicit terms that veracity could easily be inferred. *Foley v. State*, 914 So. 2d 677, 2005 Miss. LEXIS 586 (Miss. 2005).

Trial court had not erred by allowing the statements of 5-year-old rape victim to be brought before the jury through the testimony of medical professionals who examined or interviewed her because the statements to doctors were statements made for the purposes of medical treat-

ment, and thus an exception to the hearsay rule of exclusion. And, the statements were made as a part of neutral medical evaluations and thus were not testimonial and defendant's confrontation clause violation argument was without merit. *Foley v. State*, 914 So. 2d 677, 2005 Miss. LEXIS 586 (Miss. 2005).

Trial court had not erred by allowing the statements of 5-year-old rape victim to be brought before the jury through the testimony of medical professionals who examined or interviewed her because the victim's statements were squarely within the tender years exception to hearsay as provided by Miss. R. Evid. 803(25). There was no doubt that the overwhelming physical evidence of abuse to the child's person corroborated the statements by her alleging sexual abuse and her comments, spontaneously made to a number of professionals trained to detect abuse and its effects, showed an overwhelming sense of adult knowledge of sexual topics of which children in their earliest years should have no knowledge. *Foley v. State*, 914 So. 2d 677, 2005 Miss. LEXIS 586 (Miss. 2005).

Trial court had not erred by allowing the statements of 5-year-old rape victim to be brought before the jury through the testimony of medical professionals who examined or interviewed her because the statements to doctors were admissible under Miss. R. Evid. 803(4) as statements made for the purposes of medical treatment, and thus an exception to the hearsay rule of exclusion. *Foley v. State*, 914 So. 2d 677, 2005 Miss. LEXIS 586 (Miss. 2005).

Victim's testimony alone is sufficient to support a rape conviction, even though not corroborated, where it is consistent with the circumstances. *Green v. State*, 887 So. 2d 840, 2004 Miss. App. LEXIS 931 (Miss. Ct. App. 2004).

Unsupported word of the victim of a sex crime is sufficient to support a guilty verdict where that testimony is not discredited or contradicted by other credible evidence, especially if the conduct of the victim is consistent with the conduct of one who has been victimized by a sex crime. *Green v. State*, 887 So. 2d 840, 2004 Miss. App. LEXIS 931 (Miss. Ct. App. 2004).

Where defendant was charged with two counts of sexual battery and one count of conspiracy to batter, based on the victim's allegations that defendant and his accomplice held her down, beat her, and raped her, the trial court properly instructed the jury on aiding and abetting. Defendant was convicted based on evidence that he forced the victim to have sex with him. *Norris v. State*, 893 So. 2d 1071, 2004 Miss. App. LEXIS 806 (Miss. Ct. App. 2004), cert. denied, 893 So. 2d 1061, 2005 Miss. LEXIS 122 (Miss. 2005).

Evidence was sufficient to convict defendant based on the nine-year-old victim's statements describing the abuse and the corroborating testimony from the victim's doctor and school counselor. *Davis v. State*, 878 So. 2d 1020, 2004 Miss. App. LEXIS 246 (Miss. Ct. App.), cert. denied, 878 So. 2d 67, 2004 Miss. LEXIS 964 (Miss. 2004), cert. denied, 543 U.S. 1051, 125 S. Ct. 880, 160 L. Ed. 2d 773, 2005 U.S. LEXIS 474 (U.S. 2005).

Trial court had more than sufficient evidence before it, none of which was contradicted or even impeached during the hearing on a motion in limine regarding child victim's extrajudicial statements regarding the alleged sexual abuse, to conclude that the child's statements had sufficient indicia of reliability to overcome a hearsay objection and be admitted under Miss. R. Evid. 803(25), including the fact that the child related the events to a social worker without a great deal of prompting or prodding and told what happened in some detail in her own words, and the child was ten years old at the time. *Sharp v. State*, 862 So. 2d 576, 2004 Miss. App. LEXIS 7 (Miss. Ct. App. 2004).

Evidence was sufficient to convict defendant of attempted sexual battery of a female minor where the victim testified that defendant asked her to get into a car with him and to lie down in the back of the car, and asked her if "he was going to get him some sex," and when they arrived at a hotel room, defendant announced to other men there that the victim was there to have sex with them. *Quarles v. State*, 863 So. 2d 987, 2004 Miss. App. LEXIS 2 (Miss. Ct. App. 2004).

Discrepancies in a child's prior statements regarding sexual abuse by defen-

dant, a male relative, were not so damaging to the child's credibility as to have compelled the conclusion that the jury had abused its discretion in finding that she had truthfully related the events of the two encounters with defendant that led to the charges; the examining doctor testified, based on her professional experience, that it was not uncommon for a child sexual abuse victim to give different versions of events when talking to different people because, among other considerations, a child in that situation was often inclined to conceal or even deny matters if the child was made uncomfortable or fearful of the person making inquiry. *Sharp v. State*, 862 So. 2d 576, 2004 Miss. App. LEXIS 7 (Miss. Ct. App. 2004).

There certainly was evidence to support conviction on two counts of sexual battery, where the child victim was eight years old when the offenses occurred, stated that defendant had stuck his finger into her vagina and placed his penis in her mouth, and her testimony included a vivid description of the events that took place between them. *Peters v. State*, 864 So. 2d 983, 2004 Miss. App. LEXIS 16 (Miss. Ct. App. 2004).

Hearsay evidence, including statements made by the child victim were properly admitted where the trial court made extensive findings as to the factors necessary to ascertain the veracity of the child's testimony, the trial court did conduct a hearing outside the presence of the jury with regard to the victim and each witness that would be testifying under the exception, and made extensive findings of fact and conclusions of law. *Wright v. State*, 859 So. 2d 1028, 2003 Miss. App. LEXIS 1079 (Miss. Ct. App. 2003).

Evidence was sufficient to prove beyond a reasonable doubt that defendant committed sexual battery, Miss. Code Ann. § 97-3-95(1)(c), because the first victim testified that (1) defendant engaged in sexual penetration with the first victim by inserting defendant's penis into the first victim's mouth; (2) defendant was 24 or more months older than the first victim; and (3) the first victim was under the age of 14 years. *Bell v. State*, 835 So. 2d 953, 2003 Miss. App. LEXIS 214 (Miss. Ct. App. 2003).

In a prosecution for sexual battery of a 10-year-old child in violation of this section, the trial court erred in allowing a bag of sexually explicit pictures found in the defendant's vehicle to be introduced into evidence, where the victim and 2 child witnesses testified that the defendant showed them pictures of nude people in a book, but they did not testify that they were shown the bag of pictures. The defendant was prejudiced by the admission of the bag of pictures to an extent that its admission constituted reversible error, since the jurors may have been offended by the explicit nudity shown in the pictures and by the graphic depictions of heterosexual and homosexual acts, and the jurors may have concluded that because the defendant collected these pictures, he did, in fact, sexually batter the victim. *Wade v. State*, 583 So. 2d 965, 1991 Miss. LEXIS 461 (Miss. 1991).

In a prosecution for sexual battery of a child, a child therapist's brief testimony, negating the defense position that the victim had confused the defendant with other abusers, did not rise to the level of bolstering and was not reversible error. *Hosford v. State*, 560 So. 2d 163, 1990 Miss. LEXIS 174 (Miss. 1990).

In a sexual battery prosecution which involved allegations of homosexual acts with a minor victim, letters written by the defendant which contained references to his homosexuality were relevant as tending to show that the defendant was a homosexual conjoined with the issue of whether he in fact engaged in the act with which he was charged. *Kolb v. State*, 542 So. 2d 265, 1989 Miss. LEXIS 213 (Miss. 1989).

In a prosecution for sexual battery, evidence that the defendant had gonorrhea and had infected the victim with gonorrhea was admissible. *Daniel v. State*, 536 So. 2d 1319, 1988 Miss. LEXIS 611 (Miss. 1988).

Trial court committed reversible error in admitting magazines other than one viewed by victim during alleged sexual battery, because other magazines were neither relevant to any issue in case nor part of *res gestae* of crime; they were simply found in desk drawer in shed owned by defendant, and sole function of

introduction was to inflame jurors. *Collins v. State*, 513 So. 2d 877, 1987 Miss. LEXIS 2741 (Miss. 1987).

At trial of sexual battery charge, the exclusion from evidence of letters written by prosecutrix to defendant, predicated on defense's failure to disclose them in pre-trial discovery, did not deprive defendant of his constitutional right to confront witnesses, to a fair trial, and to due process of law, even though the excluded letters, which otherwise were competent evidence, on their face reflected a relationship between defendant and his stepdaughter (prosecutrix) substantially at odds with prosecution's theory that defendant had employed threats of violence or death to force his stepdaughter to engage in sexual acts with him, contained materials which impeached testimony of prosecutrix, and contradicted other more peripheral parts of prosecution's case. *Coates v. State*, 495 So. 2d 464, 1986 Miss. LEXIS 2662 (Miss. 1986).

In an attempted sexual battery prosecution, where, in an attempt to show hostility on the part of prosecutrix-daughter towards defendant, the defense had questioned defendant's wife with regard to a conversation with her daughter 2 weeks before the incident, the prosecution was properly allowed to cross-examine the wife about the same conversation to bring out testimony that daughter had stated that defendant had raped her 4 times. *Gill v. State*, 485 So. 2d 1047, 1986 Miss. LEXIS 2378 (Miss. 1986).

8. —Past sex crimes.

In a prosecution for sexual battery, the trial court should have granted the defendant's motion in limine to preclude admission, for impeachment use pursuant to Rule 609, Miss. R. Ev., of his prior conviction of touching a child for lustful purposes, even though a social worker testified that a general characteristic of pedophiles is an inability to be truthful, since admission of the prior conviction would have been manifestly prejudicial and mere reference to the conviction during the trial would have prejudiced the jury irreparably. *Hopkins v. State*, 639 So. 2d 1247, 1993 Miss. LEXIS 486 (Miss. 1993).

It was not error to permit testimony about sex assault on victim committed weekend prior to that on which crime charged occurred because offense charge was sexual offense and evidence of past sexual crimes of accused is permitted in such cases. *Woodruff v. State*, 518 So. 2d 669, 1988 Miss. LEXIS 24 (Miss. 1988).

Evidence of other sexual crimes remote in time and with third parties was improperly admitted into evidence in sexual battery case, where defendant had not been convicted of any of those crimes and they were vaguely referenced to have taken place some time between 1979 and 1981, while alleged offense for which defendant was on trial occurred in 1983; in context of sexual crimes, however, it was recognized that relaxation of rule prohibiting evidence of other crimes would be granted, if prior evidence involved sexual acts of same general type and with same person, as those charged in indictment. *Elmore v. State*, 510 So. 2d 127, 1987 Miss. LEXIS 2627 (Miss. 1987).

Where indictment charged defendant engaged in sexual battery on prosecutrix on or about or before a specified date, it was not reversible error for prosecution to prove, at trial, that defendant committed the act on the date specified in the indictment, and to prove, over defense's objections, that similar acts had occurred on numerous occasions for several years prior thereto. *Coates v. State*, 495 So. 2d 464, 1986 Miss. LEXIS 2662 (Miss. 1986).

Evidence of prior sexual acts was admissible against defendant in a sexual battery prosecution under § 97-3-95, where each prior act of sexual penetration was performed with the same youthful victim, each incident occurred at the victim's home during a time in the day or night when her mother was at work, each of the incidents occurred within a two and a half month period, each involved actual penetration of the defendant's penis into the vaginal orifice of his daughter, each act of sexual penetration occurred without the consent of the victim, and the defendant, during three of the four prior acts of intercourse, achieved orgasm. *Hicks v. State*, 441 So. 2d 1359, 1983 Miss. LEXIS 3055 (Miss. 1983), limited, *Mitchell v. State*, 539 So. 2d 1366, 1989 Miss. LEXIS 141 (Miss. 1989).

9. — Sufficiency.

Evidence supported defendant's sexual battery conviction because the minor victim stated in accounts that defendant forced the victim to go up and down on defendant when defendant's penis was inside the victim, or, alternatively, that defendant pulled the victim's underwear down, made the victim get on top of defendant, rubbed defendant's private between the victim's legs was outside of the victim's body, and put defendant's penis on top of the victim's private. Redness of the victim's labia majora was also noted in a medical examination. *Walker v. State*, 262 So. 3d 560, 2018 Miss. App. LEXIS 302 (Miss. Ct. App. 2018), cert. denied, 260 So. 3d 798, 2019 Miss. LEXIS 42 (Miss. 2019).

Evidence that the victim, upon regaining consciousness, noticed her undergarments had been removed and there was blood all over, and that the nurse who performed the sexual assault examination found the victim had vaginal redness and deep bruising inside her vagina was sufficient to support a conviction for sexual battery. *May v. State*, 267 So. 3d 803, 2018 Miss. App. LEXIS 632 (Miss. Ct. App. 2018), cert. denied, 267 So. 3d 280, 2019 Miss. LEXIS 169 (Miss. 2019).

Evidence, including the victim's detailed testimony regarding the first and last times that defendant fondled and sexually assaulted him, was sufficient to support a finding that defendant sexually assaulted and fondled the victim. *Hales v. State*, 213 So. 3d 511, 2017 Miss. LEXIS 75 (Miss. 2017).

Evidence was sufficient to sustain defendant's convictions for two counts of sexual battery and the verdict was not against the overwhelming weight of the evidence because there was ample evidence to support the jury's verdict finding that defendant sexually penetrated the victim both orally and vaginally without her consent; the victim's testimony that she was sexually battered was substantially corroborated by, inter alia, DNA evidence, the testimony of the friend of the victim, and the testimony of those to whom she immediately reported the assault; and the State was only required to prove beyond a reasonable doubt that defendant penetrated the victim without her

consent and not by mistake or accident. *Keys v. State*, 219 So. 3d 559, 2017 Miss. App. LEXIS 256 (Miss. Ct. App. 2017).

Jury verdict of guilty on the charges of gratification of lust and sexual battery was upheld on appeal based on the testimony of two victims because the material portions of the testimonies necessary to support the convictions were not contradicted or discredited, despite some inconsistencies. *Lindsey v. State*, 212 So. 3d 44, 2017 Miss. LEXIS 24 (Miss. 2017).

Evidence was insufficient to sustain a verdict for attempted sexual battery by anal penetration, as the evidence did not suggest attempted anal penetration to the extent that a reasonable juror could find it proven beyond a reasonable doubt, as none of the testimony clearly referred to the anal opening or clearly indicated that the touching constituted penetration of the anal cavity. *Williams v. State*, 216 So. 3d 409, 2017 Miss. App. LEXIS 16 (Miss. Ct. App. 2017).

There was sufficient evidence to find defendant was guilty of sexual battery because the victim's mother testified that she was tied to the bed while the victim and defendant "exchanged intercourse"; the mother also responded affirmatively when the prosecution asked her whether she saw the victim's penis go into defendant's anus, and it was undisputed that defendant was significantly more than twenty-four months older than the victim. *Dowden v. State*, 203 So. 3d 743, 2016 Miss. App. LEXIS 717 (Miss. Ct. App. 2016).

Evidence was sufficient to support defendant's convictions for two counts of sexual battery because the minor victim testified at trial that the victim was fourteen years old when the victim twice performed oral sex on defendant, who was thirty-one years old, and defendant performed oral sex on the victim once. Defendant was not entitled to relief when the victim, after the trial, signed an affidavit recanting the victim's testimony when pressed to do so by defendant's sibling. *Grant v. State*, 198 So. 3d 400, 2016 Miss. App. LEXIS 139 (Miss. Ct. App. 2016).

Evidence was insufficient to support a conviction for a second count of sexual battery as it related to defendant's alleged

penetration of a victim's anus with his penis; the victim's ambiguous statements did not suggest penetration to the extent that it was proven beyond a reasonable doubt. However, there was enough evidence to convict defendant for the lesser included offense of gratification of lust based on his act of rubbing his penis between the victim's buttocks. *Ringer v. State*, 203 So. 3d 794, 2016 Miss. App. LEXIS 288 (Miss. Ct. App. 2016).

Reasonable jury could have found defendant guilty beyond reasonable doubt of four counts of sexual battery and one count of exposing another to the human-immunodeficiency virus. *McCoy v. State*, 205 So. 3d 687, 2016 Miss. App. LEXIS 228 (Miss. Ct. App.), cert. denied, 205 So. 3d 1082, 2016 Miss. LEXIS 511 (Miss. 2016).

Evidence presented at trial sufficiently supported defendant's convictions for fondling and sexual battery because the victim testified in detail regarding the two times defendant fondled and sexually assaulted her; the victim's testimony was not substantially contradicted, and witnesses corroborated her testimony. *Graves v. State*, 216 So. 3d 1152, 2016 Miss. LEXIS 150 (Miss. 2016).

Evidence was sufficient to support defendant's convictions for forcible intercourse and sexual battery where defendant's accomplice admittedly punched the victim, the victim was scared, the accomplice's testimony corroborated the event as the victim had described it, and the jury heard the testimony of the convenience store employee's testimony recounting the moments following the incident, the testimony of the registered nurse who had performed the victim's rape kit, and the testimony of three law enforcement officers involved in the case. *Graham v. State*, 185 So. 3d 992, 2016 Miss. LEXIS 86 (Miss. 2016).

Trial court did not err by denying defendant's motion for a directed verdict on the count of the indictment charging him with performing fellatio on the victim and the evidence was sufficient for the jury to have found the essential elements of sexual battery beyond a reasonable doubt where both defendant's accomplice and the victim testified that during the assault de-

defendant forced the victim to perform oral sex. *Graham v. State*, 185 So. 3d 992, 2016 Miss. LEXIS 86 (Miss. 2016).

Evidence was sufficient to support defendant's Miss. Code Ann. §§ 97-5-23(1) and 97-3-95(1)(a) convictions where the victim testified that he sexually assaulted several times a week while she was attending high school, her testimony was not discredited or contradicted by any evidence except defendant's testimony, and given that this was a weight-of-the-evidence determination, deference was owed to the factfinder. *Different v. State*, 179 So. 3d 1078, 2015 Miss. LEXIS 589 (Miss. 2015).

Sufficient evidence supported defendant's convictions for fondling and sexual battery because the victim testified in detail about two occasions when defendant fondled and sexually assaulted her. *Graves v. State*, — So. 3d —, 2015 Miss. LEXIS 542 (Miss. Oct. 29, 2015), op. withdrawn, sub. op., 216 So. 3d 1152, 2016 Miss. LEXIS 150 (Miss. 2016).

Defendant was properly convicted of four counts of sexual battery because a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt; the victim testified clearly that defendant had abused her at least four times, defendant was at least twenty-four months older than the victim, and a detective testified that defendant made several statements during his interview that could have been interpreted as inculpatory. *Fagan v. State*, 171 So. 3d 496, 2015 Miss. LEXIS 391 (Miss. 2015).

Since defendant admitted to licking his granddaughter's vagina, there was sufficient proof of sexual penetration to support defendant's sexual battery plea. *Thomas v. State*, 175 So. 3d 525, 2015 Miss. App. LEXIS 217 (Miss. Ct. App. 2015).

Evidence was sufficient to support defendant's conviction of sexual battery where the victim was 15 years old at the time of the crime, defendant was three decades older, she testified that defendant put his finger in her vagina and directed her to put her mouth on his penis, and her testimony was corroborated by photographs found on defendant's cell phone. *Moore v. State*, 160 So. 3d 728, 2015 Miss. App. LEXIS 182 (Miss. Ct. App. 2015).

Victim testified that he was 17 years old when defendant forced him to perform oral sex, which clearly fell within the conduct provided by the statute; the victim's unsupported testimony regarding the explicit details of his sexual encounter with defendant was not contradicted or discredited, and the State presented sufficient evidence to support defendant's conviction of sexual battery. *Shelton v. State*, 172 So. 3d 216, 2014 Miss. App. LEXIS 607 (Miss. Ct. App. 2014), cert. denied, — So. 3d —, 2015 Miss. LEXIS 421 (Miss. 2015).

Based on the victim's testimony and her earlier statements to her mother and physicians, along with the physical examinations by the physicians, there was sufficient evidence to support defendant's convictions for sexual battery and gratification of lust; the victim acknowledged multiple times that defendant touched her, and she admitted on cross-examination that she told the prosecutor of the sexual assault *Mitchum v. State*, 164 So. 3d 477, 2014 Miss. App. LEXIS 514 (Miss. Ct. App. 2014), cert. denied, 163 So. 3d 301, 2015 Miss. LEXIS 244 (Miss. 2015).

Defendant's conviction for the sexual battery of a 13-year-old girl was proper because the evidence was sufficient. In part, the victim was under 14, while defendant was in his 40s; the victim testified that although she was drunk, she was sure she had been held down and sexually penetrated by defendant; and forensic evidence placed the victim's DNA on a sex toy. *Jones v. State*, 149 So. 3d 1060, 2014 Miss. App. LEXIS 388 (Miss. Ct. App. 2014).

Evidence was sufficient to sustain defendant's conviction for sexual battery because the victim's testimony alone was enough to sustain the conviction. Although the victim's testimony that the victim never gave defendant consent to lick the victim's penis and that the victim was telling defendant to stop throughout the incident was unsubstantiated and uncorroborated, it supported the lack-of-consent element of defendant's sexual-battery conviction, as the testimony was not discredited or contradicted by other credible evidence. *Pierce v. State*, 135 So. 3d 206, 2014 Miss. App. LEXIS 145 (Miss. Ct.

App. 2014), cert. denied, 158 So. 3d 1153, 2015 Miss. LEXIS 144 (Miss. 2015).

In a sexual battery case, there was sufficient evidence to establish that defendant violated Miss. Code Ann. §§ 97-3-95(1)(d) when defendant engaged in sexual penetration with a child who was protected by the statute. At the time of the offense, defendant was 36 years old, and the victim was 11 years old. *Joiner v. State*, 139 So. 3d 757, 2014 Miss. App. LEXIS 294 (Miss. Ct. App. 2014).

Circuit court did not abuse its discretion when it denied defendant's motion for a new trial because, given the testimony from the alleged sexual battery victim and witnesses who corroborated the victim's version of events, there was no evidentiary reason to disturb the verdict. *Matthews v. State*, 132 So. 3d 646, 2014 Miss. App. LEXIS 67 (Miss. Ct. App. 2014).

Evidence was sufficient to support defendant's conviction for sexual battery because he was more than 24 months older than his daughter, she was under the age of 14 at the times at issue, and the testimony of the daughter, her mother, and the mother's boyfriend was sufficient to find that defendant engaged in sexual penetration of the daughter's anus and mouth. *Allred v. State*, 130 So. 3d 504, 2014 Miss. LEXIS 54 (Miss. 2014).

Evidence was sufficient to convict defendant of statutory rape and sexual battery and the verdicts were not against the overwhelming weight of the evidence because the victim, who was not defendant's wife, was 14 years of age, and defendant was 26 years of age at the time of the October incident; the victim testified that defendant inserted his private organ into her rectum; and the absence of physical evidence did not negate his conviction as there was testimonial evidence. *Sims v. State*, 127 So. 3d 307, 2013 Miss. App. LEXIS 861 (Miss. Ct. App. 2013).

Evidence was sufficient to sustain defendant's convictions for statutory rape and sexual battery of a child and the overwhelming weight of the evidence was not contrary to the verdicts because the victims both testified that they visited defendant during the time span in which the offenses occurred, the victims both testified in detail regarding the sexual

abuse, and the victims' mother testified regarding the victims' visitation with defendant. *Hines v. State*, 126 So. 3d 985, 2013 Miss. App. LEXIS 819 (Miss. Ct. App. 2013).

Evidence was sufficient to support defendant's conviction for sexual battery by one in a position of authority over a child under the age of eighteen years old because the victim testified that defendant, the victim's grandparent, sexually abused the victim, who was under 18 years of age, when the victim was living in defendant's home and the victim's sole parent was away at the time. Moreover, defendant gave a statement to the police of having sexually abused the victim. *Gill v. State*, 126 So. 3d 128, 2013 Miss. App. LEXIS 782 (Miss. Ct. App. 2013).

Jury's verdict finding defendant guilty of sexual battery upon his fourteen-year-old daughter was sufficiently supported by the evidence and not against the overwhelming weight of the evidence because the victim testified that defendant had touched her vagina several times between June 2010 and September 2010 with his hands, mouth, penis, and a vibrator, and DNA evidence inside and outside the victim's vagina did not eliminate defendant as a potential source. *Weeks v. State*, 123 So. 3d 373, 2013 Miss. LEXIS 427 (Miss. 2013).

There was substantial evidence to support defendant's conviction of sexual battery as alleged in the indictment because the State's burden was met; the child demonstrated each act through hand gestures while on the witness stand, and a forensic interviewer and a detective offered corroborating testimony that the child described the incidents during interviews. *Jones v. State*, 164 So. 3d 1009, 2013 Miss. App. LEXIS 477 (Miss. Ct. App. 2013).

Conviction of sexual battery of a mentally deficient person, Miss. Code Ann. § 97-3-95(1)(b), was affirmed because there was sufficient evidence that the victim suffered from a mental deficiency; among other things, the victim's special-education teacher and former mental-health therapist testified that the victim's IQ was 61 and that he was significantly cognitively disabled. Moreover, the testi-

mony sufficiently showed that the victim's mental age was that of a young child. *Santos v. State*, 110 So. 3d 341, 2013 Miss. App. LEXIS 103 (Miss. Ct. App. 2013).

Sufficient evidence supported defendant's conviction for sexual battery of his daughter, in violation of Miss. Code Ann. § 97-3-95(2) (Rev. 2006), where the parties presented the jury with two varying theories on how defendant's DNA arrived inside of his daughter's vagina, and the jury considered the evidence and testimony presented by both parties and reached their verdict based on this information. The credibility of witness testimony was the province of the jury. *Wilson v. State*, 72 So. 3d 1145, 2011 Miss. App. LEXIS 236 (Miss. Ct. App.), cert. denied, 71 So. 3d 1207, 2011 Miss. LEXIS 513 (Miss. 2011).

Evidence was sufficient to convict defendant of sexual battery even though the State failed to establish that the crime occurred within the time frame alleged in the indictment and offense-tracking instruction. Defendant was not prejudiced by the variance and the proof showed the crime could have occurred reasonably near the time frame alleged. *McBride v. State*, 61 So. 3d 138, 2011 Miss. LEXIS 245 (Miss. 2011).

Defendant's conviction for sexual battery of a seven-year-old child, his nephew, in violation of Miss. Code Ann. § 97-3-95(1)(d), was supported by the evidence because the evidence was sufficient to sustain a conviction based on fellatio-based sexual battery under Miss. Code Ann. § 97-3-97(a); when asked to draw an "X" where defendant put his mouth, the victim drew an "X" on the penis on an anatomically-correct drawing of a male child. *Beasley v. State*, 74 So. 3d 357, 2010 Miss. App. LEXIS 681 (Miss. Ct. App. 2010).

Defendant's conviction for the sexual battery of his minor daughter in violation of Miss. Code Ann. § 97-3-95(1)(d) was appropriate because, while the testimony of the victim as to her age during the incident's time frame was vague, viewing the evidence in the light most favorable to the State, there was sufficient evidence for a reasonable juror to have found that she was sexually battered well before her

fourteenth birthday and within the parameters of the indictment's stated dates of "on or about or between" January 2002 and December 2005. *McBride v. State*, 61 So. 3d 174, 2010 Miss. App. LEXIS 218 (Miss. Ct. App. 2010), superseded, 61 So. 3d 138, 2011 Miss. LEXIS 245 (Miss. 2011).

Fact that the jury did not find defendant guilty of sexual battery did not vitiate the evidence as to touching; it simply meant that the jury was discerning and did not find sufficient evidence to support the sexual battery charges. *Dubose v. State*, 22 So. 3d 340, 2009 Miss. App. LEXIS 784 (Miss. Ct. App. 2009).

Defendant's conviction for sexual battery was appropriate because his conviction was not against the overwhelming weight of the evidence. The victim, who was 12 years old at the time, testified that she had been repeatedly raped by defendant, and her testimony was corroborated by her father's testimony and a medical examination. *Tanner v. State*, 20 So. 3d 764, 2009 Miss. App. LEXIS 761 (Miss. Ct. App. 2009).

Defendant's conviction of sexual battery and child fondling was supported by sufficient evidence where the victim, defendant's stepdaughter, testified that defendant fondled her breasts and genitals, inserted a vibrator into her vagina, and attempted vaginal penetration with his penis when she was between the ages of nine and ten years old. Further, the victim's grandmother testified that the victim admitted that defendant was "touching her" and that she took the victim to a doctor specializing in gynecology for a physical, and the doctor testified that her examination of the victim revealed tears in her hymen, which were consistent with and evidence of trauma. *Tate v. State*, 20 So. 3d 623, 2009 Miss. LEXIS 529 (Miss. 2009).

Evidence was sufficient to sustain defendant's conviction for sexual battery, and a jury's verdict was not against the weight of the evidence, because the evidence, which was based on medical evidence, the testimony of the victim, the testimony of a nurse, and defendant's admissions, showed that penetration of the nine-year-old victim had occurred. *Ruiz v.*

State, 22 So. 3d 309, 2009 Miss. App. LEXIS 344 (Miss. Ct. App. 2009).

Verdict convicting defendant of sexual battery for sexual penetration of a five-year-old girl by inserting his fingers into her vagina, in violation of Miss. Code Ann. § 97-3-95(1)(d), was not against the weight of the evidence because the victim testified that defendant put his fingers in her private parts; the victim's testimony was corroborated by her brother, who witnessed the incident, and by a nurse who examined her. *Valmain v. State*, 5 So. 3d 1079, 2009 Miss. LEXIS 142 (Miss. 2009).

Trial court did not err when it denied defendant's motion for a new trial where the jury's verdict was not against the overwhelming weight of the evidence; the victim's testimony regarding the incidents of sexual battery was never discredited, and all other witness testimony was consistent with the victim's account, and the fact that the jury did not believe defendant's theory of the case did not render the verdict untenable. *Caldwell v. State*, 6 So. 3d 1076, 2009 Miss. LEXIS 75 (Miss. 2009).

Evidence as sufficient to support defendant's convictions of burglary, kidnapping, and sexual battery where the father of the two-year-old victim testified that he went to pick up his girlfriend from work and left his children secured in their home, that he encountered the 17-year-old defendant while en route and told him where he was going, that he discovered upon his return that his home had been broken into and that his daughter was missing, that he found defendant with his daughter in an abandoned structure nearby, and that, upon examination, the girl's genital area was red, bleeding, and scratched and where a physician who examined the victim testified that the girl's vagina was red, swollen, and irritated but that there was no evidence of infection as the cause. Because the two-year-old victim was too short to have unlocked the door to the family home by herself and had never walked out of the home unassisted, the evidence permitted the jury to reasonably infer that defendant had broken into the family residence, removed the victim therefrom without her father's permission, and sexually assaulted her. *Moton v.*

State, 999 So. 2d 1287, 2009 Miss. App. LEXIS 20 (Miss. Ct. App. 2009).

Evidence was sufficient to sustain defendant's conviction of sexual battery, under Miss. Code Ann. § 97-3-95(1)(a), and for the denial of defendant's motion for judgment notwithstanding the verdict because the victim's testimony of a non-consensual assault, although unsupported, was not discredited or contradicted by other credible evidence and because the DNA testing identified the defendant as the source of the semen found in the victim's vaginal vault. *Wilkins v. State*, 1 So. 3d 850, 2008 Miss. LEXIS 588 (Miss. 2008).

Defendant's conviction for sexual battery of a 22-year-old mentally retarded woman, in violation of Miss. Code Ann. § 97-3-95(1)(b), was supported by the evidence because, based on testimony by the victim's mother, the jury could have found beyond a reasonable doubt that sexual penetration, as defined in Miss. Code Ann. § 97-3-97(a), was occurring at the moment the mother walked in on the victim and defendant. *Holmes v. State*, 20 So. 3d 681, 2008 Miss. App. LEXIS 713 (Miss. Ct. App. 2008), cert. denied, 20 So. 3d 680, 2009 Miss. LEXIS 543 (Miss. 2009).

Jury was faced with the victim's account of the crime versus defendant's denial and weighing the evidence in the light most favorable to the verdict, the court could not find that allowing defendant's conviction under Miss. Code Ann. §§ 97-5-23(1), 97-3-95(1)(d) to stand would sanction an unconscionable injustice. *Wilson v. State*, 990 So. 2d 798, 2008 Miss. App. LEXIS 572 (Miss. Ct. App. 2008).

Victim testified that defendant had placed two fingers inside her and the jury clearly found the victim's testimony to be more credible and resolved any conflicts in favor of the victim, and thus the evidence was sufficient to support defendant's conviction of sexual battery under Miss. Code Ann. § 97-3-95(1)(d). *Wilson v. State*, 990 So. 2d 798, 2008 Miss. App. LEXIS 572 (Miss. Ct. App. 2008).

Where the State presented credible testimony from the seven-year-old victim, a social worker, a nurse specializing in sexual assault examinations, and an investigator with the sheriff's department,

the evidence was sufficient to establish the elements of sexual battery in violation of Miss. Code Ann. § 97-3-95. Tests showed that the victim's hymen had been broken, and she was infected with gonorrhea, and there were abnormalities in the victim's vagina and anus indicating penetration with a blunt object, consistent with penetration by a penis. *Reed v. State*, 987 So. 2d 1054, 2008 Miss. App. LEXIS 408 (Miss. Ct. App. 2008).

Victim's testimony that defendant sexually abused her was not discredited or contradicted by other credible evidence, and the jury believed the testimony of the victim, her mother, and her doctor; therefore, there was sufficient and credible evidence for a reasonable jury to find defendant guilty of sexual battery beyond a reasonable doubt. *Morgan v. State*, 995 So. 2d 812, 2008 Miss. App. LEXIS 351 (Miss. Ct. App.), cert. denied, 999 So. 2d 374, 2008 Miss. LEXIS 661 (Miss. 2008).

Denial of appellant's, an inmate's, request for post-conviction relief after he was convicted of capital murder (murder during the commission of sexual battery) was appropriate because he failed to prove that he received the ineffective assistance of counsel. Even if counsel had procured a DNA expert who testified that the inmate's DNA was not present, that did not exonerate the inmate of the sexual battery charge because sexual penetration could be by insertion of any object into the genital or anal opening of another person's body. *Havard v. State*, 988 So. 2d 322, 2008 Miss. LEXIS 264 (Miss. 2008).

In defendant's criminal prosecution for sexual battery in violation of Miss. Code Ann. § 97-3-95, the victim testified that when she was nine years old defendant touched her with his private parts while he was dating her mother; the testimony of six witnesses showed a consistency in the victim's allegations and expert testimony showed that the victim exhibited the physical and psychological characteristics of a sexually abused child. There was sufficient proof to establish the essential elements of sexual battery under Miss. Code Ann. § 97-3-95(1)(c); the trial court did not err in denying defendant's motions for a directed verdict. *Smith v. State*, 989 So. 2d 973, 2008 Miss. App. LEXIS 255 (Miss. Ct. App. 2008).

Defendant's conviction for sexual battery of a minor at least 14 years of age but under 16 years of age in violation of Miss. Code Ann. § 97-3-95(1)(c) was appropriate because, based on the closeness of the victim's birthday and the estimated date of conception, the jury could have reasonably determined that the victim was 14 at the time the baby was conceived with defendant as the father. The crime of sexual battery was committed against the victim and the DNA evidence, if believed as it was by the jury, indicated that defendant was the perpetrator. *Jones v. State*, 991 So. 2d 629, 2008 Miss. App. LEXIS 236 (Miss. Ct. App.), cert. denied, 997 So. 2d 924, 2008 Miss. LEXIS 495 (Miss. 2008).

Evidence was sufficient to support a conviction of child sexual abuse, despite the fact that there was no physical evidence of sexual penetration, because the jury could have inferred that such occurred in the form of cunnilingus. The six-year-old victim stated that defendant had taken her into his trailer, told her about sex, and licked her bottom; it was shown that the child was unable to distinguish between her genital and anal area due to her age. *Pierce v. State*, 2 So. 3d 641, 2008 Miss. App. LEXIS 90 (Miss. Ct. App. 2008), cert. denied, 999 So. 2d 1280, 2009 Miss. LEXIS 93 (Miss. 2009), cert. denied, 558 U.S. 846, 130 S. Ct. 113, 175 L. Ed. 2d 74, 2009 U.S. LEXIS 5318 (U.S. 2009).

Evidence was sufficient to convict defendant of sexual battery where although he stated that the evidence was insufficient to sustain his conviction, he did not elaborate as to why he considered the evidence insufficient; the victim testified that defendant placed his finger in her vagina against her will, and the jury believed the victim over defendant. *Leonard v. State*, 972 So. 2d 24, 2008 Miss. App. LEXIS 16 (Miss. Ct. App. 2008).

Evidence was sufficient to convict defendant of sexual battery where there was ample evidence to support the jury's verdict; the jury heard the victim's testimony in which she described the various inappropriate ways defendant touched her, and the jury also heard defendant's recorded phone conversations with the vic-

tim. *Williams v. State*, 970 So. 2d 727, 2007 Miss. App. LEXIS 577 (Miss. Ct. App. 2007).

Post-conviction relief was denied where there was a factual basis for a plea to sexual battery under Miss. Code Ann. § 97-3-95(1)(a), (d); defendant confessed to police that he penetrated a 13-year-old when he was 25, the victim stated that she was the victim of forcible intercourse, and the medical evidence showed that she had been vaginally penetrated. *Parkman v. State*, 953 So. 2d 315, 2007 Miss. App. LEXIS 202 (Miss. Ct. App. 2007).

In a sexual battery case, defendant's motion for a directed verdict was properly denied because the state showed that penetration occurred through a child victim's testimony and that of a doctor; the victim stated that defendant put his finger in her "middle spot," and an examination revealed that she had an inflamed hymen. *Pryer v. State*, 958 So. 2d 818, 2007 Miss. App. LEXIS 122 (Miss. Ct. App. 2007).

Trial court did not err by denying defendant's motion for a new trial because the evidence weighed in the light most favorable to the verdict supported the jury's resolution of the conflicting testimony; the evidence presented in defendant's trial for sexual battery and fondling included: (1) the victim's testimony in graphic detail as to the licking and touching that she endured from defendant; (2) defendant exercised his right to testify and testified that he did nothing wrong to the victim, his stepdaughter, but that the victim just wanted him out of the house; and (3) an investigator testified regarding what defendant stated in his written statement as well as statements defendant made that he did not want in the written statement. *Ivy v. State*, 949 So. 2d 748, 2007 Miss. LEXIS 40 (Miss. 2007).

Trial court did not err by denying defendant's motion for judgment notwithstanding the verdict because there was sufficient evidence to convict defendant of both sexual battery and fondling; the victim testified that, inter alia: (1) defendant licked her everywhere, including between her legs and her chest; (2) defendant penetrated the victim's vagina with his tongue; (3) defendant pulled off the victim's panties in order to fondle and lick

her; (4) defendant pulled up her shirt to lick her chest; (5) defendant tried to insert his thumb inside the victim; (6) and the victim was 13 years old at the time, and defendant was her stepfather. *Ivy v. State*, 949 So. 2d 748, 2007 Miss. LEXIS 40 (Miss. 2007).

Based on the doctor's testimony concerning the victim's injuries to his rectum which he stated were consistent with sexual battery and the victim's testimony that defendant assaulted him, the evidence was sufficient for the jury to draw a reasonable inference that defendant sexually penetrated the victim's rectum; thus, defendant's sexual battery conviction was affirmed. *Divine v. State*, 947 So. 2d 1017, 2007 Miss. App. LEXIS 23 (Miss. Ct. App. 2007).

Defendant's conviction for sexual battery was upheld where the victim's testimony established that defendant forced her to have sex with him against her will. Even assuming that the victim's uncorroborated testimony was insufficient, she testified that she reported the sexual battery to her boyfriend and grandmother almost immediately, and she went to the police station on the night of the incident. *Jones v. State*, 936 So. 2d 951, 2006 Miss. App. LEXIS 243 (Miss. Ct. App. 2006).

There was sufficient evidence for a jury to find defendant guilty of sexual battery, in violation of Miss. Code Ann. § 97-3-95(d), where the testimony of the seven-year-old victim's sister and a forensic interviewer and social worker bolstered the victim's testimony that defendant, when he was 17 years old, inserted his finger into the victim's vagina. *McClure v. State*, 941 So. 2d 896, 2006 Miss. App. LEXIS 818 (Miss. Ct. App. 2006).

Evidence was sufficient to convict defendant of attempted sexual battery pursuant to Miss. Code Ann. § 97-1-7 and Miss. Code Ann. § 97-3-95(1)(a) and (d) because, inter alia: (1) there was evidence that defendant intended to penetrate the six-year-old victim's privates with his privates, which satisfied the definition of penetration under Miss. Code Ann. § 97-3-97(a); and (2) at the time of the incident, defendant, who was 18, was more than two years older than the victim. *Bracken v. State*, 939 So. 2d 826, 2006 Miss. App. LEXIS 742 (Miss. Ct. App. 2006).

In a sexual battery case, the weight of the evidence supported defendant's convictions because a doctor testified that she found lacerations to the victim's rectum consistent with molestation, and witnesses testified that the victim told them that defendant molested him. *Davis v. State*, 933 So. 2d 1014, 2006 Miss. App. LEXIS 538 (Miss. Ct. App. 2006).

Sufficient evidence existed to convict defendant of sexual battery because the victim, an eight-year-old girl, testified that defendant took her into another room where he pulled down his pants and made her commit an oral act on his penis. *Curry v. State*, 943 So. 2d 78, 2006 Miss. App. LEXIS 548 (Miss. Ct. App. 2006).

Fifteen-year-old victim testified that defendant kissed her neck, fondled her breasts, and put his fingers into her privates; that conduct clearly constituted sexual battery under the provisions of Miss. Code Ann. § 97-3-95(1)(c). Also, the corroborated testimony of the victim provided a sound basis for the jury's determination of guilt; thus, the evidence was sufficient to convict defendant of sexual battery. *Smith v. State*, 925 So. 2d 825, 2006 Miss. LEXIS 119 (Miss. 2006).

Evidence was sufficient to convict defendant of sexual battery, where the trial court found that defendant's statement was given voluntarily after being advised of his rights, and was not the result of threats, promises, coercion, or duress, and there was an abundance of evidence present to prove the corpus delicti; the victim's testimony, the testimony of the interviewers, as well as defendant's own confession, served as enough evidence for the jury to weigh in favor of defendant's conviction. *Frei v. State*, 934 So. 2d 318, 2006 Miss. App. LEXIS 196 (Miss. Ct. App. 2006).

Defendant's conviction for sexual battery was proper where the jury verdict was not against the overwhelming weight of the evidence. Photographs at trial clearly showed the presence of the victim's injuries and various witnesses testified to seeing those injuries first-hand. *Houston v. State*, 911 So. 2d 1018, 2005 Miss. App. LEXIS 674 (Miss. Ct. App. 2005).

There was sufficient evidence to convict defendant of capital rape and sexual assault where the State offered the testi-

mony of a number of medical and counseling professionals indicating that the victim's statements were consistent with those of a sexual abuse victim. The victim named defendant as the perpetrator, and the State offered physical evidence in the form of medical diagnoses and test results as well as many of the objects the victim stated defendant utilized in his abuse of her. *Foley v. State*, 914 So. 2d 677, 2005 Miss. LEXIS 586 (Miss. 2005).

Judge did not err in denying defendant's motion for a directed verdict where evidence was sufficient to support a conviction of sexual battery in violation of Miss. Code Ann. § 97-3-95, as the victim testified that defendant touched her in her private area and placed his penis in her mouth, and any issue of the victim's credibility as a witness was within the province of the jury. *Hensley v. State*, 912 So. 2d 1083, 2005 Miss. App. LEXIS 746 (Miss. Ct. App. 2005).

Evidence was sufficient to convict defendant of two counts of sexual battery where, even though the minor victims' testimony slightly differed regarding the events of the sexual abuse, the word of the victim of a sex crime, even if unsupported, was sufficient to support a guilty verdict when that testimony had not been discredited or contradicted by credible evidence; based on the evidence presented, the jury decided which testimony to accept and which to reject and returned a reasonable verdict. *Bradley v. State*, 921 So. 2d 385, 2005 Miss. App. LEXIS 865 (Miss. Ct. App. 2005).

Evidence was sufficient for a reasonable jury to find that defendant committed sexual battery where both the victim and the eyewitness testified that defendant played a pornographic video and that the victim subsequently performed oral sex on him at his request and the jury apparently accepted the victim's testimony over her great aunt's contradictory testimony. *Durbin v. State*, 924 So. 2d 562, 2005 Miss. App. LEXIS 912 (Miss. Ct. App. 2005).

Evidence was sufficient to convict defendant of three counts of sexual battery where the children's testimony was clear and consistent with the three counts charged against defendant, and the only

evidence presented to contradict their testimony was defendant's testimony, for which he presented a general denial of the accusations; the testimony from the witnesses was consistent with the accounts provided by the children and the jury was the sole judge of witness credibility. *Torrey v. State*, 891 So. 2d 188, 2004 Miss. LEXIS 1375 (Miss. 2004), overruled in part, *Gowdy v. State*, 56 So. 3d 540, 2010 Miss. LEXIS 656 (Miss. 2010).

Where the victim testified that defendant forced her to perform oral sex on him and raped her, the evidence was sufficient to support defendant's conviction for sexual battery and rape. The victim gave a recorded statement to the police that night; the fact that the rape kit did not conclusively identify defendant as the source of semen retrieved did not detract from the validity of her testimony. *Green v. State*, 887 So. 2d 840, 2004 Miss. App. LEXIS 931 (Miss. Ct. App. 2004).

Where the child-victim told her mother that defendant had sexually abused her and the medical evidence showed that she suffered a vaginal tear indicative of forced penetration by an adult male, the evidence was sufficient to convict defendant of sexual battery. *Perry v. State*, 904 So. 2d 1122, 2004 Miss. App. LEXIS 974 (Miss. Ct. App. 2004).

Where the child-victims testified as to several incidents of sexual abuse spanning the course of several years and police found items in defendant's home that the victims alleged were used during their sexual encounters, including a pornographic tape, condoms, and some lubricant, the evidence was sufficient to support defendant's conviction for five counts of statutory rape, one count of sexual battery, and three counts of fondling. *Moses v. State*, 885 So. 2d 730, 2004 Miss. App. LEXIS 912 (Miss. Ct. App. 2004).

Given the corroborated testimony of defendant's daughter and the results of the sexual abuse examination, there was more than sufficient evidence in the record to support the guilty verdict of sexual battery against defendant; therefore, the findings of the trial judge, sitting as the jury, were neither manifestly wrong nor clearly erroneous. *Wilson v. State*, 891 So. 2d 237, 2004 Miss. App. LEXIS 726 (Miss.

Ct. App. 2004), cert. denied, 892 So. 2d 824, 2005 Miss. LEXIS 32 (Miss. 2005).

Both girls testified as victims and eye-witnesses to defendant's crimes of statutory rape and sexual battery; any issues of credibility or motive were for the jury to decide. Thus, the verdict was not contrary to either the weight or the sufficiency of the the evidence, and defendant's convictions for statutory rape and sexual battery were affirmed. *Barrett v. State*, 886 So. 2d 22, 2004 Miss. App. LEXIS 484 (Miss. Ct. App.), cert. denied, 887 So. 2d 183, 2004 Miss. LEXIS 1371 (Miss. 2004).

Where victim's mother stated that defendant, the mother's boyfriend, had sex with her 10-year-old daughter, the jury's guilty verdict of sexual battery and statutory rape was not against the overwhelming weight of the evidence, as the jury had heard the evidence and the testimony of the witnesses, including a social worker, a doctor who examined the victim and determined that she had been sexually abused, and a molecular biology and DNA expert who opined that the genetic profile of the sperm extracted from the victim's panties was consistent with the suspect being the major contributor. *Sanderson v. State*, 872 So. 2d 735, 2004 Miss. App. LEXIS 441 (Miss. Ct. App. 2004).

Sufficient evidence existed to convict defendant of capital murder as the evidence showed the victim died of blunt force trauma and was sexually assaulted and defendant was the only adult in the home with the child when she died. *Gilmore v. State*, 872 So. 2d 744, 2004 Miss. App. LEXIS 440 (Miss. Ct. App. 2004).

Where a victim testified that defendant had committed an abduction, restrained the victim, and driven the victim to another location before performing various sexual acts while holding a weapon to the victim's head, there was sufficient evidence to sustain a conviction for sexual battery. *McCoy v. State*, 878 So. 2d 167, 2004 Miss. App. LEXIS 53 (Miss. Ct. App.), cert. denied, 878 So. 2d 67, 2004 Miss. LEXIS 910 (Miss. 2004).

Evidence was sufficient to convict defendant of sexual battery, statutory rape, and touching a child for lustful purposes where the totally uncorroborated testi-

mony of the victims was sufficient to support a guilty verdict where that testimony was not discredited or contradicted by other evidence; it was the jury's duty to resolve conflicts in testimony. *Carle v. State*, 864 So. 2d 993, 2004 Miss. App. LEXIS 33 (Miss. Ct. App. 2004).

Child victim's testimony to sexual abuse was corroborated by the child's mother, the counselor from the department of human services, a law enforcement officer, and a doctor, the doctor testifying to better than a reasonable degree of medical certainty that the victim had been digitally penetrated, thus, there was sufficient evidence to support defendant's conviction for sexual battery. *Wright v. State*, 859 So. 2d 1028, 2003 Miss. App. LEXIS 1079 (Miss. Ct. App. 2003).

Evidence was sufficient to convict defendant of sexual battery where the victim testified clearly that defendant acted without her consent and that she struggled with him, scratching and hitting him in order to try to get him to stop; pictures of defendant with scratches on his face were introduced into evidence supporting the victim's testimony, and the jury was the judge of the weight and credibility of testimony and was free to accept or reject all or some of the testimony given by each witness. *Piercy v. State*, 850 So. 2d 219, 2003 Miss. App. LEXIS 656 (Miss. Ct. App. 2003).

Evidence was sufficient to prove beyond a reasonable doubt that defendant committed sexual battery, Miss. Code Ann. § 97-3-95(1)(c), because the first victim testified that (1) defendant engaged in sexual penetration with the first victim by inserting defendant's penis into the first victim's mouth; (2) defendant was 24 or more months older than the first victim; and (3) the first victim was under the age of 14 years. *Bell v. State*, 835 So. 2d 953, 2003 Miss. App. LEXIS 214 (Miss. Ct. App. 2003).

Evidence was sufficient to convict defendant of sexual battery where the unsupported word of the victim was sufficient to support a guilty verdict and the testimony was not discredited or contradicted by other credible evidence, especially if the conduct of the victim was consistent with the conduct of one who had been victim-

ized by a sex crime; the victim's testimony was not discredited or contradicted. *Byars v. State*, 835 So. 2d 965, 2003 Miss. App. LEXIS 215 (Miss. Ct. App. 2003).

Evidence was sufficient where the 10-year-old victim gave a statement to the police, alleging that defendant had committed sexual acts on her; the child was not presumed to be dishonest; and the McClain standard was not met and reversal was thus not required. *Parker v. State*, 825 So. 2d 59, 2002 Miss. App. LEXIS 473 (Miss. Ct. App. 2002).

Sufficient evidence was presented to the jury by the State with regard to the element of lack of consent, and the jury was entitled to find the victim more credible than the defendant. *Winters v. State*, 814 So. 2d 184, 2002 Miss. App. LEXIS 206 (Miss. Ct. App. 2002).

Evidence was sufficient to establish attempted sexual battery where (1) the nine-year-old victim was in a check-out line at a store with his mother when the mother sent victim back to the appropriate aisle to get a box of cereal, (2) once the victim got to that aisle, the defendant approached him and asked, using the vernacular, if he could engage in fellatio on the victim, (3) simultaneously with the verbal request, the defendant pointed to his own genitals, (4) the victim refused, and the encounter ended, and (5) the defendant never touched the victim or made any effort to restrain him. *Ishee v. State*, 2000 Miss. App. LEXIS 412 (Miss. Ct. App. Aug. 29, 2000).

Evidence was sufficient to support the conviction of the defendant for sexual battery of several young children, notwithstanding the absence of physical evidence, the fact that some of the children could not remember exact dates, and the assertion that the allegations of the children were suspect in light of their continued visits to his home after the alleged incidents of abuse. *Williams v. State*, 757 So. 2d 953, 1999 Miss. LEXIS 284 (Miss. 1999).

Evidence was sufficient to establish penetration and, therefore, to support a conviction for sexual battery, where the victim testified that the defendant partially penetrated her, and the arresting officer testified that the defendant admit-

ted to him that he was trying to have sexual relations with the victim but that he did not rape her. *Hopson v. State*, 749 So. 2d 227, 1999 Miss. App. LEXIS 539 (Miss. Ct. App. 1999).

Evidence was sufficient to support a conviction under subsection (1)(c) of this section, notwithstanding that the case was a “he said, she said” case; the facts and inferences did not so point in favor of the defendant that a reasonable person could not have found him guilty beyond a reasonable doubt. *Vaughan v. State*, 759 So. 2d 1092, 1999 Miss. LEXIS 178 (Miss. 1999).

Evidence was sufficient to sustain the defendant’s conviction where he admitted to sexual intercourse with the victim and claimed that the victim consented, but the victim asserted that she did not consent. *Waltman v. State*, 734 So. 2d 324, 1999 Miss. App. LEXIS 57 (Miss. Ct. App. 1999).

Conviction for sexual battery and attempted sexual battery was supported by victim’s testimony that described anal and digital penetration, attempted anal penetration, and attempted cunnilingus, victim’s testimony that defendant had threatened to harm other members of her family if she told anyone about the abuse, corroboration by other witnesses, and evidence that immediately after alleged abuse, victim had been treated for gonorrhea and chlamydia. *Eakes v. State*, 665 So. 2d 852, 1995 Miss. LEXIS 555 (Miss. 1995).

In an attempted sexual battery prosecution, testimony of victim, the defendant’s daughter, concerning the attempt, which was partially corroborated by her brother, together with testimony of neighbor admissible under exception to hearsay rule, and testimony of defendant’s wife on cross-examination, furnished ample competent evidence to support jury’s guilty verdict. *Gill v. State*, 485 So. 2d 1047, 1986 Miss. LEXIS 2378 (Miss. 1986).

In a prosecution for attempted sexual battery in violation of this section, evidence was insufficient to sustain a conviction under § 97-1-7, where the uncontradicted facts indicated that there was no penetration, as defined by § 97-3-97, the prosecution conceded that there was no

attempt to penetrate, the defendant had every opportunity to penetrate if he had wished to do so, and his failure was not the product of his victim’s admittedly ineffective resistance or the intervention of extraneous causes. *West v. State*, 437 So. 2d 1212, 1983 Miss. LEXIS 2924 (Miss. 1983).

Verdict finding defendant guilty of one count of fondling and two counts of sexual battery was not against the overwhelming weight of the evidence as the testimony of the victim, defendant’s step-granddaughter, itself was sufficient to find him guilty; and an investigator testified about his interview with defendant, in which defendant admitted to sexual contact with the victim but disputed the details and time frame. *Scarborough v. State*, 270 So. 3d 1026, 2018 Miss. App. LEXIS 489 (Miss. Ct. App. 2018).

Evidence was sufficient to show that defendant held a position of trust or authority over the victim, his step-granddaughter, for his conviction of sexual battery of a child under 18 years of age where the person was in a position of trust or authority as the victim referred to defendant as her step-grandfather; and she treated defendant in the same manner she treated her biological grandmother. *Scarborough v. State*, 270 So. 3d 1026, 2018 Miss. App. LEXIS 489 (Miss. Ct. App. 2018).

Evidence was sufficient to convict defendant of sexual battery because the victim testified that she did not consent to sexual contact with defendant; the sexual-assault exam performed within hours after the encounter revealed bruising to the victim’s arms, legs, and buttocks, and bruising and swelling to her vagina and rectum, indicating penetration; and the sexual-assault exam also revealed a large amount of semen, with the DNA analysis implicating defendant, with a chance of one in ten billion that the DNA would match another unrelated person. *Young v. State*, 264 So. 3d 797, 2018 Miss. App. LEXIS 423 (Miss. Ct. App. 2018), cert. denied, 263 So. 3d 666, 2019 Miss. LEXIS 80 (Miss. 2019).

10. —Other; miscellaneous.

Prosecutor’s lone isolated comment that the alleged sexual battery victim had to

tell an investigator about the victim's first sexual experience did not rise to the level of prosecutorial misconduct so extreme as to violate defendant's constitutional right to a fair trial. *Matthews v. State*, 132 So. 3d 646, 2014 Miss. App. LEXIS 67 (Miss. Ct. App. 2014).

In a sexual-battery case, the trial court did not err in allowing an employee of the Mississippi Department of Human Services to testify about the victim's statements to her because the victim was of tender years when she made the statement, as she was 12 years old; the victim's statements to the employee had substantial indicia of reliability; and the victim testified at trial. *Pickett v. State*, 143 So. 3d 596, 2013 Miss. App. LEXIS 761 (Miss. Ct. App. 2013), cert. denied, 141 So. 3d 947, 2014 Miss. LEXIS 374 (Miss. 2014).

In a sexual-battery case, the trial court incorrectly identified the evidence of the testimony of the victim's mother about what her son told her as hearsay because it was not admitted to prove the truth of the matter asserted, but, rather, it was admitted only to show why the victim's mother went to the back room where she stated that she found the victim kneeling on the floor facing defendant, who had his pants and underwear pulled down around his knees. *Pickett v. State*, 143 So. 3d 596, 2013 Miss. App. LEXIS 761 (Miss. Ct. App. 2013), cert. denied, 141 So. 3d 947, 2014 Miss. LEXIS 374 (Miss. 2014).

In a sexual-battery case, the trial court did not abuse its discretion by accepting the licensed clinical social worker as an expert witness and allowing her to testify that she diagnosed the victim with post-traumatic stress disorder based on information gathered from the victim though an interview because the *Daubert* factor of being able to test an expert witness's opinion for reliability did not apply. *Pickett v. State*, 143 So. 3d 596, 2013 Miss. App. LEXIS 761 (Miss. Ct. App. 2013), cert. denied, 141 So. 3d 947, 2014 Miss. LEXIS 374 (Miss. 2014).

In a case of sexual battery of a victim under the age of 14, the trial court was not required conduct a preliminary interrogation of the four-year-old child to determine competency, and defendant did not show that the trial court erred in allowing her

to testify. *Graham v. State*, 120 So. 3d 1038, 2013 Miss. App. LEXIS 552 (Miss. Ct. App. 2013).

Defendant's written confession to penetration of his six-year-old niece in violation of Miss. Code Ann. § 97-3-95(1)(d) was properly admitted because his case was in the investigatory stage, not the accusatory stage; moreover, the trial court found that his confession was not coerced by the promise of a six-month to one-year sentence. *Petty v. State*, 118 So. 3d 659, 2013 Miss. App. LEXIS 390 (Miss. Ct. App. 2013).

Denial of defendant's motion for judgment of acquittal notwithstanding the verdict and, in the alternative, motion for a new trial, after he had been convicted of sexual battery in violation of Miss. Code Ann. § 97-3-95(1)(a) was appropriate because the defense failed to make a sufficient proffer after the trial court excluded a doctor's testimony. Further, even finding that the doctor's testimony would have been relevant, the record was insufficient for the supreme court to determine whether it could have survived under the Miss. R. Evid. 403 balancing test for admissibility. *Abernathy v. State*, 30 So. 3d 320, 2010 Miss. LEXIS 103 (Miss. 2010).

Defendant's conviction for sexual battery of child under the age of 14 in violation of Miss. Code Ann. § 97-3-95(1) was appropriate because the admission of the testimony of a forensic interviewer and a doctor who was an expert in forensic interviewing and child abuse was not erroneous. The record did not show that those witnesses failed to reliably apply the principles of their expertise to the case. *Carter v. State*, 996 So. 2d 112, 2008 Miss. App. LEXIS 445 (Miss. Ct. App. 2008), cert. denied, 999 So. 2d 374, 2009 Miss. LEXIS 43 (Miss. 2009).

Admission of testimony by a child's mother was improper under Miss. R. Evid. 803(25) because there was no hearing conducted; moreover, it was inadmissible under Miss. R. Evid. 803(1), (2) because the child made the statement to the mother long after alleged sexual abuse. However, the error was harmless where the evidence came in through Miss. R. Evid. 803(4) due to an examination by a doctor. *Pierce v. State*, 2 So. 3d 641, 2008 Miss.

App. LEXIS 90 (Miss. Ct. App. 2008), cert. denied, 999 So. 2d 1280, 2009 Miss. LEXIS 93 (Miss. 2009), cert. denied, 558 U.S. 846, 130 S. Ct. 113, 175 L. Ed. 2d 74, 2009 U.S. LEXIS 5318 (U.S. 2009).

Evidence that a child victim had allegedly caused injuries to his own rectum by sticking objects there was properly excluded in a sexual battery case because it was irrelevant under Miss. R. Evid. 401 and highly prejudicial under Miss. R. Evid. 403, and it was also a collateral issue that was too remote in time to rebut the charges based on the fact that it was a year before the charges in an indictment; case law under Miss. R. Evid. 412 was helpful in making this determination, despite the fact that the victim's actions did not constitute clear sexual activity. *Mason v. State*, 971 So. 2d 618, 2007 Miss. App. LEXIS 327 (Miss. Ct. App.), cert. denied, 973 So. 2d 244, 2007 Miss. LEXIS 701 (Miss. 2007).

In a sexual battery of a child case, the State and the trial court complied with Miss. R. Evid. 702, in eliciting a psychotherapist's qualifications in open court; defendant was put on notice of her qualifications, credentials, and the nature of her testimony. Defendant had ample opportunity to challenge those qualifications but chose not to do so; thus, the trial court did not err in finding that the child was unavailable to testify under Miss. R. Evid. 804(a)(6) because there was substantial likelihood the victim's emotional or psychological health would be substantially impaired if he were required to testify in the physical presence of defendant. *Hobgood v. State*, 926 So. 2d 847, 2006 Miss. LEXIS 118 (Miss. 2006), cert. denied, 549 U.S. 1118, 127 S. Ct. 928, 166 L. Ed. 2d 714, 2007 U.S. LEXIS 143 (U.S. 2007).

Defendant's conviction for sexual battery in violation of Miss. Code Ann. § 97-3-95 was proper because, without more, the victim's use of the "I have a friend" approach in a letter, did not cast doubt on her credibility, and thus the appellate court was unable to find reversible error in permitting testimony under Miss. R. Evid. 803(25). *Larson v. State*, 957 So. 2d 1005, 2006 Miss. App. LEXIS 814 (Miss. Ct. App. 2006), cert. denied, 958 So. 2d 1232, 2007 Miss. LEXIS 318 (Miss. 2007).

In a prosecution for sexual battery of a three-year-old female child, the trial judge had discretion to either accept or reject offered evidence, and the trial judge was within his rights to accept the testimony of the child as competent, but to later reject testimony from the child given in response to defense counsel's cross-examination where such testimony was found by the trial judge to be incompetent. *Renfrow v. State*, 863 So. 2d 1047, 2004 Miss. App. LEXIS 36 (Miss. Ct. App. 2004).

Defendant's post-conviction claim that counsel was ineffective in failing to challenge an unconstitutional indictment charging two counts of sexual battery on a child under the age of 14 years in violation of Miss. Code Ann. § 97-3-95(1) was without merit as defendant's claim was actually that the indictment did not allege the proper subsections of the statute, and that the statute as it read at the time of the alleged offenses did not contain the subsection divisions referred to by defendant. *Agee v. State*, 829 So. 2d 726, 2002 Miss. App. LEXIS 573 (Miss. Ct. App. 2002).

For statement made by child of tender years describing act of sexual contact performed with or on child by another to be admissible, reliability of statement must be judged independently of any corroborating evidence. *Eakes v. State*, 665 So. 2d 852, 1995 Miss. LEXIS 555 (Miss. 1995).

A defendant's conviction of sexual battery would be reversed and remanded for a new trial where the prosecution failed to present evidence that the victim was under 14 years of age; the inference of the victim's age from the mere fact that she had teenage babysitters or from the jury's actual sight of the victim while she testified was insufficient to sustain a verdict that she was below the age of 14 beyond a reasonable doubt. *Washington v. State*, 645 So. 2d 915, 1994 Miss. LEXIS 536 (Miss. 1994).

In a prosecution for sexual battery of the defendant's 5-year-old daughter, the use of the defendant's guilty plea to simple assault on his daughter 2 years earlier was a proper use of a prior inconsistent statement to impeach the defendant's credibility as a witness under Rules 613 and 801(d)(2), Miss. R. Ev., where the defendant denied during direct examina-

tion that he had ever “abused” his daughter, thereby “opening the door” for impeachment; although the prior conviction for simple assault was admissible for the purpose of impeachment, the defendant should not have been cross-examined about the details of the abuse leading to the conviction. *Quimby v. State*, 604 So. 2d 741, 1992 Miss. LEXIS 402 (Miss. 1992).

Under the excited utterance exception to the hearsay rule, the fact that questions are asked, while relevant to spontaneity, does not ipso facto demonstrate a lack of spontaneity in every case. Thus, a sexual battery victim’s statements to a police officer and a crossing guard were admissible under the excited utterance exception where the only question asked of the victim was “what happened?” and the statements were made shortly after the incident when the victim was still extremely upset. *Sanders v. State*, 586 So. 2d 792, 1991 Miss. LEXIS 644 (Miss. 1991).

Since it is doubtful that a child sexual abuse syndrome or profile is generally accepted by the scientific community, courts should be reluctant to allow expert testimony that a child displays the so-called typical characteristics of other victims. However, the admission of such improper testimony in a prosecution for sexual battery of a child was harmless where the entire defense strategy was predicated on the assumption that the child had been sexually abused by persons other than the defendant, and was therefore confused regarding the identity of the abuser and the nature of displays of affection; since the defense admitted that the child was a sexual abuse victim, there was no reversible error in allowing the expert witness to give her opinion that the child exhibited the characteristics of a sex abuse victim. *Hosford v. State*, 560 So. 2d 163, 1990 Miss. LEXIS 174 (Miss. 1990).

Evidence of prior sexual assault upon victim, not committed by defendant, was not relevant, although defendant argued it established knowledge of this kind of abnormal behavior on victim’s part thus enabling him to falsely accuse defendant and that it went to issue of consent. *Woodruff v. State*, 518 So. 2d 669, 1988 Miss. LEXIS 24 (Miss. 1988).

Instances of previous molestation of child victim by person other than accused may be relevant, but relevancy must be determined by trial judge in his discretion. *Woodruff v. State*, 518 So. 2d 669, 1988 Miss. LEXIS 24 (Miss. 1988).

Defense counsel may not elicit from 9 year old victim of sexual battery answer to question of whether victim has ever seen act of sexual intercourse. *Hines v. State*, 472 So. 2d 386, 1985 Miss. LEXIS 2131 (Miss. 1985).

Prosecutor in sexual battery prosecution may use leading questions in examination of 9 year old girl who is alleged victim of battery; however, where on cross-examination girl’s responses become equivocal, court may not initiate series of questions without request from state or defendant which have effect of reconstituting witness and thereby lending court’s approval to her testimony before jury. *Thompson v. State*, 468 So. 2d 852, 1985 Miss. LEXIS 1948 (Miss. 1985).

11. Practice and procedure; jury instructions.

In a sexual battery case, the trial court did not err in instructing the jury that “sexual penetration” was any penetration of the genital or anal openings of another person’s body by any part of a person’s body as the instruction’s use of the term “any” did not render the instruction vague or misleading; and the instruction properly and clearly stated the applicable law. *Keys v. State*, 219 So. 3d 559, 2017 Miss. App. LEXIS 256 (Miss. Ct. App. 2017).

Defense counsel declined to object to a jury instruction on sexual battery and agreed it was a correct statement of the law, and thus the instruction could not be challenged on appeal, and the issue was also without merit. *Shelton v. State*, 172 So. 3d 216, 2014 Miss. App. LEXIS 607 (Miss. Ct. App. 2014), cert. denied, — So. 3d —, 2015 Miss. LEXIS 421 (Miss. 2015).

Circuit court did not abuse its discretion when it denied defendant’s request for a new trial on the basis that the alleged sexual battery victim concealed and destroyed important evidence because defendant neither requested the jury be instructed on a spoliation inference, nor did defendant show that defendant was en-

titled to a spoliation instruction, as defendant conceded that the State of Mississippi did nothing wrong regarding the victim's clothes. *Matthews v. State*, 132 So. 3d 646, 2014 Miss. App. LEXIS 67 (Miss. Ct. App. 2014).

Jury instruction submitted to the jury fairly stated the law of the case, and did not create an injustice, because the instruction followed the language of Miss. Code Ann. § 97-3-95 and clearly asked the jury to determine whether defendant was in a position of trust or authority at the time when defendant was alleged to have sexually abused the victim. *Gill v. State*, 126 So. 3d 128, 2013 Miss. App. LEXIS 782 (Miss. Ct. App. 2013).

Giving of a jury instruction did not constitute error by allowing the jury to convict defendant on a broader definition of sexual battery than the crime alleged in the indictment because the jury was fairly and adequately instructed, and defendant was clearly convicted of the crime for which he was charged in the indictment; the disputed language in the instruction did not substantially alter the elements of proof necessary to find defendant guilty. *Jones v. State*, 164 So. 3d 1009, 2013 Miss. App. LEXIS 477 (Miss. Ct. App. 2013).

Trial court's failure to include in a jury instruction the element of sexual battery that defendant was twenty-four or more months older than the child was not prejudicial and did not amount to plain error because that element was listed in the indictment; therefore, defendant was given sufficient notice and had a reasonable opportunity to prepare and present a defense to that element, but he did not do so. *Jones v. State*, 164 So. 3d 1009, 2013 Miss. App. LEXIS 477 (Miss. Ct. App. 2013).

Trial court did not err in failing to include in a jury instruction the element of sexual battery that defendant was twenty-four or more months older than the child because the absence of the element had no effect on the State's burden of proof, and the jury was properly instructed as to the State's burden; any fair-minded juror could have easily deduced that defendant, being twenty-eight years of age, was twenty-four or more months older than the child, who was

eight years old. *Jones v. State*, 164 So. 3d 1009, 2013 Miss. App. LEXIS 477 (Miss. Ct. App. 2013).

In defendant's sexual battery prosecution under Miss. Code Ann. § 97-3-95(2) (Rev. 2006), the jury was properly instructed that if it found that defendant possessed the status of the victim's parent, then it must find that he held a position of trust or authority over the victim. *Wilson v. State*, 72 So. 3d 1145, 2011 Miss. App. LEXIS 236 (Miss. Ct. App.), cert. denied, 71 So. 3d 1207, 2011 Miss. LEXIS 513 (Miss. 2011).

Defendant argued that a sexual battery instruction proved an element of the crime, namely that the child was under the age of 14, but defendant was procedurally barred from raising this issue for the first time on appeal, plus the victim's age at the time of the crime was sufficiently established. *Wilson v. State*, 990 So. 2d 798, 2008 Miss. App. LEXIS 572 (Miss. Ct. App. 2008).

Instructing the jury that in order to sustain a conviction for the crime of sexual battery some penetration had to be proven beyond a reasonable doubt, however, it did not need to be full penetration, and even the slightest penetration was sufficient to prove the crime of sexual battery, was proper. *Wilson v. State*, 990 So. 2d 798, 2008 Miss. App. LEXIS 572 (Miss. Ct. App. 2008).

Where the instruction given to the jury regarding sexual battery did not require the jury to find that the penetration was without consent as required by Miss. Code Ann. § 97-3-95, defendant was entitled to a new trial. *Goodin v. State*, 977 So. 2d 338, 2008 Miss. LEXIS 143 (Miss. 2008).

Where a doctor who examined the victim testified that the victim's rectum was swollen and there was a tear on the opening into the rectum, and he stated that those injuries were consistent with sexual battery, the evidence clearly indicated that the victim was sexually penetrated pursuant to the sexual battery statute, Miss. Code Ann. § 97-3-95(1)(d); with regard to the statement by the victim's grandmother that the victim had told lies before, the evidence did not rise to the level of conflicting evidence warranting a lustful touching jury instruction, and thus

the trial court did not err in denying the jury instruction on the lesser-included offense of lustful touching. *Divine v. State*, 947 So. 2d 1017, 2007 Miss. App. LEXIS 23 (Miss. Ct. App. 2007).

Circuit had not erred in not giving defendant's proposed instructions on circumstantial evidence because the circuit court found the child victim's medical report constituted actual or direct evidence. Additionally, the child was clearly an eyewitness to the abuse committed upon her person. *Foley v. State*, 914 So. 2d 677, 2005 Miss. LEXIS 586 (Miss. 2005).

Trial judge mistakenly determined the crime of molestation under Miss. Code Ann. § 97-5-23 to be a lesser-included offense of sexual battery, Miss. Code Ann. § 97-3-95; molestation was recognized as a separate offense from sexual battery as defendants were frequently charged with both crimes simultaneously, such that to allow defendant to be convicted of a crime for which he was never charged would have created an injustice, as the legislature felt it necessary to construct two separate and distinct statutes regarding sexual battery and molestation. *Friley v. State*, 856 So. 2d 654, 2003 Miss. App. LEXIS 584 (Miss. Ct. App. 2003), rev'd, 2004 Miss. LEXIS 998 (Miss. Aug. 5, 2004).

In a prosecution for sexual battery on his wife, the court was not obligated to give a sua sponte lesser offense instruction on simple assault. *Trigg v. State*, 759 So. 2d 448, 2000 Miss. App. LEXIS 85 (Miss. Ct. App. 2000).

This section creates three separate classes of victims. Thus, in a prosecution for sexual battery of a child under the age of 14, the defendant was not entitled to an instruction containing the element "without her consent." *Ryan v. State*, 525 So. 2d 799, 1988 Miss. LEXIS 251 (Miss. 1988).

Supposed defect in instruction which limits crime charged from general "sexual penetration" of indictment to more specific "anal sexual penetration," yet still allows jury to return verdict of "guilty as charged" is technical point that should be tidied up but does not constitute ground for reversal of conviction where defense counsel makes no utterance remotely resembling objection when instruction is

tendered. *Hines v. State*, 472 So. 2d 386, 1985 Miss. LEXIS 2131 (Miss. 1985).

12. Sentence.

Sexual battery counts of defendant's indictment were fatally defective because the indictment failed to allege the essential elements of the crime under the statute in effect at the time. Specifically, the indictment failed to allege the essential element that defendant was in a position of power or authority over the victim. *Masters v. State*, 285 So. 3d 192, 2019 Miss. App. LEXIS 563 (Miss. Ct. App. 2019).

Because petitioner was under the age of 18 at the time of the sexual battery, the trial court had discretion in the length of the sentence. *Watkins v. State*, 170 So. 3d 582, 2014 Miss. App. LEXIS 631 (Miss. Ct. App. 2014), cert. denied, 163 So. 3d 301, 2015 Miss. LEXIS 301 (Miss. 2015).

Defendant's sentence of thirty-five years in prison, with thirty years to serve and five years suspended, followed by five years' supervised probation, without the possibility of parole, was permissible under Miss. Code Ann. § 47-7-3(1)(b), although Miss. Code Ann. § 97-3-101(3) did not expressly authorize day-for-day sentences and parole restrictions. *Petty v. State*, 118 So. 3d 659, 2013 Miss. App. LEXIS 390 (Miss. Ct. App. 2013).

Defendant's sentence was affirmed because the trial judge was well within his authority in Miss. Code Ann. § 99-19-21 to impose concurrent or consecutive sentences, and pursuant to Miss. Code Ann. § 99-7-2(3), the court could impose separate sentences for each of his sexual battery of a minor convictions under Miss. Code Ann. § 97-3-95(1)(d). *Eason v. Epps*, 32 So. 3d 538, 2009 Miss. App. LEXIS 723 (Miss. Ct. App. 2009).

In a case where defendant father and defendant adopted son were convicted of conspiracy to commit sexual battery, Miss. Code Ann. §§ 97-1-1 and 97-3-95(1)(d), sexual battery, Miss. Code Ann. § 97-3-95(1)(d), and contributing to the delinquency of a minor, Miss. Code Ann. § 97-5-39(1), defendant father was sentenced to five years and a \$ 5,000 fine on the conspiracy count; 30 years and a \$ 10,000 fine on the sexual battery count; and one

year and a \$ 1,000 fine on the contributing to the delinquency of a minor charge and the trial court ordered that the prison time be served consecutively; however, nothing in the record or presented by defendant father warranted reversal or reduction of his sentence because his sentence was within the statutory limits and it was a just punishment for the despicable crimes for which he was found guilty by a fair and impartial jury. *King v. State*, 857 So. 2d 702, 2003 Miss. LEXIS 450 (Miss. 2003).

Trial court acted within its discretion by imposing 2 consecutive 20-year sentences for 2 sexual battery convictions and concurrent 20-year sentence for attempted sexual battery conviction. *Eakes v. State*, 665 So. 2d 852, 1995 Miss. LEXIS 555 (Miss. 1995).

Sentence of 30 years in prison without probation or parole, maximum term of imprisonment prescribed for offense of sexual battery, did not violate either United States Constitution or Mississippi Constitution; under standards set forth in *Solem v. Helm*, 463 U.S. 277, 103 S. Ct. 3001, 77 L. Ed. 2d 637, 1983 U.S. LEXIS 93 (U.S. 1983) (superseded by statute as stated in *Re Petition of Lauer* (CA8) 788 F2d 135) sentence was not grossly disproportionate to crime of sexual battery where harshness of penalty was justified by gravity of offense, non-habitual offenders convicted under this section could be sentenced to up to 30 years in prison, and sentence was not so dissimilar to sentences for same crime in other states as to make it a disproportionate penalty. *Davis v. State*, 510 So. 2d 794, 1987 Miss. LEXIS 2637 (Miss. 1987).

13. Other, miscellaneous.

Because a juvenile's adjudication of delinquency for the strict-liability crime of sexual battery against a victim under the age of fourteen involved the use of force, the juvenile had to register as a sex offender. Force was presumed as a child could not consent to sexual battery by operation of law. *L.B.C. v. Forrest Cty. Youth Court*, — So. 3d —, 2017 Miss. LEXIS 443 (Miss. Nov. 30, 2017).

Trial court did not err in dismissing appellant's motion for postconviction re-

lief because the record reflected a sufficient factual basis in support of appellant's guilty plea and the offense of sexual battery of a child under fourteen years old; appellant testified as to his age at the time of the plea hearing, as well as his birth date, the State's offer of proof provided that the victim was under fourteen years old, and appellant did not contest that offer of proof. *Carter v. State*, 204 So. 3d 791, 2016 Miss. App. LEXIS 762 (Miss. Ct. App. 2016).

Trial court did not abuse its discretion by denying defendant's motion to sever the sexual battery count from the child exploitation count where both charges were based on the same act or transaction, namely defendant's sexual assault of the victim that he photographed. *Moore v. State*, 160 So. 3d 728, 2015 Miss. App. LEXIS 182 (Miss. Ct. App. 2015).

Circuit court thoroughly questioned petitioner during the plea hearing, and the fact that petitioner felt some pressure to plead guilty after discussing the offer with his attorney was insufficient to render his pleas involuntary, plus there was a sufficient factual basis for his pleas to sexual battery and felony child, given the indictment, the statement of the prosecutor, the incorporated witness testimony, and petitioner's admissions; the circuit court did not clearly err in finding that petitioner failed to meet his burden to prove entitlement to post-conviction relief. *Watkins v. State*, 170 So. 3d 582, 2014 Miss. App. LEXIS 631 (Miss. Ct. App. 2014), cert. denied, 163 So. 3d 301, 2015 Miss. LEXIS 301 (Miss. 2015).

Trial court did not abuse its discretion in denying defendant a mistrial due to remarks the prosecutor made about other children being present in a house when an assault on the child victim occurred because defendant himself provided overwhelming evidence of his guilt in a statement in which he admitted that not only did the victim perform oral sex on defendant, but that defendant had performed anal sex on the victim. *Flowers v. State*, 119 So. 3d 1108, 2013 Miss. App. LEXIS 347 (Miss. Ct. App. 2013).

Offender was required to continue registering as a sex offender under Miss. Code Ann. § 45-33-47(2)(b)(ix) due to his

guilty plea to a Maryland sex offense because: (1) the offender admitted in his plea that he had placed his hands on the victim's vagina without her consent; and (2) his conduct and plea satisfied the elements of the Mississippi crime of attempted sexual battery, which was a registrable offense under Miss. Code Ann. § 45-33-25(1). *Stallworth v. Miss. Dep't of Pub. Safety*, 986 So. 2d 259, 2008 Miss. LEXIS 258 (Miss. 2008).

Where there was nothing in the record before the appellate court that would have permitted any meaningful analysis of what uncalled witnesses might have testified to, nor whether there might have been compelling reasons not to call them even if they were prepared to offer the testimony that defendant contended they would have in his brief, defendant's ineffective assistance of counsel claim had to be accomplished through the vehicle of a post-conviction relief motion. *Sharp v. State*, 862 So. 2d 576, 2004 Miss. App. LEXIS 7 (Miss. Ct. App. 2004).

Where defendant was indicted for the crime of sexual battery, pursuant to Miss. Code Ann. § 97-3-95, but convicted of touching a child for lustful purposes under Miss. Code Ann. § 97-5-23(1), there was a common nucleus of operative facts and the record contained an evidentiary basis for the trial court to grant an instruction on the lesser offense of unlawful touching. Further, because defendant offered an instruction that would have allowed the jury to find defendant guilty of the lesser offense (as opposed to a "lesser-included offense"), the lack of an indictment on the lesser offense was waived, and the trial court did not commit plain error when it granted the lesser offense instruction. *Dupuis v. State*, 2003 Miss. App. LEXIS 1268 (Miss. Ct. App. June 24, 2003).

In a case where defendant father and defendant adopted son were convicted of conspiracy to commit sexual battery, Miss. Code Ann. §§ 97-1-1 and 97-3-95(1)(d), sexual battery, Miss. Code Ann. § 97-3-95(1)(d), and contributing to the delinquency of a minor, Miss. Code Ann. § 97-5-39(1), none of the issues raised by defendant father rose to the level of reversible error either standing alone or when considered together as the evidence

supported the finding that defendant father was the ringleader of the abominable enterprise and he failed to demonstrate any procedural or substantive errors that warranted reversal; thus, defendant father's convictions and sentences were affirmed. *King v. State*, 857 So. 2d 702, 2003 Miss. LEXIS 450 (Miss. 2003).

An indictment charging a killing occurring "while engaged in the commission of" one of the enumerated felonies in § 97-3-19 includes the actions of the defendant leading up to the felony, the attempted felony, and flight from the scene of the felony. Thus, in a capital murder prosecution, involving the underlying felony of sexual battery, the fact that the actual moment of the victim's death preceded consummation of the underlying felony did not vitiate the capital charge. *Baker v. Baker*, 553 So. 2d 8, 1989 Miss. LEXIS 537 (Miss. 1989).

Proof was sufficient to establish burglary under former § 97-17-21 where evidence established that defendant was in vicinity of crime at time and on occasion of its commission; that shortly thereafter windowpane in door was found broken, which constituted evidence of forcible breaking and entering of occupied dwelling; and, that victim was found with bloody mouth, battered face, and unclothed lower half, which constituted evidence of intent to commit sexual battery upon mentally defective person under this section; when crime charged is burglary, prosecution need not prove sexual penetration of victim, but must merely prove that defendant broke and entered with intent to commit that crime. *Williams v. State*, 512 So. 2d 666, 1987 Miss. LEXIS 2645 (Miss. 1987).

14. Lesser included offenses.

Trial court did not err by giving a lesser-included-offense jury instruction regarding fondling under the count charging defendant with sexual battery because ample evidence supported the lesser-included offense of fondling, and the intent element of fondling could be inferred from defendant's actions. *Jenkins v. State*, 131 So. 3d 544, 2013 Miss. LEXIS 569 (Miss. 2013), modified, 2014 Miss. LEXIS 133 (Miss. Feb. 20, 2014).

In a sexual battery, the circuit court did not err in denying defendant's proposed lesser-included-offense instruction for simple assault because sexual battery (the superior offense) could have been committed without a simple assault (the putative lesser-included offense) being committed. Thus, the elements of the separate offenses were distinctly different. *Wallace v. State*, 10 So. 3d 913, 2009 Miss. LEXIS 262 (Miss. 2009).

In a sexual battery case, a trial court did not err in failing to instruct the jury on simple assault which was not a lesser-included offense; the element "bodily injury" was missing from the sexual battery statute, Miss. Code Ann. § 97-3-95. *Seigfried v. State*, 869 So. 2d 1040, 2003 Miss. App. LEXIS 958 (Miss. Ct. App. 2003), cert. denied, 870 So. 2d 666, 2004 Miss. LEXIS 352 (Miss. 2004).

15. Double jeopardy.

Defendant's convictions for sexual battery and gratification of lust did not violate defendant's right against double jeopardy as the gratification-of-lust conviction did not merge with the sexual-battery conviction because the State of Mississippi presented sufficient evidence through the minor victim's testimony to support separate and distinct acts of fondling and sexual battery by defendant. *Shoemaker v. State*, 256 So. 3d 604, 2018 Miss. App. LEXIS 105 (Miss. Ct. App.), cert. denied, 256 So. 3d 593, 2018 Miss. LEXIS 449 (Miss. 2018).

Appellant did not experience double jeopardy because he was never prosecuted twice for the same offense; burglary and sexual battery required proof of different facts, and thus, even if the prosecution had pursued the sexual-battery charge, appellant would not have been subjected to double jeopardy since he pleaded guilty to burglary. *Stamps v. State*, 151 So. 3d 248, 2014 Miss. App. LEXIS 651 (Miss. Ct. App. 2014).

Defendant was properly convicted of sexual battery in violation of Miss. Code Ann. § 97-3-95(d)(1) and unlawful touching of a child under the age of sixteen in violation of Miss. Code Ann. § 97-5-23 because his rights under the Double Jeopardy Clause were not violated when the

record clearly evinced two separate acts of touching, and the State presented separate and independent proof of each charge; defendant sexually assaulted the victim in her living room when he committed statutory rape and sexually assaulted her again when he committed sexual battery by inserting his finger into her anus, and evidence was presented by numerous witnesses that the victim consistently described a second act of touching at a different time and in a different location of the house. *Woods v. State*, 30 So. 3d 362, 2009 Miss. App. LEXIS 617 (Miss. Ct. App. 2009).

Crime of sexual abuse of a vulnerable person under Miss. Code Ann. § 43-47-19 does not encompass the crime of sexual battery under Miss. Code Ann. § 97-3-95, and a conviction of both offenses does not implicate double jeopardy concerns because the crimes require additional and different elements of proof; specifically, the former offense does not require proof of penetration, while the latter offense does require this proof. Additionally, abuse of a vulnerable person requires proof that defendant willfully inflicted physical pain or injury upon a vulnerable person, while sexual battery has no such requirement; there are additional differences in that sexual battery does not require that the victim's abilities to provide for his or her protection from sexual contact be impaired by the infirmities of aging or that the victim be a patient or resident of a care facility, while the charge of abuse of a vulnerable person does require this additional element. *Simoneaux v. State*, 29 So. 3d 26, 2009 Miss. App. LEXIS 445 (Miss. Ct. App. 2009), cert. denied, 29 So. 3d 774, 2010 Miss. LEXIS 115 (Miss. 2010), cert. denied, 562 U.S. 836, 131 S. Ct. 151, 178 L. Ed. 2d 38, 2010 U.S. LEXIS 6093 (U.S. 2010).

Where defendant was tried in a second case for statutory rape, sexual battery, and fondling, double jeopardy was not violated; while the victims were the same, the factual bases supporting the charges in the current indictment were totally different from the factual bases undergirding the charges in the first case. *Moses v. State*, 885 So. 2d 730, 2004 Miss. App. LEXIS 912 (Miss. Ct. App. 2004).

16. New trial.

Trial court did not abuse its discretion in denying defendant's motion for a new trial on the verdict finding defendant guilty of sexual battery of the teen-age daughter of defendant's former girlfriend and then wife because the jury decided to believe the victim's version of events over that of defendant and defendant's wife, and not to give the inconsistent evidence and the vague time-line of events great weight. Furthermore, the victim's version of events was very detailed and never changed throughout the victim's testimony. *McManus v. State*, 213 So. 3d 80, 2016 Miss. App. LEXIS 529 (Miss. Ct. App. 2016).

Defendant's motion for a new trial was properly denied because jury's verdict did not amount to an unconscionable injustice and because the evidence did not preponderate heavily against the jury's verdict finding defendant guilty of sexual battery involving an eight-year-old boy where the evidence included testimony of the victim, the victim's mother, the nurse who examined the victim on the night of the attack, a serologist who determined that the dried secretions found on the buttocks of the victim were seminal fluid, and members of the police department who participated in the investigation. The victim maintained a largely consistent story from his first reports to his testimony on the stand, and all of the State's witnesses presented testimony that implicated defendant; even though there was some conflicting evidence presented by the defense and the defense presented an alibi, the evidence presented by the State was of such a level that the guilty verdict was not against the overwhelming weight of the evidence. *Bolden v. State*, 23 So. 3d 491, 2009 Miss. App. LEXIS 193 (Miss. Ct. App.), cert. denied, 22 So. 3d 1193, 2009 Miss. LEXIS 614 (Miss. 2009).

In a case involving sexual battery of a child under Miss. Code Ann. § 97-3-95, a trial court did not err by denying defendant's request for a new trial or a directed verdict because, although there was no physical evidence against defendant, the victim's testimony was corroborated by a doctor, who found signs of sexual abuse during an examination. Moreover, the ver-

dict did not sanction an unconscionable result. *Steadham v. State*, 995 So. 2d 835, 2008 Miss. App. LEXIS 634 (Miss. Ct. App. 2008).

In a child sexual abuse case where a six-year-old victim stated that defendant had taken her into his trailer, told her about sex, and licked her bottom, no new trial was required because the verdict was not against the overwhelming weight of the evidence; the child's statement was admissible into evidence, a neighbor observed the child go into defendant's trailer, and defendant was shown to live near the child. *Pierce v. State*, 2 So. 3d 641, 2008 Miss. App. LEXIS 90 (Miss. Ct. App. 2008), cert. denied, 999 So. 2d 1280, 2009 Miss. LEXIS 93 (Miss. 2009), cert. denied, 558 U.S. 846, 130 S. Ct. 113, 175 L. Ed. 2d 74, 2009 U.S. LEXIS 5318 (U.S. 2009).

17. Speedy trial.

Defendant's conviction for the sexual battery of his minor daughter in violation of Miss. Code Ann. § 97-3-95(1)(d) was appropriate because he failed to raise his statutory right to a speedy trial specifically under Miss. Code Ann. § 99-17-1. Additionally, when he raised his constitutional right to a speedy trial, it was well past the 270-day requirement of the statute. *McBride v. State*, 61 So. 3d 174, 2010 Miss. App. LEXIS 218 (Miss. Ct. App. 2010), superseded, 61 So. 3d 138, 2011 Miss. LEXIS 245 (Miss. 2011).

Defendant's conviction for the sexual battery of his minor daughter in violation of Miss. Code Ann. § 97-3-95(1)(d) was appropriate because he was not denied his constitutional right to a speedy trial since, while there was a delay in the trial, there was no evidence the State deliberately created the delay, nor did defendant object in any way to the delay until the case was set for trial a month later. Further, when defendant did object, he requested the charges be dropped and not that the case be heard sooner; there was also no prejudice to the defense due to the delay. *McBride v. State*, 61 So. 3d 174, 2010 Miss. App. LEXIS 218 (Miss. Ct. App. 2010), superseded, 61 So. 3d 138, 2011 Miss. LEXIS 245 (Miss. 2011).

OPINIONS OF THE ATTORNEY GENERAL

The list of persons in a "position of trust" provided by subsection (2) of this section is not an exclusive list and a per-

son in a "position of trust" could include a law enforcement officer. Huffman, July 7, 2004, A.G. Op. 04-0254.

RESEARCH REFERENCES

ALR.

Assault with intent to commit unnatural sex act upon minor as affected by latter's consent. 65 A.L.R.2d 748.

Rape or similar offense based on intercourse with woman who is allegedly mentally deficient. 31 A.L.R.3d 1227.

Assault and battery: sexual nature of physical contact as aggravating offense. 63 A.L.R.3d 225.

What constitutes offense of "sexual battery". 87 A.L.R.3d 1250.

Sexual child abuser's civil liability to child's parent. 54 A.L.R.4th 93.

Parent's right to recover for loss of consortium in connection with injury to child. 54 A.L.R.4th 112.

Prosecution of female as principal for rape. 67 A.L.R.4th 1127.

Defense of mistake of fact as to victim's consent in rape prosecution. 102 A.L.R.5th 447.

Am. Jur.

65 Am. Jur. 2d, Rape §§ 3, 7-14, 20-26, 29.

70 Am. Jur. 2d, Sodomy §§ 1 et seq.

2A Am. Jur. Pl & Pr Forms, Assault and Battery, Forms 191-193 (complaints and

instructions as to sex offenses); Forms 195.1, 196.1 (complaint, petition or declaration, sexual molestation of minor daughter during daughter's childhood, against father); Form 195.2 (Complaint, petition, or declaration – Sexual assault and battery – Against mental incompetent, county, and county mental health agency).

CJS.

6A C.J.S. Assault and Battery §§ 70-74.

75 C.J.S., Rape §§ 25-41.

81 C.J.S., Sodomy §§ 1 et seq.

Law Reviews.

Comment: Recent amendments to the Mississippi Rules of Evidence – the rights of the victim v. the rights of the accused in child abuse prosecutions and dependency or neglect proceedings. 61 Miss. L. J. 367 (Fall, 1991).

Practice References.

Ronald L. Schoenberg, Criminal Law Deskbook (Matthew Bender).

The Prosecution and Defense of Sex Crimes (Matthew Bender).

Sexual Assault Trials, Second Edition (Michie).

§ 97-3-97. Sexual battery; definitions.

For purposes of Sections 97-3-95 through 97-3-103 the following words shall have the meaning ascribed herein unless the context otherwise requires:

(a) "Sexual penetration" includes cunnilingus, fellatio, buggery or pederasty, any penetration of the genital or anal openings of another person's body by any part of a person's body, and insertion of any object into the genital or anal openings of another person's body.

(b) A "mentally defective person" is one who suffers from a mental disease, defect or condition which renders that person temporarily or permanently incapable of knowing the nature and quality of his or her conduct.

(c) A "mentally incapacitated person" is one rendered incapable of knowing or controlling his or her conduct, or incapable of resisting an act due

to the influence of any drug, narcotic, anesthetic, or other substance administered to that person without his or her consent.

(d) A “physically helpless person” is one who is unconscious or one who for any other reason is physically incapable of communicating an unwillingness to engage in an act.

HISTORY: Laws, 1980, ch. 450, § 2, eff from and after July 1, 1980.

Cross References — Rape, see §§ 97-3-65 and 97-3-71.

Sexual penetration of incarcerated offenders by law enforcement officers or employees, see § 97-3-104.

Carnal knowledge of step or adopted child or child of cohabitating partner, see § 97-5-41.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Sexual penetration.
3. Indictment.
4. Jury Instructions.
5. Mentally defective person.
6. Manifest weight of evidence

1. In general.

Defendant's two convictions for sexual battery of the victim, his then seven-year-old cousin, were not so contrary to the overwhelming weight of the evidence that to allow them to stand would sanction an unconscionable injustice because the victim's testimony was direct, unequivocal, and sufficiently detailed in describing the abuse that had occurred; the victim was generally consistent in her prior statements and had no apparent motive to lie; and her account was corroborated by her being discovered entering the house late at night with defendant, an incident defendant himself admitted occurred (though in his telling it was under different circumstances). *Magee v. State*, 231 So. 3d 243, 2017 Miss. App. LEXIS 677 (Miss. Ct. App. 2017).

Evidence was sufficient to support defendant's convictions where the jury obviously found the victims' testimony and the other evidence supporting the pattern of sexual abuse more credible than defendant's defense, there was no injustice in allowing the jury's verdicts to stand. *Faulkner v. State*, 109 So. 3d 142, 2013 Miss. App. LEXIS 75 (Miss. Ct. App. 2013).

Defendant's conviction and sentence for the sexual battery of a minor child in violation of Miss. Code Ann. §§ 97-3-95(1)(d) and 97-3-97(a) was proper where his motion to suppress was rightfully denied since intoxication did not automatically render his confession involuntary. He failed to show symptoms of being under the influence and the record indicated that he was given his Miranda warnings and asked questions. *Morris v. State*, 913 So. 2d 432, 2005 Miss. App. LEXIS 307 (Miss. Ct. App. 2005).

Evidence was sufficient to convict defendant of attempted sexual battery of a female minor where the victim testified that defendant asked her to get into a car with him and to lie down in the back of the car, and asked her if “he was going to get him some sex,” and when they arrived at a hotel room, defendant announced to other men there that the victim was there to have sex with them. *Quarles v. State*, 863 So. 2d 987, 2004 Miss. App. LEXIS 2 (Miss. Ct. App. 2004).

Whether fellatio by defendant was penetration of or with victim was irrelevant to sexual battery, and, thus, indictment could charge sexual penetration of male person under age of fourteen, even though statute prohibits sexual penetration with victim. *Hennington v. State*, 702 So. 2d 403, 1997 Miss. LEXIS 637 (Miss. 1997).

Contact between person's mouth, lips, or tongue and genitals of person's body, whether by kissing, licking, or sucking, is “sexual penetration,” regardless of gender of victim or perpetrator. *Hennington v.*

State, 702 So. 2d 403, 1997 Miss. LEXIS 637 (Miss. 1997).

Conviction for sexual battery and attempted sexual battery was supported by victim's testimony that described anal and digital penetration, attempted anal penetration, and attempted cunnilingus, victim's testimony that defendant had threatened to harm other members of her family if she told anyone about the abuse, corroboration by other witnesses, and evidence that immediately after alleged abuse, victim had been treated for gonorrhea and chlamydia. *Eakes v. State*, 665 So. 2d 852, 1995 Miss. LEXIS 555 (Miss. 1995).

Indictment tracking statutory language was sufficient to inform accused of charge against him, and no ambiguity existed where lone reference to defendant being beyond age 18 did not track statutory language. *Cantrell v. State*, 507 So. 2d 325, 1987 Miss. LEXIS 2478 (Miss. 1987).

Although, on its face, the definition of sexual penetration announced in this section encompasses any penetration, the parameters of the definition of sexual penetration are logically confined to activities which are the product of sexual behavior or libidinal gratification, not merely the product of clinical examination or domestic, parental functions. *Roberson v. State*, 501 So. 2d 398, 1987 Miss. LEXIS 2267 (Miss. 1987).

In a prosecution for attempted sexual battery in violation of § 97-3-95, evidence was insufficient to sustain a conviction under § 97-1-7, where the uncontradicted facts indicated that there was no penetration, as defined by this section, the prosecution conceded that there was no attempt to penetrate, the defendant had every opportunity to penetrate if he had wished to do so, and his failure was not the product of his victim's admittedly ineffective resistance or the intervention of extraneous causes. *West v. State*, 437 So. 2d 1212, 1983 Miss. LEXIS 2924 (Miss. 1983).

2. Sexual penetration.

Trial court did not err in denying defendant's judgment notwithstanding the verdict motion because a reasonable jury could find beyond a reasonable doubt that

his contact with the victim included some slight penetration of the labia, which was all that was required to sustain the conviction for sexual battery; the victim's testimony was sufficient for the jury to infer that defendant at least slightly penetrated the victim's vulva or labia, and other evidence supported a finding of penetration. *Austin v. State*, 282 So. 3d 545, 2019 Miss. App. LEXIS 297 (Miss. Ct. App. 2019).

Evidence supported defendant's sexual battery conviction because the minor victim stated in accounts that defendant forced the victim to go up and down on defendant when defendant's penis was inside the victim, or, alternatively, that defendant pulled the victim's underwear down, made the victim get on top of defendant, rubbed defendant's private between the victim's legs was outside of the victim's body, and put defendant's penis on top of the victim's private. Redness of the victim's labia majora was also noted in a medical examination. *Walker v. State*, 262 So. 3d 560, 2018 Miss. App. LEXIS 302 (Miss. Ct. App. 2018), cert. denied, 260 So. 3d 798, 2019 Miss. LEXIS 42 (Miss. 2019).

Evidence was sufficient to convict defendant of sexual battery of the victim, his then seven-year-old cousin, as alleged in Count II because the victim testified that defendant touched her vagina with his mouth; the child victim's statements were admitted under the tender years exception to the rule against hearsay; and, during an interview with the Child Advocacy Center, the victim stated that defendant had sucked on her middle, which she identified as her genital area, which unambiguously proved penetration as proof of contact, skin to skin, between a person's mouth, lips, or tongue and the genital opening of a woman's body, whether by kissing, licking, or sucking, was sufficient proof of sexual penetration through the act of cunnilingus. *Magee v. State*, 231 So. 3d 243, 2017 Miss. App. LEXIS 677 (Miss. Ct. App. 2017).

Evidence was insufficient to support a conviction for a second count of sexual battery as it related to defendant's alleged penetration of a victim's anus with his penis; the victim's ambiguous statements did not suggest penetration to the extent

that it was proven beyond a reasonable doubt. However, there was enough evidence to convict defendant for the lesser included offense of gratification of lust based on his act of rubbing his penis between the victim's buttocks. *Ringer v. State*, 203 So. 3d 794, 2016 Miss. App. LEXIS 288 (Miss. Ct. App. 2016).

Trial court did not err by denying defendant's motion for a directed verdict on the count of the indictment charging him with performing fellatio on the victim and the evidence was sufficient for the jury to have found the essential elements of sexual battery beyond a reasonable doubt where both defendant's accomplice and the victim testified that during the assault defendant forced the victim to perform oral sex. *Graham v. State*, 185 So. 3d 992, 2016 Miss. LEXIS 86 (Miss. 2016).

Victim testified that he was 17 years old when defendant forced him to perform oral sex, which clearly fell within the conduct provided by the statute; the victim's unsupported testimony regarding the explicit details of his sexual encounter with defendant was not contradicted or discredited, and the State presented sufficient evidence to support defendant's conviction of sexual battery. *Shelton v. State*, 172 So. 3d 216, 2014 Miss. App. LEXIS 607 (Miss. Ct. App. 2014), cert. denied, — So. 3d —, 2015 Miss. LEXIS 421 (Miss. 2015).

Evidence was sufficient to convict defendant of statutory rape and sexual battery and the verdicts were not against the overwhelming weight of the evidence because the victim, who was not defendant's wife, was 14 years of age, and defendant was 26 years of age at the time of the October incident; the victim testified that defendant inserted his private organ into her rectum; and the absence of physical evidence did not negate his conviction as there was testimonial evidence. *Sims v. State*, 127 So. 3d 307, 2013 Miss. App. LEXIS 861 (Miss. Ct. App. 2013).

Defendant's conviction for sexual battery of a seven-year-old child, his nephew, in violation of Miss. Code Ann. § 97-3-95(1)(d), was supported by the evidence because the evidence was sufficient to sustain a conviction based on fellatio-based sexual battery, which was sexual

penetration under Miss. Code Ann. § 97-3-97(a); when asked to draw an "X" where defendant put his mouth, the victim drew an "X" on the penis on an anatomically-correct drawing of a male child. *Beasley v. State*, 74 So. 3d 357, 2010 Miss. App. LEXIS 681 (Miss. Ct. App. 2010).

Seminal fluid found on a victim's body does not constitute penetration under Miss. Code Ann. § 97-3-97. *Singleton v. State*, 16 So. 3d 742, 2009 Miss. App. LEXIS 169 (Miss. Ct. App. 2009).

For purposes of a new trial, a guilty verdict in a sexual battery case was not against the overwhelming weight of the evidence because it was up to a jury to assess the reliability of a victim's sister, who testified on the issue of penetration; moreover, even though defendant's seminal fluid on the victim's body did not prove penetration, the testimony of the sister and of police detectives regarding defendant's admission of other instances of oral sex established that element of the crime. *Singleton v. State*, 16 So. 3d 742, 2009 Miss. App. LEXIS 169 (Miss. Ct. App. 2009).

In a sexual battery case under Miss. Code Ann. § 97-3-95(2) where penetration was an issue, a judgment notwithstanding the verdict was properly denied because it was up to a jury to determine the credibility of a victim's sister, who testified that she saw defendant sticking his tongue in between the victim's vagina; also, defendant admitted to other instances of oral sex performed by the victim. *Singleton v. State*, 16 So. 3d 742, 2009 Miss. App. LEXIS 169 (Miss. Ct. App. 2009).

Defendant's conviction for sexual battery of a 22-year-old mentally retarded woman, in violation of Miss. Code Ann. § 97-3-95(1)(b), was supported by the evidence because, based on testimony by the victim's mother, the jury could have found beyond a reasonable doubt that sexual penetration, as defined in Miss. Code Ann. § 97-3-97(a), was occurring at the moment the mother walked in on the victim and defendant. *Holmes v. State*, 20 So. 3d 681, 2008 Miss. App. LEXIS 713 (Miss. Ct. App. 2008), cert. denied, 20 So. 3d 680, 2009 Miss. LEXIS 543 (Miss. 2009).

Denial of appellant's, an inmate's, request for postconviction relief after he was

convicted of capital murder (murder during the commission of sexual battery) was appropriate because he failed to prove that he received the ineffective assistance of counsel. Even if counsel had procured a DNA expert who testified that the inmate's DNA was not present, that did not exonerate the inmate of the sexual battery charge because sexual penetration could be by insertion of any object into the genital or anal opening of another person's body. *Havard v. State*, 988 So. 2d 322, 2008 Miss. LEXIS 264 (Miss. 2008).

Evidence was sufficient to support a conviction of child sexual abuse, despite the fact that there was no physical evidence of sexual penetration, because the jury could have inferred that such occurred in the form of cunnilingus. The six-year-old victim stated that defendant had taken her into his trailer, told her about sex, and licked her bottom; it was shown that the child was unable to distinguish between her genital and anal area due to her age. *Pierce v. State*, 2 So. 3d 641, 2008 Miss. App. LEXIS 90 (Miss. Ct. App. 2008), cert. denied, 999 So. 2d 1280, 2009 Miss. LEXIS 93 (Miss. 2009), cert. denied, 558 U.S. 846, 130 S. Ct. 113, 175 L. Ed. 2d 74, 2009 U.S. LEXIS 5318 (U.S. 2009).

Based on the doctor's testimony concerning the victim's injuries to his rectum which he stated were consistent with sexual battery and the victim's testimony that defendant assaulted him, the evidence was sufficient for the jury to draw a reasonable inference that defendant sexually penetrated the victim's rectum; thus, defendant's sexual battery conviction was affirmed. *Divine v. State*, 947 So. 2d 1017, 2007 Miss. App. LEXIS 23 (Miss. Ct. App. 2007).

Where a doctor who examined the victim testified that the victim's rectum was swollen and there was a tear on the opening into the rectum, and he stated that those injuries were consistent with sexual battery, the evidence clearly indicated that the victim was sexually penetrated pursuant to the sexual battery statute, Miss. Code Ann. § 97-3-95(1)(d); with regard to the statement by the victim's grandmother that the victim had told lies before, the evidence did not rise to the

level of conflicting evidence warranting a lustful touching jury instruction, and thus the trial court did not err in denying the jury instruction on the lesser-included offense of lustful touching. *Divine v. State*, 947 So. 2d 1017, 2007 Miss. App. LEXIS 23 (Miss. Ct. App. 2007).

There was sufficient evidence for a jury to find defendant guilty of sexual battery, in violation of Miss. Code Ann. § 97-3-95(d), where the testimony of the seven-year-old victim's sister and a forensic interviewer and social worker bolstered the victim's testimony that defendant, when he was 17 years old, inserted his finger into the victim's vagina. *McClure v. State*, 941 So. 2d 896, 2006 Miss. App. LEXIS 818 (Miss. Ct. App. 2006).

Evidence was sufficient to convict defendant of attempted sexual battery pursuant to Miss. Code Ann. § 97-1-7 and Miss. Code Ann. § 97-3-95(1)(a) and (d) because, *inter alia*: (1) there was evidence that defendant intended to penetrate the six-year-old victim's privates with his privates, which satisfied the definition of penetration under Miss. Code Ann. § 97-3-97(a); and (2) at the time of the incident, defendant, who was 18, was more than two years older than the victim. *Bracken v. State*, 939 So. 2d 826, 2006 Miss. App. LEXIS 742 (Miss. Ct. App. 2006).

Trial court properly refused to merge two counts of an indictment charging defendant with sexual battery because the two counts alleged two separate acts of penetration; the first count charged that defendant inserted his tongue into the victim's vagina, while the second count charged that defendant inserted his penis into the victim's vagina. *Hill v. State*, 929 So. 2d 375, 2006 Miss. App. LEXIS 390 (Miss. Ct. App. 2006).

Evidence was legally sufficient to show defendant committed a sexual battery upon defendant's daughter as the only contested element of sexual battery was whether there was digital penetration of the vagina and the daughter testified that defendant had put his finger in her vagina and only stopped because defendant's wife had pulled up. *Pittman v. State*, 836 So. 2d 779, 2002 Miss. App. LEXIS 316 (Miss. Ct. App. 2002), cert. denied, 835 So. 2d 952, 2003 Miss. LEXIS 737 (Miss. 2003).

Cunnilingus is considered to be penetration for the purpose of determining whether or not a sexual battery occurred. *Brady v. State*, 722 So. 2d 151, 1998 Miss. App. LEXIS 699 (Miss. Ct. App. 1998).

3. Indictment.

Defendant was properly convicted of sexually battery by digital penetration where sufficient proof showed that defendant was provided notice that he was being charged with sexual battery, and the variance between the language of the indictment and proof at trial was not a fatal error under Miss. Const. art. 3, § 26. *Burrows v. State*, 961 So. 2d 701, 2007 Miss. LEXIS 341 (Miss. 2007).

Although defendant argued that the indictment failed to expressly charge that he penetrated the victim with lustful intent, neither Miss. Code Ann. § 97-3-95 nor Miss. Code Ann. § 97-3-97(a) required proof of lustful intent; defendant's claim as to the sufficiency of the dates alleged in the indictment was waived for failure to demur the indictment in the court below. *Frei v. State*, 934 So. 2d 318, 2006 Miss. App. LEXIS 196 (Miss. Ct. App. 2006).

An indictment improperly omitted the essential element that the crime was without the victim's consent where the indictment asserted only that the defendant attempted to engage in sexual penetration of a female person in violation of § 97-3-95(1)(a). *Hawthorne v. State*, 751 So. 2d 1090, 1999 Miss. App. LEXIS 457 (Miss. Ct. App. 1999).

4. Jury Instructions.

In a sexual battery case, the trial court did not err in instructing the jury that "sexual penetration" was any penetration of the genital or anal openings of another person's body by any part of a person's body as the instruction's use of the term "any" did not render the instruction vague or misleading; and the instruction properly and clearly stated the applicable law. *Keys v. State*, 219 So. 3d 559, 2017 Miss. App. LEXIS 256 (Miss. Ct. App. 2017).

Trial court did not err by instructing the jury on the elements of the offense of sexual battery because the jury unanimously convicted him of sexually penetrating the victim, which was the essence

of the offense of sexual battery. *Young v. State*, 194 So. 3d 904, 2016 Miss. App. LEXIS 438 (Miss. Ct. App. 2016).

Giving of a jury instruction did not constitute error by allowing the jury to convict defendant on a broader definition of sexual battery than the crime alleged in the indictment because the jury was fairly and adequately instructed, and defendant was clearly convicted of the crime for which he was charged in the indictment; the disputed language in the instruction did not substantially alter the elements of proof necessary to find defendant guilty. *Jones v. State*, 164 So. 3d 1009, 2013 Miss. App. LEXIS 477 (Miss. Ct. App. 2013).

Defendant claimed that giving the supplemental instruction was an abuse of discretion because the instruction gave undue prominence to evidence concerning penetration without re-instructing the jury as to the other elements needed to establish the offense of rape and that, when plainly read, the supplemental instruction stated that the offense was established by penetration alone. While it certainly would have been better procedure to have reminded the jury that penetration was only one element of the offense and that all of the instructions, including the supplemental one, should have been considered, there was no reversible error; in that respect, the trial court did unmistakably tie the supplemental instruction to the other elements of rape listed in the original instruction and the supplemental instruction was not meant to encompass the entire offense of rape but was merely an explanation and clarification of one of the elements listed in the original jury instructions. *Williams v. State*, 928 So. 2d 867, 2005 Miss. App. LEXIS 600 (Miss. Ct. App. 2005), cert. denied, 929 So. 2d 923, 2006 Miss. LEXIS 257 (Miss. 2006).

5. Mentally defective person.

Conviction of sexual battery of a mentally deficient person, Miss. Code Ann. § 97-3-95(1)(b), was affirmed because there was sufficient evidence that the victim suffered from a mental deficiency; among other things, the victim's special-education teacher and former mental-health therapist testified that the victim's

IQ was 61 and that he was significantly cognitively disabled. Moreover, the testimony sufficiently showed that the victim's mental age was that of a young child. *Santos v. State*, 110 So. 3d 341, 2013 Miss. App. LEXIS 103 (Miss. Ct. App. 2013).

6. Manifest weight of evidence

Defendant's two convictions for sexual battery of the victim, his then seven-year-old cousin, were not so contrary to the overwhelming weight of the evidence that to allow them to stand would sanction an unconscionable injustice because the vic-

tim's testimony was direct, unequivocal, and sufficiently detailed in describing the abuse that had occurred; the victim was generally consistent in her prior statements and had no apparent motive to lie; and her account was corroborated by her being discovered entering the house late at night with defendant, an incident defendant himself admitted occurred (though in his telling it was under different circumstances). *Magee v. State*, 231 So. 3d 243, 2017 Miss. App. LEXIS 677 (Miss. Ct. App. 2017).

RESEARCH REFERENCES

ALR.

Assault with intent to commit unnatural sex act upon minor as affected by latter's consent. 65 A.L.R.2d 748.

Assault and battery: sexual nature of physical contact as aggravating offense. 63 A.L.R.3d 225.

What constitutes offense of "sexual battery". 87 A.L.R.3d 1250.

Sufficiency of allegations or evidence of serious bodily injury to support charge of aggravated degree of rape, sodomy, or other sexual abuse. 25 A.L.R.4th 1213.

Prosecution of female as principal for rape. 67 A.L.R.4th 1127.

Am. Jur.

65 Am. Jur. 2d, Rape §§ 2, 5-10, 15-20.

70C Am. Jur. 2d, Sodomy §§ 1 et seq.

2A Am. Jur. Pl & Pr Forms, Assault and Battery, Forms 191-193 (complaints and instructions as to sex offenses).

CJS.

6A C.J.S., Assault and Battery §§ 75, 85-88.

75 C.J.S., Rape §§ 36-50.

Practice References.

Ronald L. Schoenberg, *Criminal Law Deskbook* (Matthew Bender).

The Prosecution and Defense of Sex Crimes (Matthew Bender).

Sexual Assault Trials, Second Edition (Michie).

§ 97-3-99. Sexual battery; defense.

A person is not guilty of any offense under Sections 97-3-95 through 97-3-103 if the alleged victim is that person's legal spouse and at the time of the alleged offense such person and the alleged victim are not separated and living apart; provided, however, that the legal spouse of the alleged victim may be found guilty of sexual battery if the legal spouse engaged in forcible sexual penetration without the consent of the alleged victim.

HISTORY: Laws, 1980, ch. 450, § 3; Laws, 1993, ch. 469, § 1, eff from and after passage (approved March 27, 1993).

Cross References — Proceedings for protection from domestic abuse, see §§ 93-21-1 et seq.

Rape, see §§ 97-3-65 through 97-3-71.

Carnal knowledge of step or adopted child or child of cohabitating partner, see § 97-5-41.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Illustrative cases.

1. In general.

Marriage can be an affirmative defense to sexual battery, yet it is not an absolute defense; once the defense of marriage is raised, it will apply, unless the State proves beyond a reasonable doubt that the two were separated or living apart at the time of the attack or that force was involved, and proof of force negates the affirmative defense. *Burgess v. State*, 178 So. 3d 1266, 2015 Miss. LEXIS 570 (Miss. 2015).

Force is not an element of sexual battery, and force is not required to be established in sexual-battery cases unless the affirmative defense of marriage is raised; if it is raised, the State is required to prove the use of force beyond a reasonable doubt, to overcome the marital-defense exception. *Burgess v. State*, 178 So. 3d 1266, 2015 Miss. LEXIS 570 (Miss. 2015).

A defendant was not immune from prosecution under this section for a sexual battery on his wife committed by another person, even though he may have been

immune from prosecution had he alone committed the battery; this section did not give the defendant immunity since the sexual battery was committed by someone else and the defendant had aided and abetted its commission. *Davis v. State*, 611 So. 2d 906, 1992 Miss. LEXIS 802 (Miss. 1992).

2. Illustrative cases.

Trial court did not err in approving jury instructions that included the requirement of force for sexual battery because defendant raised the issue of force; in asserting the affirmative defense of marriage, defendant was not surprised because he introduced the issue, and once he raised the defense, the jury was properly instructed to consider force. *Burgess v. State*, 178 So. 3d 1266, 2015 Miss. LEXIS 570 (Miss. 2015).

The marital exception did not exculpate the defendant from liability for sexual battery on his wife where he rendered her unconscious by lacing her food with drugs, physically undressed her, and then sexually penetrated her since all of those actions required some amount of force. *Trigg v. State*, 759 So. 2d 448, 2000 Miss. App. LEXIS 85 (Miss. Ct. App. 2000).

RESEARCH REFERENCES

ALR.

Assault with intent to commit unnatural sex act upon minor as affected by latter's consent. 65 A.L.R.2d 748.

Criminal responsibility of husband for rape, or assault to commit rape on wife. 84 A.L.R.2d 1017.

Assault and battery: sexual nature of physical contact as aggravating offense. 63 A.L.R.3d 225.

What constitutes offense of "sexual battery". 87 A.L.R.3d 1250.

Criminal responsibility of husband for rape, or assault to commit rape, on wife. 24 A.L.R.4th 105.

Prosecution of female as principal for rape. 67 A.L.R.4th 1127.

Am. Jur.

65 Am. Jur. 2d, Rape §§ 2, 5-10, 15-20.

70C Am. Jur. 2d, Sodomy §§ 1 et seq.

2A Am. Jur. Pl & Pr Forms, Assault and Battery, Forms 191-193 (complaints and instructions as to sex offenses).

CJS.

6A C.J.S., Assault and Battery §§ 75, 84-88.

75 C.J.S., Rape §§ 36-50.

Law Reviews.

Family Law At the Turn of the Century, 71 Miss. L.J. 781, Spring, 2002.

Practice References.

Ronald L. Schoenberg, Criminal Law Deskbook (Matthew Bender).

Anthony Morosco, The Prosecution and Defense of Sex Crimes (Matthew Bender).

Sexual Assault Trials, Second Edition (Michie).

§ 97-3-101. Sexual battery; penalty; criminal sexual assault protection order.

(1) Every person who shall be convicted of sexual battery under Section 97-3-95(1)(a), (b) or (2) shall be imprisoned in the State Penitentiary for a period of not more than thirty (30) years, and for a second or subsequent such offense shall be imprisoned in the Penitentiary for not more than forty (40) years.

(2)(a) Every person who shall be convicted of sexual battery under Section 97-3-95(1)(c) who is at least eighteen (18) but under twenty-one (21) years of age shall be imprisoned for not more than five (5) years in the State Penitentiary or fined not more than Five Thousand Dollars (\$5,000.00), or both;

(b) Every person who shall be convicted of sexual battery under Section 97-3-95(1)(c) who is twenty-one (21) years of age or older shall be imprisoned not more than thirty (30) years in the State Penitentiary or fined not more than Ten Thousand Dollars (\$10,000.00), or both, for the first offense, and not more than forty (40) years in the State Penitentiary for each subsequent offense.

(3) Every person who shall be convicted of sexual battery under Section 97-3-95(1)(d) who is eighteen (18) years of age or older shall be imprisoned for life in the State Penitentiary or such lesser term of imprisonment as the court may determine, but not less than twenty (20) years.

(4) Every person who shall be convicted of sexual battery who is thirteen (13) years of age or older but under eighteen (18) years of age shall be sentenced to such imprisonment, fine or other sentence as the court, in its discretion, may determine.

(5)(a) Upon conviction under this section, the court may issue a criminal sexual assault protection order prohibiting the offender from any contact with the victim, without regard to the relationship between the victim and offender. The court may include in a criminal sexual assault protection order any relief available under Section 93-21-15. The term of a criminal sexual assault protection order shall be for a time period determined by the court, but all orders shall, at a minimum, remain in effect for a period of two (2) years following the expiration of any sentence of imprisonment and subsequent period of community supervision, conditional release, probation, or parole. Upon issuance of a criminal sexual assault protection order, the clerk of the issuing court shall enter the order in the Mississippi Protection Order Registry within twenty-four (24) hours of issuance with no exceptions for weekends or holidays as provided in Section 93-21-25, and a copy must be provided to both the victim and offender.

(b) Criminal sexual assault protection orders shall be issued on the standardized form developed by the Office of the Attorney General.

(c) It is a misdemeanor to knowingly violate any condition of a criminal sexual assault protection order. Upon conviction for a violation, the defendant shall be punished by a fine of not more than Five Hundred Dollars

(\$500.00) or by imprisonment in the county jail for not more than six (6) months, or both. Any sentence imposed for the violation of a criminal sexual assault protection order shall run consecutively to any other sentences imposed on the offender. The court may extend the criminal sexual assault protection order for a period of one (1) year for each violation. The incarceration of a person at the time of the violation is not a bar to prosecution under this section. Nothing in this subsection shall be construed to prohibit the imposition of any other penalties or disciplinary action otherwise allowed by law or policy.

HISTORY: Laws, 1980, ch 450, § 4; Laws, 1993, ch. 512, § 3; Laws, 1995, ch. 596, § 15; Laws, 1998, ch. 549, § 4; Laws, 1999, ch. 560, § 2; Laws, 2017, ch. 414, § 2, eff from and after passage (approved Apr. 6, 2017).

Cross References — Rape, see §§ 97-3-65 and 97-3-71.

Carnal knowledge of step or adopted child or child of cohabitating partner, see § 97-5-41.

Imposition of standard state assessment in addition to all court imposed fines or other penalties for any misdemeanor violation, see § 99-19-73.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Sentence ranges.
3. Plea bargain.

1. In general.

Sentences which defendant received for sexual battery and fondling of a child were beyond the maximum sentences for the offenses at the time the offenses were committed. Therefore, remand for re-sentencing in accordance with the applicable statute was necessary. *Masters v. State*, 285 So. 3d 192, 2019 Miss. App. LEXIS 563 (Miss. Ct. App. 2019).

The trial court sentenced the defendant within the limits of this section and did not abuse its discretion where the defendant was convicted of six counts of sexual battery and the trial court sentenced him to a term of 30 years on each count, with two of the sentences running consecutively and four running concurrently, making the term that he would have to serve 60 years. *Williams v. State*, 757 So. 2d 953, 1999 Miss. LEXIS 284 (Miss. 1999).

Fondling is not a lesser included offense of sexual battery. *Brady v. State*, 722 So. 2d 151, 1998 Miss. App. LEXIS 699 (Miss. Ct. App. 1998).

Trial court acted within its discretion by imposing 2 consecutive 20-year sentences for 2 sexual battery convictions and concurrent 20-year sentence for attempted sexual battery conviction. *Eakes v. State*, 665 So. 2d 852, 1995 Miss. LEXIS 555 (Miss. 1995).

A sentence of 30 years in the state penitentiary was not disproportionate to the crime of sexual battery since 30 years' imprisonment is the maximum sentence which may be imposed upon a person convicted of sexual battery pursuant to § 97-3-101. *Smith v. State*, 569 So. 2d 1203, 1990 Miss. LEXIS 665 (Miss. 1990).

2. Sentence ranges.

Two life sentences imposed were not unduly harsh and did not amount to cruel and unusual punishment, given the ongoing nature of the offenses. *Portis v. State*, 245 So. 3d 457, 2018 Miss. LEXIS 273 (Miss. 2018).

Because petitioner was under the age of 18 at the time of the sexual battery, the trial court had discretion in the length of the sentence. *Watkins v. State*, 170 So. 3d 582, 2014 Miss. App. LEXIS 631 (Miss. Ct. App. 2014), cert. denied, 163 So. 3d 301, 2015 Miss. LEXIS 301 (Miss. 2015).

Inmate's sentence of twenty years with ten years to serve was well within the

statutory guidelines, and therefore, a “grossly disproportionate” review under the U.S. Supreme Court decision in *Solem v. Helm* was unnecessary. *Miller v. State*, 106 So. 3d 860, 2013 Miss. App. LEXIS 23 (Miss. Ct. App. 2013).

Defendant's sentence of thirty-five years in prison, with thirty years to serve and five years suspended, followed by five years' supervised probation, without the possibility of parole, was permissible under Miss. Code Ann. § 47-7-3(1)(b), although Miss. Code Ann. § 97-3-101(3) did not expressly authorize day-for-day sentences and parole restrictions. *Petty v. State*, 118 So. 3d 659, 2013 Miss. App. LEXIS 390 (Miss. Ct. App. 2013).

Defendant's sentence was not illegal, under Miss. Code Ann. § 97-3-101(3), because, for the attempted-sexual-battery count, defendant was sentenced to twelve years, with eight years of post-release supervision, which, when combined, was for twenty years and was within the statutory limits. *Moore v. State*, 112 So. 3d 1084, 2013 Miss. App. LEXIS 207 (Miss. Ct. App. 2013).

Defendant's life sentence after he was convicted of sexual battery of child under the age of 14 was appropriate because it was constitutional, Miss. Code Ann. § 97-3-101(3). Although there were certainly Mississippi cases where defendants were sentenced to less than life for the crime of sexual battery or other similar crimes, there were also numerous cases where life sentences were given for such crimes; the fact that other similarly situated defendants received lighter sentences did not prove that defendant's sentence was grossly disproportionate to the crime committed. *Carter v. State*, 996 So. 2d 112, 2008 Miss. App. LEXIS 445 (Miss. Ct. App. 2008), cert. denied, 999 So. 2d 374, 2009 Miss. LEXIS 43 (Miss. 2009).

Defendant was convicted of four counts of sexual battery for repeatedly sexually battering defendant's stepdaughter during a time period when she was 11 years of age by forcing her to engage in sex acts and sexual intercourse with defendant, and defendant was sentenced to two consecutive life sentences (the statutory maximum) and two consecutive 20-year terms; defendant also stated that he took

pictures of the victim and possessed child pornography, and in light of the evidence put forth supporting defendant's guilt, and the nature of the crime of which defendant was convicted, defendant's sentences were not grossly disproportionate to the offenses or constitutionally violative. *Evans v. State*, 984 So. 2d 308, 2007 Miss. App. LEXIS 641 (Miss. Ct. App. 2007), cert. denied, 984 So. 2d 277, 2008 Miss. LEXIS 289 (Miss. 2008).

In a sexual battery case, Miss. Code Ann. § 97-3-101(3) authorizes the maximum sentence to be life in prison, but does not require the jury to arrive at that verdict. Because the trial court acted within the limits of the statute and the statute did not require a finding by the jury, the procedure used by the trial court did not violate his due process rights because it did not fail to take into consideration certain factors in determining a proper sentence. *Hobgood v. State*, 926 So. 2d 847, 2006 Miss. LEXIS 118 (Miss. 2006), cert. denied, 549 U.S. 1118, 127 S. Ct. 928, 166 L. Ed. 2d 714, 2007 U.S. LEXIS 143 (U.S. 2007).

Appellate court concluded that defendant entered a guilty plea to the charge of sexual battery of a fourteen-year-old, and he received a thirty-year sentence; the term of incarceration was within the statutory guidelines, and defendant failed to present concrete facts to support his allegation that the sentence was unjust. *Bates v. State*, 914 So. 2d 297, 2005 Miss. App. LEXIS 790 (Miss. Ct. App. 2005).

Where defendant pleaded guilty to sexual battery of a girl under the age of 14 under Miss. Code Ann. § 97-3-95(1)(c), the fact that the inmate was not advised of a statutory minimum did not present grounds for postconviction relief, as under Miss. Code Ann. § 97-3-101, there was no statutory minimum sentence. *Bryant v. State*, 879 So. 2d 530, 2004 Miss. App. LEXIS 756 (Miss. Ct. App. 2004).

3. Plea bargain.

Where appellant was charged with sexual battery, his defense attorney was not ineffective for allowing him to plead guilty of aggravated assault. Aggravated assault is a lesser crime than sexual battery and carries a lower maximum sen-

tence. *Pearson v. State*, 906 So. 2d 788, 2004 Miss. App. LEXIS 1139 (Miss. Ct. App. 2004).

OPINIONS OF THE ATTORNEY GENERAL

Section 47-7-33 does not empower circuit judges to suspend sentences pursuant to Section 97-3-65(2)(c) and Section 97-3-101(3) because the latter sections each

provide that a life sentence is the maximum sentence that may be imposed. *Caranna*, May 5, 2000, A.G. Op. #2000-0239.

RESEARCH REFERENCES

ALR.

Assault with intent to commit unnatural sex act upon minor as affected by latter's consent. 65 A.L.R.2d 748.

Assault and battery: sexual nature of physical contact as aggravating offense. 63 A.L.R.3d 225.

What constitutes offense of "sexual battery". 87 A.L.R.3d 1250.

Am. Jur.

65 Am. Jur. 2d, Rape §§ 2, 5-10, 15-20.

70C Am. Jur. 2d, Sodomy §§ 1 et seq.

2A Am. Jur. Pl & Pr Forms, Assault and

Battery, Forms 191-193 (complaints and instructions as to sex offenses).

CJS.

6A C.J.S., Assault and Battery §§ 75, 85-88.

75 C.J.S., Rape §§ 36-50.

Practice References.

Ronald L. Schoenberg, *Criminal Law Deskbook* (Matthew Bender).

Anthony Morosco, *The Prosecution and Defense of Sex Crimes* (Matthew Bender).

Sexual Assault Trials, Second Edition (Michie).

§ 97-3-103. Sexual battery; relationship with other criminal statutes.

Sections 97-3-95 through 97-3-103 shall not be held to repeal, modify or amend any other criminal statute of this state.

HISTORY: Laws, 1980, ch. 450, § 5, eff from and after July 1, 1980.

Cross References — Rape, see §§ 97-3-65 and 97-3-71.

JUDICIAL DECISIONS

1. In general.

Where defendant's 19-year-old daughter testified at trial that she and defendant had engaged in acts of fellatio and cunnilingus, defendant was properly indicted under § 97-29-59, and not § 97-3-95 et seq., which were enacted subse-

quent to the violation for which he was convicted, in that this section expressly provides that the sexual battery statutes do not repeal, modify or amend any other criminal statute. *Contreras v. State*, 445 So. 2d 543, 1984 Miss. LEXIS 1612 (Miss. 1984).

RESEARCH REFERENCES

ALR.

Assault with intent to commit unnatu-

ral sex act upon minor as affected by latter's consent. 65 A.L.R.2d 748.

Assault and battery: sexual nature of physical contact as aggravating offense. 63 A.L.R.3d 225.

What constitutes offense of “sexual battery”. 87 A.L.R.3d 1250.

Am. Jur.

65 Am. Jur. 2d, Rape §§ 2, 5-10, 15-20.

70C Am. Jur. 2d, Sodomy §§ 1 et seq.

2A Am. Jur. Pl & Pr Forms, Assault and Battery, Forms 191-193 (complaints and instructions as to sex offenses).

CJS.

6A C.J.S., Assault and Battery §§ 75, 85-88.

75 C.J.S., Rape §§ 36-50.

Practice References.

Ronald L. Schoenberg, Criminal Law Deskbook (Matthew Bender).

Anthony Morosco, The Prosecution and Defense of Sex Crimes (Matthew Bender).

Sexual Assault Trials, Second Edition (Michie).

§ 97-3-104. Crime of sexual activity between certain individuals and offenders incarcerated in correctional facilities or on correctional supervision; sanctions.

(1) It is unlawful for any jailer, guard, employee of the Department of Corrections, sheriff, constable, marshal, other officer, or employee of a law enforcement agency or correctional facility to engage in any sexual penetration, as defined in Section 97-3-97, or other sexual act with any offender, with the offender’s consent, who is incarcerated at any jail or any state, county or private correctional facility or who is serving on probation, parole, earned-release supervision, post-release supervision, earned probation, intensive supervision or any other form of correctional supervision.

(2) It is unlawful for any civilian with supervisory or custodial authority over an offender to engage in any sexual penetration, as defined in Section 97-3-97, or other sexual act with the offender, with the offender’s consent, who is incarcerated at any jail or any state, county or private correctional facility.

(3) Any person who violates this section is guilty of a felony and upon conviction shall be fined not more than Five Thousand Dollars (\$5,000.00) or imprisoned for a term not to exceed five (5) years, or both.

HISTORY: Laws, 1998, ch. 470, § 1; Laws, 2004, ch. 589, § 1; Laws, 2005, ch. 518, § 1; Laws, 2010, ch. 369, § 1, eff from and after passage (approved Mar. 16, 2010).

Cross References — Imposition of standard state assessment in addition to all court imposed fines or other penalties for any felony violation, see § 99-19-73.

OPINIONS OF THE ATTORNEY GENERAL

The term “offender” is not limited to criminal detainees, but rather includes any person detained in a facility described

in the statute. McDonald, Feb. 4, 2005, A.G. Op. 05-0017.

RESEARCH REFERENCES

Practice References.

- Ronald L. Schoenberg, Criminal Law (Michie). Sexual Assault Trials, Second Edition
 Deskbook (Matthew Bender).
 Anthony Morosco, The Prosecution and Defense of Sex Crimes (Matthew Bender).

§ 97-3-105. Hazing; initiation into organization.

(1) A person is guilty of hazing in the first degree when, in the course of another person's initiation into or affiliation with any organization, he intentionally or recklessly engages in conduct which creates a substantial risk of physical injury to such other person or a third person and thereby causes such injury.

(2) Any person violating the provisions of subsection (1) of this section shall be guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not more than Two Thousand Dollars (\$2,000.00) or imprisonment in the county jail for not more than six (6) months, or both.

(3) A person is guilty of hazing in the second degree when, in the course of another person's initiation into or affiliation with any organization, he intentionally or recklessly engages in conduct which creates a substantial risk of physical injury to such other person or a third person.

(4) Any person violating the provisions of subsection (3) of this section shall be guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not more than One Thousand Dollars (\$1,000.00).

(5) The provisions of this section shall be in addition to other criminal laws, and actions taken pursuant to this section shall not bar prosecutions for other violations of criminal law.

HISTORY: Laws, 1990, ch. 343, § 1, eff from and after July 1, 1990.

Cross References — Imposition of standard state assessment in addition to all court imposed fines or other penalties for any misdemeanor violation, see § 99-19-73.

RESEARCH REFERENCES

Law Reviews.

- Halcomb Lewis, The criminalization of fraternity, non-fraternity and non-colle-
 giate hazing. 61 Miss. L. Journal 111
 (Spring, 1991).

§ 97-3-107. Stalking; aggravated stalking; penalties; definitions.

(1)(a) Any person who purposefully engages in a course of conduct directed at a specific person, or who makes a credible threat, and who knows or should know that the conduct would cause a reasonable person to fear for his or her own safety, to fear for the safety of another person, or to fear damage or destruction of his or her property, is guilty of the crime of stalking.

(b) A person who is convicted of the crime of stalking under this section shall be punished by imprisonment in the county jail for not more than one (1) year or by a fine of not more than One Thousand Dollars (\$1,000.00), or by both such fine and imprisonment.

(c) Any person who is convicted of a violation of this section when there is in effect at the time of the commission of the offense a valid temporary restraining order, ex parte protective order, protective order after hearing, court approved consent agreement, or an injunction issued by a municipal, justice, county, circuit or chancery court, federal or tribal court or by a foreign court of competent jurisdiction prohibiting the behavior described in this section against the same party, shall be punished by imprisonment in the county jail for not more than one (1) year and by a fine of not more than One Thousand Five Hundred Dollars (\$1,500.00).

(2)(a) A person who commits acts that would constitute the crime of stalking as defined in this section is guilty of the crime of aggravated stalking if any of the following circumstances exist:

(i) At least one (1) of the actions constituting the offense involved the use or display of a deadly weapon with the intent to place the victim of the stalking in reasonable fear of death or great bodily injury to self or a third person;

(ii) Within the past seven (7) years, the perpetrator has been previously convicted of stalking or aggravated stalking under this section or a substantially similar law of another state, political subdivision of another state, of the United States, or of a federally recognized Indian tribe, whether against the same or another victim; or

(iii) At the time of the offense, the perpetrator was a person required to register as a sex offender pursuant to state, federal, military or tribal law and the victim was under the age of eighteen (18) years.

(b) Aggravated stalking is a felony punishable as follows:

(i) Except as provided in subparagraph (ii), by imprisonment in the custody of the Department of Corrections for not more than five (5) years and a fine of not more than Three Thousand Dollars (\$3,000.00).

(ii) If, at the time of the offense, the perpetrator was required to register as a sex offender pursuant to state, federal, military or tribal law, and the victim was under the age of eighteen (18) years, by imprisonment for not more than six (6) years in the custody of the Department of Corrections and a fine of Four Thousand Dollars (\$4,000.00).

(3) Upon conviction, the sentencing court shall consider issuance of an order prohibiting the perpetrator from any contact with the victim. The duration of any order prohibiting contact with the victim shall be based upon the seriousness of the facts before the court, the probability of future violations, and the safety of the victim or another person.

(4) Every conviction of stalking or aggravated stalking may require as a condition of any suspended sentence or sentence of probation that the defendant, at his own expense, submit to psychiatric or psychological counseling or other such treatment or behavioral modification program deemed appropriate by the court.

(5) In any prosecution under this section, it shall not be a defense that the perpetrator was not given actual notice that the course of conduct was unwanted or that the perpetrator did not intend to cause the victim fear.

(6) When investigating allegations of a violation of this section, law enforcement officers shall utilize the Uniform Offense Report prescribed by the Office of the Attorney General in consultation with the sheriffs' and police chiefs' associations. However, failure of law enforcement to utilize the Uniform Offense Report shall in no way invalidate the crime charged under this section.

(7) For purposes of venue, any violation of this section shall be considered to have been committed in any county in which any single act was performed in furtherance of a violation of this section. An electronic communication shall be deemed to have been committed in any county from which the electronic communication is generated or in which it is received.

(8) For the purposes of this section:

(a) "Course of conduct" means a pattern of conduct composed of a series of two (2) or more acts over a period of time, however short, evidencing a continuity of purpose and that would cause a reasonable person to fear for his or her own safety, to fear for the safety of another person, or to fear damage or destruction of his or her property. Such acts may include, but are not limited to, the following or any combination thereof, whether done directly or indirectly: (i) following or confronting the other person in a public place or on private property against the other person's will; (ii) contacting the other person by telephone or mail, or by electronic mail or communication as defined in Section 97-45-1; or (iii) threatening or causing harm to the other person or a third party.

(b) "Credible threat" means a verbal or written threat to cause harm to a specific person or to cause damage to property that would cause a reasonable person to fear for the safety of that person or damage to the property.

(c) "Reasonable person" means a reasonable person in the victim's circumstances.

(9) The incarceration of a person at the time the threat is made shall not be a bar to prosecution under this section. Constitutionally protected activity is not prohibited by this section.

HISTORY: Laws, 1992, ch. 532, § 1; Laws, 1996, ch. 326, § 1; Laws, 2000, ch. 553, § 1; Laws, 2006, ch. 583, § 1; Laws, 2010, ch. 453, § 1, eff from and after July 1, 2010.

Editor's Notes — Laws of 1992, ch. 532, § 2, effective from and after July 1, 1992, provides as follows:

"SECTION 2. The provisions of this act shall not be construed to disallow a prosecution for a criminal offense other than stalking against a person who is being or has been prosecuted for the offense of stalking, regardless of any differences in the degree of punishment which may be prescribed for the different offenses."

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Right of trial by jury.
3. Sufficiency of the evidence.
4. Indictment.
5. Instructions.

1. In general.

Because it was clear that for a violation of Miss. Code Ann. § 97-3-107(4) to occur the offending conduct had to be intentional, and Miss. Code Ann. § 15-1-35 applied to all intentional torts that were substantially like those enumerated, stalking was subject to the one-year statute of limitations of § 15-1-35; because the employee did not file her complaint within one year of last alleged action by her supervisor, it was time-barred. *Jones v. B.L. Dev. Corp.*, 940 So. 2d 961, 2006 Miss. App. LEXIS 792 (Miss. Ct. App. 2006).

Defendant's display of pistol and his heated request for victim to shoot him, following his repeated threats against victim, constituted violation of stalking statute and was an unlawful act which would preclude defendant's use of accident as a defense to homicide charge. *Nicholson ex rel. Gollott v. State*, 672 So. 2d 744, 1996 Miss. LEXIS 146 (Miss. 1996).

2. Right of trial by jury.

Because the offense of stalking under Miss. Code Ann. § 97-3-107(1), with which defendant was being charged, was punishable by up to one year in jail, defendant had a right to a jury trial, a circuit court had no discretion to deny him that right and the circuit court erred in refusing defendant's request for a jury trial. *Ude v. State*, 992 So. 2d 1213, 2008 Miss. App. LEXIS 387 (Miss. Ct. App. 2008).

3. Sufficiency of the evidence.

Sufficient evidence supported defendant's aggravated assault conviction; he threatened the victim and her parents, he struck the victim's father in the head with a wrench, causing a large gash, and whether or not the father suffered serious injury, defendant clearly attempted to as-

sault him and the means he used were likely to produce serious injury. *Beasley v. State*, 251 So. 3d 746, 2017 Miss. App. LEXIS 619 (Miss. Ct. App. 2017).

Defendant's aggravated stalking conviction was supported by the evidence, as defendant sent text messages to the victim's mother that he was going to "put down" the victim's cat, the messages would have caused a reasonable person to fear for her safety, defendant broke into the victim's home and jumped out of a closet with a pipe wrench and threatened her and her mother, and defendant had been convicted of stalking before. *Beasley v. State*, 251 So. 3d 746, 2017 Miss. App. LEXIS 619 (Miss. Ct. App. 2017).

Evidence, including that defendant repeatedly called the victim, visited her office, sent her gifts and food despite being told numerous times that he was not to have any contact with the victim; the victim's testimony that she confronted defendant about his behavior and told him that she did not wish to have any contact with him, that he became angry and violent, and that he yelled at her; and other testimony that defendant refused to obey numerous specific directives that he stay away from the victim, was sufficient evidence for a circuit court to have found defendant guilty of stalking. *Ude v. State*, 992 So. 2d 1213, 2008 Miss. App. LEXIS 387 (Miss. Ct. App. 2008).

4. Indictment.

Defendant's indictment gave him adequate notice of his aggravated-stalking charge because the indictment provided a clear and concise description of the charge, and it established a course of conduct by listing defendant's three prior stalking convictions against the victim in addition to the foregoing incident; defendant's indictment almost identically tracked the language of the statute. *McGilvary v. State*, 290 So. 3d 1273, 2020 Miss. App. LEXIS 25 (Miss. Ct. App. 2020).

5. Instructions.

State's elements jury instruction did not constitute a constructive amendment be-

cause the fact that the instruction lacked the specific language, “course of conduct,” did not substantially alter the elements or proof necessary to find defendant guilty of aggravated stalking; the State’s inclusion of the subject incident along with defendant’s prior convictions against the victim effectively established the requisite course of conduct. *McGilvary v. State*, 290 So. 3d 1273, 2020 Miss. App. LEXIS 25 (Miss. Ct. App. 2020).

Rational trier of fact could have con-

victed defendant of aggravated stalking beyond a reasonable doubt because the State and defense stipulated that defendant had three prior convictions of stalking the victim in municipal court; defendant actions on the day of the incident, in conjunction with the three prior convictions, thereby established the requisite course of conduct. *McGilvary v. State*, 290 So. 3d 1273, 2020 Miss. App. LEXIS 25 (Miss. Ct. App. 2020).

OPINIONS OF THE ATTORNEY GENERAL

No legal precedent requires charges under the statute to be based upon a threat made directly to the victim; thus, where threats are made to an officer and the officer believes the individual is capable of

carrying out the threat, then the facts may be such that would substantiate the definition of “credible threat.” *Boone*, Apr. 23, 2001, A.G. Op. #01-0215.

RESEARCH REFERENCES

Practice References.

Ronald L. Schoenberg, *Criminal Law Deskbook* (Matthew Bender).

§ 97-3-109. Drive-by shooting; drive-by bombing.

(1) A person is guilty of a drive-by shooting if he attempts, other than for lawful self-defense, to cause serious bodily injury to another, or causes such injury purposely, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life by discharging a firearm while in or on a vehicle.

(2) A person is guilty of a drive-by bombing if he attempts to cause serious bodily injury to another or attempts to cause damage to the property of another, or causes such injury or damage purposely, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life by throwing or ejecting any bomb or explosive device from a vehicle while in or on the vehicle.

(3) A person convicted of violating subsection (1) or (2) of this section shall be punished by commitment to the custody of the State Department of Corrections for a term not to exceed thirty (30) years and a fine not to exceed Ten Thousand Dollars (\$10,000.00). A drive-by shooting or a drive-by bombing shall be a felony.

(4) This section shall not be construed to restrict the power to apprehend or arrest a person committing an offense if such apprehension or arrest is otherwise lawful.

HISTORY: Laws, 1993, ch. 376, § 1; Laws, 1994, ch. 373, § 1; Laws, 1995, ch. 608, § 2, eff from and after July 1, 1995.

Cross References — Drive-by shooting or bombing, as provided in this section, defined as crime of violence, see § 97-3-2.

Forfeiture of vehicles used in drive-by shootings, see § 97-3-111.

JUDICIAL DECISIONS

ANALYSIS

1. Indictment.
2. Evidence.
3. Essential elements.
4. Jury instructions.

1. Indictment.

Trial court did not err in dismissing appellant's motion for post-conviction relief because his indictment was legally sufficient; by setting forth the statutory section charged, Miss. Code Ann. § 97-3-109(1), which was the applicable statute for drive-by shooting, the indictment gave appellant sufficient notice, meeting the requirements of Miss. Unif. Cir. & Cty. R. 7.06 and due process. *Byers v. State*, 107 So. 3d 1071, 2013 Miss. App. LEXIS 65 (Miss. Ct. App. 2013).

The trial court committed reversible error by granting an instruction on the elements of the crime of drive-by shooting that contained an additional charge for reckless indifference that was not included in the indictment. *Smith v. State*, 754 So. 2d 1159, 2000 Miss. LEXIS 2 (Miss. 2000), overruled in part, 986 So. 2d 290, 2008 Miss. LEXIS 339 (Miss. 2008).

The indictment was not required to include the element of lack of self-defense where the jury was properly instructed that it had to find that defendants were not acting in self-defense before convicting them of the charge, and the evidence supported the jury's finding that the defendants were not acting in self-defense. *Smith v. State*, 754 So. 2d 1159, 2000 Miss. LEXIS 2 (Miss. 2000), overruled in part, 986 So. 2d 290, 2008 Miss. LEXIS 339 (Miss. 2008).

The omission of the phrases "purposely or recklessly under circumstances manifesting extreme indifference to the value of human life" and "other than for lawful self defense" did not render an indictment fatally defective. *Moore v. State*, 1999 Miss. App. LEXIS 204 (Miss. Ct. App. Apr. 20, 1999), rev'd, 754 So. 2d 1159, 2000 Miss. LEXIS 2 (Miss. 2000).

An indictment for a drive-by shooting was sufficient where it charged that the defendant unlawfully, willfully, feloniously, and knowingly caused serious bodily injury to victim by discharging a firearm while in a vehicle and thus striking the victim, with bullets fired from the firearm. *Smith v. State*, 1999 Miss. App. LEXIS 126 (Miss. Ct. App. Mar. 23, 1999), rev'd, 754 So. 2d 1159, 2000 Miss. LEXIS 2 (Miss. 2000).

2. Evidence.

Evidence supported defendant's conviction for a drive-by shooting because two men in a pickup were seen fleeing the scene of a drive-by shooting; a short time later, and not too far away, defendant and a friend were pulled over for speeding in a pickup; defendant gave officers a half-empty pistol containing cartridges that matched shell casings found at the scene; and defendant tested positive for gunshot residue on the outside of defendant's left hand. *Wallace v. State*, 166 So. 3d 520, 2014 Miss. App. LEXIS 385 (Miss. Ct. App. 2014), cert. dismissed, — So. 3d —, 2015 Miss. LEXIS 341 (Miss. 2015).

Jury could reasonably find defendant guilty of the crime of drive-by shooting where the victim testified that defendant was inside the car when the shot was fired and the fact that a bullet matching the gun fired by defendant was found lodged in the victim's car, which had been parked outside his apartment, bolstered the victim's testimony that he had not stepped outside of his doorway and that defendant was pointing the gun in his direction; therefore, the trial judge did not err in denying defendant's motion for judgment notwithstanding the verdict. *Richardson v. State*, 875 So. 2d 1106, 2004 Miss. App. LEXIS 599 (Miss. Ct. App. 2004).

Evidence was held sufficient to establish that the defendant intended to cause serious bodily injury to another. *Fox v. State*, 724 So. 2d 968, 1998 Miss. App. LEXIS 1049 (Miss. Ct. App. 1998).

3. Essential elements.

In order to obtain a valid conviction of a defendant for felony murder while engaged in the crime of drive-by shooting, the State is required to prove all essential elements of both Miss. Code Ann. § 97-3-19(1)(c) and Miss. Code Ann. § 97-3-109(1). Thus, the State is required to prove under Miss. Code Ann. § 97-3-109(1) that the defendant caused serious bodily injury to another purposely, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life by discharging a firearm while in or on a vehicle. *Boyd v. State*, 977 So. 2d 329, 2008 Miss. LEXIS 144 (Miss. 2008).

4. Jury instructions.

Trial court properly charged the jury to find guilty of drive-by shooting if the State of Mississippi proved beyond a reasonable doubt that defendant attempted to cause serious bodily injury to another by discharging a firearm while in or on a vehicle without acting in lawful self-defense. The court was not required to use the words “knowingly or recklessly” in the instruction. *Wallace v. State*, 166 So. 3d 520, 2014 Miss. App. LEXIS 385 (Miss. Ct. App. 2014), cert. dismissed, — So. 3d —, 2015 Miss. LEXIS 341 (Miss. 2015).

§ 97-3-110. Seizure and forfeiture of firearms unlawfully possessed by juveniles and of motor vehicles used in drive-by shootings or bombings.

(1) Whenever a person under eighteen (18) years of age is unlawfully in possession of a firearm, the firearm shall be seized and, after an adjudication of delinquency or conviction, shall be subject to forfeiture.

(2) Whenever a person under eighteen (18) years of age unlawfully discharges a firearm in or throws or ejects a bomb from a motor vehicle in violation of Section 97-3-109, Mississippi Code of 1972, the motor vehicle shall be subject to seizure and, after an adjudication of delinquency or conviction, be subject to forfeiture pursuant to the procedures set forth in Section 97-3-111, Mississippi Code of 1972.

HISTORY: Laws, 1995, ch. 608 § 1, eff from and after July 1, 1995.

RESEARCH REFERENCES

ALR.

Propriety of search of nonoccupant visitor's belongings pursuant to warrant issued for another's premises. 51 A.L.R.5th 375.

Am. Jur.

21 Am. Jur. 2d, Criminal Law § 34.
36 Am. Jur. 2d, Forfeitures and Penalties § 20.

68 Am. Jur. 2d, Searches and Seizures § 13.

68 Am. Jur. 2d, Searches and Seizures § 36.

CJS.

43 C.J.S., Infants §§ 23-25.
79 C.J.S., Searches and Seizures §§ 78, 84, 88.
94 C.J.S., Weapons §§ 41-43, 47-50.

§ 97-3-111. Forfeiture of vehicles used in drive-by shootings or bombings.

(1) All vehicles which are used in any manner to facilitate the discharging

of a firearm or the throwing or ejection of a bomb or explosive device in violation of Section 97-3-109 shall be subject to forfeiture, however:

(a) No conveyance used by any person as a common carrier in the transaction of business as a common carrier is subject to forfeiture under this section unless it appears that the owner or other person in charge of the conveyance is a consenting party or privy to a violation of Section 97-3-109 and this section;

(b) No conveyance is subject to forfeiture under this section by reason of any act or omission proved by the owner thereof to have been committed or omitted without his knowledge or consent; if the confiscating authority has reason to believe that the conveyance is a leased or rented conveyance, then the confiscating authority shall notify the owner of the conveyance within five (5) days of the confiscation;

(c) A forfeiture of a conveyance encumbered by a bona fide security interest is subject to the interest of the secured party if he neither had knowledge of nor consented to the act or omission.

(2) Except as otherwise provided in subsection (16), when any property is seized pursuant to subsection (1), proceedings under this section shall be instituted promptly.

(3) A petition for forfeiture shall be filed promptly in the name of the State of Mississippi, the county or the municipality and may be filed in the county in which the seizure is made, the county in which the criminal prosecution is brought or the county in which the owner of the seized property is found. Forfeiture proceedings may be brought in (a) the circuit court, or (b) the county court if a county court exists in the county and the value of the seized property is within the jurisdictional limits of the county court as set forth in Section 9-9-21, Mississippi Code of 1972, or (c) the youth court in the case of a person adjudicated delinquent where the underlying basis for the delinquency is a violation of Section 97-3-109, Mississippi Code of 1972. A copy of such petition shall be served upon the following persons by service of process in the same manner as in civil cases:

(a) The owner of the property, if address is known;

(b) Any secured party who has registered his lien or filed a financing statement as provided by law, if the identity of such secured party can be ascertained by the local law enforcement agency by making a good faith effort to ascertain the identity of such secured party as described in subsections (4), (5), (6), (7) and (8) of this section;

(c) Any other bona fide lienholder or secured party or other person holding an interest in the property in the nature of a security interest of whom the local law enforcement agency has actual knowledge; and

(d) Any person in possession of property subject to forfeiture at the time that it was seized.

(4) If the property is a motor vehicle susceptible of titling under the Mississippi Motor Vehicle Title Law and if there is any reasonable cause to believe that the vehicle has been titled, the local law enforcement agency shall make inquiry of the State Tax Commission as to what the records of the State

Tax Commission show as to who is the record owner of the vehicle and who, if anyone, holds any lien or security interest which affects the vehicle.

(5) If the property is a motor vehicle and is not titled in the State of Mississippi, then the local law enforcement agency shall attempt to ascertain the name and address of the person in whose name the vehicle is licensed, and if the vehicle is licensed in a state which has in effect a certificate of title law, the local law enforcement agency shall make inquiry of the appropriate agency of that state as to what the records of the agency show as to who is the record owner of the vehicle and who, if anyone, holds any lien, security interest or other instrument in the nature of a security device which affects the vehicle.

(6) In the event the answer to an inquiry states that the record owner of the property is any person other than the person who was in possession of it when it was seized, or states that any person holds any lien, encumbrance, security interest or other interest which affects the property, the local law enforcement agency shall cause any record owner and also any lienholder, secured party or other person who holds an interest in the property in the nature of a security interest which affects the property to be named in the petition of forfeiture and to be served with process in the same manner as in civil cases.

(7) If the owner of the property cannot be found and served with a copy of the petition of forfeiture, or if no person was in possession of the property subject to forfeiture at the time that it was seized and the owner of the property is unknown, the local law enforcement agency shall file with the clerk of the court in which the proceeding is pending an affidavit to such effect, whereupon the clerk of the court shall publish notice of the hearing addressed to "the Unknown Owner of _____", filling in the blank space with a reasonably detailed description of the property subject to forfeiture. Service by publication shall contain the other requisites prescribed in Section 11-33-41, Mississippi Code of 1972, and shall be served as provided in Section 11-33-37, Mississippi Code of 1972, for publication of notice for attachments at law.

(8) No proceedings instituted pursuant to the provisions of this section shall proceed to hearing unless the judge conducting the hearing is satisfied that this section has been complied with. Any answer received from an inquiry required by subsections (4) through (5) of this section shall be introduced into evidence at the hearing.

(9) Except as otherwise provided in subsection (16), an owner of property that has been seized pursuant to subsection (1) shall file an answer within thirty (30) days after the completion of service of process. If an answer is not filed, the court shall hear evidence that the property is subject to forfeiture and forfeit the property to the local law enforcement agency. If an answer is filed, a time for hearing on forfeiture shall be set within thirty (30) days of filing the answer or at the succeeding term of court, if court would not be in progress within thirty (30) days after filing the answer. Provided, however, that upon request by the local law enforcement agency or the owner of the property, the court may postpone said forfeiture hearing to a date past the time any criminal action is pending against said owner.

(10) If the owner of the property has filed an answer denying that the property is subject to forfeiture, then the burden is on the petitioner to prove that the property is subject to forfeiture. However, if an answer has not been filed by the owner of the property, the petition for forfeiture may be introduced into evidence and is *prima facie* evidence that the property is subject to forfeiture. The standard of proof placed upon the petitioner in regard to property forfeited under the provisions of Section 97-3-109 and this section shall be by a preponderance of the evidence.

(11) At the hearing any claimant of any right, title or interest in the property may prove his lien, encumbrance, security interest or other interest in the nature of a security interest to be bona fide and created without knowledge or consent that the property was to be used so as to cause the property to be subject to forfeiture.

(12) If it is found that the property is subject to forfeiture, then the judge shall forfeit the property to the local law enforcement agency. However, if proof at the hearing discloses that the interest of any bona fide lienholder, secured party or other person holding an interest in the property in the nature of a security interest is greater than or equal to the present value of the property, the court shall order the property released to him. If such interest is less than the present value of the property and if the proof shows that the property is subject to forfeiture, the court shall order the property forfeited to the local law enforcement agency.

(13) All other property which is forfeited under this section shall be liquidated and, after deduction of court costs and the expenses of liquidation, the proceeds shall be divided and deposited as follows:

(a) In the event only one (1) law enforcement agency participates in the underlying criminal case out of which the forfeiture arises, fifty percent (50%) of the proceeds shall be forwarded to the State Treasurer and deposited in the General Fund of the state and fifty percent (50%) of the proceeds shall be deposited and credited to the budget of the participating law enforcement agency.

(b) In the event more than one (1) law enforcement agency participates in the underlying criminal case out of which the forfeiture arises, fifty percent (50%) of the proceeds shall be deposited and credited to the budget of the law enforcement agency whose officers initiated the criminal case and fifty percent (50%) shall be divided equitably between or among the other participating law enforcement agencies, and shall be deposited and credited to the budgets of the participating law enforcement agencies. In the event that the other participating law enforcement agencies cannot agree on the division of their fifty percent (50%), a petition shall be filed by any one (1) of them in the court in which the civil forfeiture case is brought and the court shall make an equitable division.

(14) All other property that has been forfeited shall, except as otherwise provided, be sold at a public auction for cash by the chief law enforcement officer of the initiating law enforcement agency, or his designee, to the highest and best bidder after advertising the sale for at least once each week for three

(3) consecutive weeks, the last notice to appear not more than ten (10) days nor less than five (5) days prior to such sale, in a newspaper having a general circulation in the jurisdiction in which said law enforcement agency is located. Such notices shall contain a description of the property to be sold and a statement of the time and place of sale. It shall not be necessary to the validity of such sale either to have the property present at the place of sale or to have the name of the owner thereof stated in such notice. The proceeds of the sale shall be disposed of as follows:

(a) To any bona fide lienholder, secured party or other party holding an interest in the property in the nature of a security interest, to the extent of his interest; and

(b) The balance, if any, remaining after deduction of all storage, court costs and expenses of liquidation shall be divided, forwarded and deposited in the same manner set out in subsection (13) of this section.

(15) The State Tax Commission shall issue a certificate of title to any person who purchases property under the provisions of this section when a certificate of title is required under the laws of this state.

(16) When any property the value of which does not exceed Five Thousand Dollars (\$5,000.00) is seized pursuant to subsection (1), the property may be forfeited by the administrative forfeiture procedures provided for in subsections (16) through (22).

(17) The attorney for the seizing law enforcement agency shall provide notice of intention to forfeit the seized property administratively, by certified mail, return receipt requested, to all persons who are required to be notified.

(18) In the event that notice of intention to forfeit the seized property administratively cannot be given as provided in subsection (17) of this section because of refusal, failure to claim, insufficient address or any other reason, the attorney for the seizing law enforcement agency shall provide notice by publication in a newspaper of general circulation in the county in which the seizure occurred for once a week for three (3) consecutive weeks.

(19) Notice pursuant to subsections (17) and (18) of this section shall include the following information:

(a) A description of the property;

(b) The approximate value of the property;

(c) The date and place of the seizure;

(d) The connection between the property and the violation of Section 97-3-109;

(e) The instructions for filing a request for judicial review; and

(f) A statement that the property will be forfeited to the seizing law enforcement agency if a request for judicial review is not timely filed.

(20) Persons claiming an interest in the seized property may initiate judicial review of the seizure and proposed forfeiture by filing a request for judicial review with the attorney for the seizing law enforcement agency, within thirty (30) days after receipt of the certified letter or within thirty (30) days after the first publication of notice, whichever is applicable.

(21) If no request for judicial review is timely filed, the attorney for the seizing law enforcement agency shall prepare a written declaration of forfei-

ture of the subject property and the forfeited property shall be used, distributed or disposed of in accordance with the provisions of this section.

(22) Upon receipt of a timely request for judicial review, the attorney for the seizing law enforcement agency shall promptly file a petition for forfeiture and proceed as provided in subsections (3) through (15).

HISTORY: Laws, 1993, ch. 376, § 2; Laws, 1995, ch. 608, § 3, eff from and after July 1, 1995.

Editor's Notes — Section 27-3-4 provides that the terms “Mississippi State Tax Commission,” ‘State Tax Commission,’ ‘Tax Commission’ and ‘commission’ appearing in the laws of this state in connection with the performance of the duties and functions by the Mississippi State Tax Commission, the State Tax Commission or Tax Commission shall mean the Department of Revenue.”

Cross References — Mississippi Motor Vehicle Title Law, see §§ 63-21-1 et seq.

RESEARCH REFERENCES

ALR.

Forfeiture of property for unlawful use before trial of individual offender. 3 A.L.R.2d 738.

Conviction or acquittal in criminal prosecution as bar to action for seizure, condemnation, or forfeiture of property. 27 A.L.R.2d 1137.

Lawfulness of seizure of property used in violation of law as prerequisite to forfeiture action or proceeding. 8 A.L.R.3d 473.

Necessity of conviction of offense associated with property seized in order to support forfeiture of property to state or local authorities. 38 A.L.R.4th 515.

Jurisdiction of United States District Court under 28 USCS § 1346(a) in civil

action to order return of fines, forfeitures, and costs imposed after criminal conviction subsequently held to have been unconstitutional. 41 A.L.R. Fed. 350.

Am. Jur.

36 Am. Jur. 2d, Forfeitures and Penalties § 20.

12 Am. Jur. Pl & Pr Forms (Rev), Forfeitures and Penalties, Forms 10-17 (notice of forfeiture; claim for return of property; answer).

8B Am. Jur. Legal Forms 2d, Forfeitures and Penalties, Forms 123:1 et seq.

CJS.

24 C.J.S., Criminal Law § 2007.

37 C.J.S., Forfeitures §§ 1 et seq.

§ 97-3-113. Mississippi Carjacking Act; short title.

Sections 97-3-113, 97-3-115 and 97-3-117 shall be known and may be cited as the “Mississippi Carjacking Act of 1993.”

HISTORY: Laws, 1993, ch. 471, § 1, eff from and after passage (approved March 27, 1993).

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Immediate actual possession found.
3. Possession may be actual or constructive.

1. In general.

Fair minded jurors could have accepted defendant's assertion that there was no common plan to commit a carjacking in Mississippi, and that he was merely a bystander. They also could have inferred

from his actions of stealing a car earlier, on the same date, with his companions that did conduct the carjacking, that he was an active participant; thus, his admission to the earlier theft was admissible under Miss. R. Evid. 404(b), and the evidence was sufficient for the trial court to deny his motions for a directed verdict and for judgment notwithstanding the verdict. *Washington v. State*, 912 So. 2d 996, 2005 Miss. App. LEXIS 195 (Miss. Ct. App. 2005).

Actual possession for purposes of a carjacking charge is the physical occupancy or control over property. *Murphy v. State*, 868 So. 2d 1030, 2003 Miss. App. LEXIS 1161 (Miss. Ct. App. 2003), cert. denied, 868 So. 2d 345, 2004 Miss. LEXIS 297 (Miss. 2004).

2. Immediate actual possession found.

State proved that defendant took from the victim's immediate actual possession a car for purposes of a carjacking charge where: (1) the victim was sitting in the

passenger seat with the keys in the ignition, (2) the victim could easily have swung her legs over and driven the car away, (3) at the time of defendant's approach, the victim quite literally had direct physical control of the car, and (4) clearly, the victim occupied the vehicle at the time defendant seized it as she was in possession of the vehicle, and she had control of the running vehicle at the time it was seized. *Murphy v. State*, 868 So. 2d 1030, 2003 Miss. App. LEXIS 1161 (Miss. Ct. App. 2003), cert. denied, 868 So. 2d 345, 2004 Miss. LEXIS 297 (Miss. 2004).

3. Possession may be actual or constructive.

Virginia Court of Appeals has stated that possession of a vehicle for purposes of carjacking may be actual or constructive; constructive possession occurs where an individual has the means of exercising dominion or control over the vehicle. *Murphy v. State*, 868 So. 2d 1030, 2003 Miss. App. LEXIS 1161 (Miss. Ct. App. 2003), cert. denied, 868 So. 2d 345, 2004 Miss. LEXIS 297 (Miss. 2004).

RESEARCH REFERENCES

ALR.

Validity, construction, and application of state carjacking statutes. 100 A.L.R.5th 67.

Validity, construction, and application of Anti-Car Theft Act (18 USCS § 2119). 140 A.L.R. Fed. 249.

§ 97-3-115. Mississippi Carjacking Act; definitions.

The following words and phrases shall have the meanings ascribed herein unless the context clearly indicates otherwise:

(a) "Carjacking" means taking of a motor vehicle from another person's immediate actual possession knowingly or recklessly by force or violence, whether against resistance or by sudden or stealthy seizure or snatching, or by putting in fear, or attempting to do so, or by any other means.

(b) "Motor vehicle" includes every device in, upon or by which any person or property is or may be transported or drawn upon a highway, which is self-propelled.

HISTORY: Laws, 1993, ch. 471, § 2, eff from and after passage (approved March 27, 1993).

JUDICIAL DECISIONS

1. Immediate actual possession defined.

In defining “immediate actual possession” for purposes of carjacking, the court of appeals in the District of Columbia has stated that a thing is within one’s immediate actual possession so long as it is within such range that he could, if not deterred by violence or fear, retain actual physical control over it; the court of ap-

peals in the District of Columbia has held, in agreement with the District of Columbia Circuit, that immediate actual possession is retained if the car is within such range that the victim could, if not deterred by violence or fear, retain actual physical control over it. *Murphy v. State*, 868 So. 2d 1030, 2003 Miss. App. LEXIS 1161 (Miss. Ct. App. 2003), cert. denied, 868 So. 2d 345, 2004 Miss. LEXIS 297 (Miss. 2004).

§ 97-3-117. Mississippi Carjacking Act; what constitutes offense of carjacking; attempted carjacking; armed carjacking; penalties.

(1) Whoever shall knowingly or recklessly by force or violence, whether against resistance or by sudden or stealthy seizure or snatching, or by putting in fear, or attempting to do so, or by any other means shall take a motor vehicle from another person’s immediate actual possession shall be guilty of carjacking.

(a) A person who is convicted of carjacking shall be fined not more than Five Thousand Dollars (\$5,000.00) and be committed to the custody of the State Department of Corrections for not more than fifteen (15) years.

(b) A person who is convicted of attempted carjacking shall receive the same punishment as the person who is convicted of carjacking.

(2) Whoever commits the offense of carjacking while armed with or having readily available any pistol or other firearm or imitation thereof or other dangerous or deadly weapon, including a sawed-off shotgun, shotgun, machine gun, rifle, dirk, bowie knife, butcher knife, switchblade, razor, blackjack, billy, or metallic or other false knuckles, or any object capable of inflicting death or serious bodily harm, shall be guilty of armed carjacking.

(a) Any person who is convicted of armed carjacking shall be fined not more than Ten Thousand Dollars (\$10,000.00) and be committed to the custody of the State Department of Corrections for not more than thirty (30) years.

(b) Any person who is convicted of attempted armed carjacking shall receive the same punishment as the person who is convicted of armed carjacking.

(3) Any person convicted of a second or subsequent offense under this section shall be fined an amount up to twice that otherwise authorized and shall be imprisoned for a term up to twice the term otherwise authorized.

HISTORY: Laws, 1993, ch. 471, § 3, eff from and after passage (approved March 27, 1993).

Cross References — Carjacking, as provided in this section, defined as crime of violence, see § 97-3-2.

Enhancement of offenses listed in 99-19-401(2) if the instrumentality used in the

commission of the 99-19-401(2) offense was initially obtained in the course of the commission of the crime(s) provided for in this section, see § 99-19-401.

JUDICIAL DECISIONS

ANALYSIS

1. Evidence.
2. Indictment.
3. Jury instructions.
4. Double jeopardy.
5. Sentence.
6. Ineffective assistance.

1. Evidence.

As there was a conflict in the testimony between the State's five witnesses and defendant's version of the events, his involvement in a carjacking was a question for the jury, and the jury rejected defendant's version. The fact that during the criminal investigation certain video footage from a nearby fast-food restaurant was not obtained, or that there was no in-person or photographic-lineup identification of defendant's, did not negate the jury's guilty verdict. *Hayes v. State*, 156 So. 3d 910, 2014 Miss. App. LEXIS 325 (Miss. Ct. App. 2014).

Evidence, though circumstantial, was sufficient to support defendant's conviction for carjacking, pursuant to Miss. Code Ann. § 97-3-117(1), because an investigator testified that defendant was implicated as being present at the scene on the morning of the attack; a photograph of defendant's mother was recovered from the vehicle after it was located in Texas, where defendant had relatives; and (3) a piece of paper with defendant's Social Security number written on it was found in the vehicle that was left at the scene. *Moses v. State*, 30 So. 3d 391, 2010 Miss. App. LEXIS 111 (Miss. Ct. App. 2010).

Trial court did not err by denying defendant's motion for a new trial because the state proved all of the elements of a carjacking; the legislature did not intend Miss. Code Ann. § 97-3-117 to be construed so literally as to mean that a person committed a carjacking only when an individual was physically inside the vehicle, and the evidence showed that the victim had just retrieved some money

from the vehicle and had her keys in her hand when defendant approached her, defendant demanded the keys from her, snatched them out of her hand, and drove off. *Young v. State*, 962 So. 2d 110, 2007 Miss. App. LEXIS 491 (Miss. Ct. App. 2007), cert. denied, 299 So. 3d 796, 2020 Miss. LEXIS 308 (Miss. 2020).

Evidence was sufficient to convict defendant of armed carjacking where the victims, when presented with a photo lineup, picked out defendant and all three identified defendant in court as the black-shirted carjacker; the eyewitness testimony was corroborated by defendant's conduct during the police chase. *Jackson v. State*, 969 So. 2d 124, 2007 Miss. App. LEXIS 472 (Miss. Ct. App. 2007).

Where defendant fit the description of the perpetrator, his car fit the description of the two-toned vehicle that followed the victim, and eyewitnesses testified to seeing a car similar to the victim's parked behind defendant's grandparents' home on the morning following the carjacking, the evidence was sufficient to convict defendant of armed carjacking under Miss. Code Ann. § 97-3-117(2)(b). *Walters v. State*, 932 So. 2d 860, 2006 Miss. App. LEXIS 115 (Miss. Ct. App.), cert. dismissed, 937 So. 2d 450, 2006 Miss. LEXIS 524 (Miss. 2006).

Evidence was sufficient to support a conviction for armed carjacking where (1) the testimony presented by the state reflected that the defendant participated in and was involved in planning and committing several crimes, including the armed carjacking, (2) the testimony presented by the defense showed that he was not identified as one of the carjackers and was not involved in the commission of the carjacking, and (3) the conflicting testimony was a question of fact resolved by the jury in favor of the state. *Simmons v. State*, 754 So. 2d 618, 2000 Miss. App. LEXIS 21 (Miss. Ct. App. 2000).

2. Indictment.

In a carjacking case, even though an indictment and a jury instruction lacked

the specific language “from another person’s immediate actual possession,” as set forth in Miss. Code Ann. § 97-3-117(1), they were sufficient because the use of the name of the victim was the equivalent of such. Therefore, there was no due process violation, and defense counsel was not ineffective for submitting the instruction to the jury. *Perryman v. State*, 16 So. 3d 41, 2009 Miss. App. LEXIS 145 (Miss. Ct. App.), cert. denied, 15 So. 3d 426, 2009 Miss. LEXIS 404 (Miss. 2009).

An indictment charged the defendant with carjacking, rather than armed carjacking, where the indictment read, in part, that the defendant “did recklessly and knowingly by force or violence, by the exhibition of a knife, take a motor vehicle from” the victim; the indictment did not charge the defendant with armed carjacking since it failed to allege the essential elements relative to the alleged use of the knife. *Williams v. State*, 772 So. 2d 406, 2000 Miss. App. LEXIS 380 (Miss. Ct. App. 2000).

Although the technical language of the statute for the crime of carjacking may not have been recited in the indictment, the statute was enumerated and the facts that were stated were sufficient to notify the defendant of the crime he was being charged with, therefore allowing him the opportunity to prepare a defense where the indictment stated that he was being charged with the crime of carjacking because he “did recklessly and knowingly by force or violence, by the exhibition of a knife, take a motor vehicle from” the victim. *Williams v. State*, 772 So. 2d 406, 2000 Miss. App. LEXIS 380 (Miss. Ct. App. 2000).

3. Jury instructions.

Trial court erred in instructing the jury the on the essential elements of attempted armed carjacking because the jury instructions as a whole did not fully and fairly instruct the jury as to the elements of attempted armed carjacking. *Harris v. State*, — So. 3d —, 2017 Miss. App. LEXIS 525 (Miss. Ct. App. Sept. 5, 2017), *aff’d*, — So. 3d —, 2019 Miss. LEXIS 37 (Miss. 2019).

Trial court did not err in refusing to give an instruction on the lesser-included of-

fense of attempted carjacking because no reasonable jury could have found that defendant was unarmed; defendant presented no evidence to rebut the victim’s assertion that defendant used a gun when attempting to carjack her. *Harris v. State*, — So. 3d —, 2017 Miss. App. LEXIS 525 (Miss. Ct. App. Sept. 5, 2017), *aff’d*, — So. 3d —, 2019 Miss. LEXIS 37 (Miss. 2019).

Jury instructions were insufficient with regard to armed carjacking where the jury was instructed that the state was required to prove that the defendant took an automobile by the exhibition of a knife, but was not instructed that the knife was a deadly weapon capable of inflicting death or serious bodily injury; however, the jury instructions were sufficient with regard to carjacking. *Williams v. State*, 772 So. 2d 406, 2000 Miss. App. LEXIS 380 (Miss. Ct. App. 2000).

4. Double jeopardy.

Convictions for armed carjacking and armed robbery occurring during the same episode did not constitute double jeopardy where the carjacking charge was based on the taking of a delivery truck and the robbery charge was based on the theft of money from one of the occupants of the truck. *McCline v. State*, 856 So. 2d 556, 2003 Miss. App. LEXIS 460 (Miss. Ct. App.), cert. denied, 860 So. 2d 315, 2003 Miss. LEXIS 722 (Miss. 2003).

5. Sentence.

There was no merit in defendant’s challenge to the federal district court’s application of U.S. Sentencing Guidelines Manual § 2K2.1; his two prior convictions for armed carjacking under the Mississippi carjacking statute were for crimes of violence. *United States v. Johnson*, 880 F.3d 226, 2018 U.S. App. LEXIS 1612 (5th Cir. Miss.), cert. denied, — U.S. —, 139 S. Ct. 70, 202 L. Ed. 2d 47, 2018 U.S. LEXIS 4236 (U.S. 2018).

Defendant’s act of carjacking per se involved conduct that presented a serious potential risk of physical violence to another, and therefore any conviction for carjacking constituted a felony involving the use or threat of violence to the person for purposes of aggravating circumstances in a death penalty case. *Galloway v. State*,

122 So. 3d 614, 2013 Miss. LEXIS 328 (Miss. 2013), cert. denied, 572 U.S. 1134, 134 S. Ct. 2661, 189 L. Ed. 2d 209, 2014 U.S. LEXIS 3685 (U.S. 2014).

Defendant's sentence to thirty years' incarceration, with ten years suspended, for armed carjacking was not excessive because the sentence was within statutorily prescribed limits. *Clark v. State*, 54 So. 3d 304, 2011 Miss. App. LEXIS 15 (Miss. Ct. App. 2011).

In a carjacking case, a trial court erred by imposing a 30-year sentence, even though defendant was a habitual offender, because this was in excess of the maximum sentence of 15 years for that crime. *Perryman v. State*, 16 So. 3d 41, 2009 Miss. App. LEXIS 145 (Miss. Ct. App.), cert. denied, 15 So. 3d 426, 2009 Miss. LEXIS 404 (Miss. 2009).

Consecutive sentences of 30 and 45 years for armed carjacking and armed

robbery were within the statutory limits for those offenses and were not excessive despite the length of the sentences and regardless of the fact that defendant chose to go to trial rather than accept a plea bargain for 10 years on each count as his co-defendants elected to do. *McCline v. State*, 856 So. 2d 556, 2003 Miss. App. LEXIS 460 (Miss. Ct. App.), cert. denied, 860 So. 2d 315, 2003 Miss. LEXIS 722 (Miss. 2003).

6. Ineffective assistance.

Because the record contained no information regarding defense counsel's strategy in conceding defendant was guilty of carjacking in his opening and closing arguments, the issue was more appropriately considered upon petition for post-conviction relief. *Brown v. State*, 282 So. 3d 1192, 2019 Miss. App. LEXIS 468 (Miss. Ct. App. 2019).

RESEARCH REFERENCES

ALR.

Cigarette Lighter as Deadly or Dangerous Weapon. 22 A.L.R. 6th 533.

Validity, construction, and application of Anti-Car Theft Act (18 USCS § 2119). 140 A.L.R. Fed. 249.

CHAPTER 5.

OFFENSES AFFECTING CHILDREN

- Sec.
- 97-5-1. Abandonment of child under age six.
- 97-5-3. Desertion or nonsupport of child under age eighteen.
- 97-5-5. Enticing child for concealment, prostitution or marriage.
- 97-5-7. Enticing child for employment.
- 97-5-9. Iceboxes, etc.; abandonment without removing latch prohibited.
- 97-5-11. Pool room or billiard hall; certain minors prohibited from entering.
- 97-5-13 through 97-5-19. Repealed.
- 97-5-21. Repealed.
- 97-5-23. Touching, handling, etc., child, mentally defective or incapacitated person or physically helpless person.
- 97-5-24. Sexual involvement of school employee with student; duty to report; penalties for failure to report; immunity from civil liability for report made in good faith.
- 97-5-25. Repealed.
- 97-5-27. Dissemination of sexually oriented material to persons under eighteen years of age; use of computer for purpose of luring or inducing persons under eighteen years of age to engage in sexual contact.
- 97-5-29. Public display of sexually oriented materials.
- 97-5-31. Exploitation of children; definitions.
- 97-5-33. Exploitation of children; prohibitions.
- 97-5-35. Exploitation of children; penalties.
- 97-5-37. Exploitation of children; other remedies.
- 97-5-39. Contributing to the neglect or delinquency of a child; felonious abuse and/or battery of a child.
- 97-5-40. Condoning child abuse.
- 97-5-41. Carnal knowledge of step or adopted child; carnal knowledge of child by cohabitating partner.
- 97-5-42. Protection of children from parents convicted of felony child sexual abuse; creation of local registry; penalties; standards for visitation.
- 97-5-43 through 97-5-47. Repealed.
- 97-5-49. Knowingly allowing party where minor obtains, possesses or consumes alcoholic beverage; definitions; applicability of section; penalties.
- 97-5-51. Mandatory reporting of sex crimes against minors; definitions; procedure; report contents; forensic samples; penalties.

§ 97-5-1. Abandonment of child under age six.

If the father or mother of any child under the age of six years, or any other person having the lawful custody of such child, or to whom such child shall have been confided, shall expose such child in any highway, street, field, house, outhouse, or elsewhere, with intent wholly to abandon it, such person shall, upon conviction, be punished by imprisonment in the penitentiary not more than seven years, or in the county jail not more than one year.

HISTORY: Codes, Hutchinson's 1848, ch. 64, art. 12, Title 3 (32); 1857, ch. 64, art. 57; 1871, § 2528; 1880, § 2752; 1892, § 1001; 1906, § 1078; Hemingway's 1917, § 805; 1930, § 824; 1942, § 2050.

Cross References — Child welfare provisions, see §§ 43-15-1 et seq.

Prohibition of person convicted of crimes affecting children or other violent crimes from being licensed as foster parent or a foster home, see § 43-15-6.

Emergency medical services providers and Department of Human Services to take custody of voluntarily abandoned children under baby drop-off law, see §§ 43-15-201 et seq.

Absolute affirmative defense to prosecution under this section for parent who voluntarily delivers unharmed child to emergency medical services provider under baby drop-off law, see § 43-15-205.

Proceedings for protection from domestic abuse, see §§ 93-21-1 et seq.

Desertion and nonsupport of children under the age of 16 years, see § 97-5-3.

Additional monetary assessment for violation of this section when committed against a minor to be deposited in Mississippi Children's Trust Fund, see § 99-19-75.

JUDICIAL DECISIONS

1. In general.

Proof of abandonment in a habeas corpus proceeding by a mother to obtain custody of a minor child does not require that the evidence show an abandonment as that term is defined in this section [Code 1942, § 2050] or to show that the

parent has been guilty of child desertion such as would render him liable to criminal prosecution under Code 1942, § 2087. *Governale v. Haley*, 228 Miss. 271, 87 So. 2d 686, 1956 Miss. LEXIS 513 (Miss. 1956).

RESEARCH REFERENCES

ALR.

Failure to provide medical attention for child as criminal neglect. 12 A.L.R.2d 1047.

Jurisdiction and venue of criminal charge for child desertion or nonsupport as affected by nonresidence of parent or child. 44 A.L.R.2d 886.

Applicability of criminal statutes relating to offenses against children of a specified age with respect to a child who has passed the anniversary date of such age. 73 A.L.R.2d 874.

Father's criminal liability for desertion of or failure to support child where divorce decree awards custody to another. 73 A.L.R.2d 960.

Application, to illegitimate children, of criminal statutes relating to abandonment, neglect, and nonsupport of children. 99 A.L.R.2d 746.

Who has custody or control of child

within terms of penal statute punishing cruelty or neglect by one having custody or control. 75 A.L.R.3d 933.

Parent's involuntary confinement, or failure to care for child as result thereof, as permitting adoption without parental consent. 78 A.L.R.3d 712.

Parent's involuntary confinement, or failure to care for child as result thereof, as evincing neglect, unfitness, or the like in dependency or divestiture proceeding. 79 A.L.R.3d 417.

Parents' criminal liability for failure to provide medical attention to their children. 118 A.L.R.5th 253.

Am. Jur.

23 Am. Jur. 2d, Desertion and Nonsupport §§ 29 et seq.

CJS.

67A C.J.S., Parent and Child §§ 378-381, 384, 385.

§ 97-5-3. Desertion or nonsupport of child under age eighteen.

Any parent who shall desert or wilfully neglect or refuse to provide for the support and maintenance of his or her child or children, including the natural parent of an illegitimate child or children wherein paternity has been estab-

lished by law or when the natural parent has acknowledged paternity in writing, while said child or children are under the age of eighteen (18) years shall be guilty of a felony and, on conviction thereof, shall be punished for a first offense by a fine of not less than One Hundred Dollars (\$100.00) nor more than Five Hundred Dollars (\$500.00), or by commitment to the custody of the Department of Corrections not more than five (5) years, or both; and for a second or subsequent offense, by a fine of not less than One Thousand Dollars (\$1,000.00) nor more than Ten Thousand Dollars (\$10,000.00), or by commitment to the custody of the Department of Corrections not less than two (2) years nor more than five (5) years, or both, in the discretion of the court.

HISTORY: Codes, 1930, § 861; 1942, § 2087; Laws, 1928, Ex. ch. 89; Laws, 1962, ch. 311; Laws, 1995, ch. 533, § 1, eff from and after July 1, 1995.

Cross References — Emergency medical services providers and Department of Human Services to take custody of voluntarily abandoned children under baby drop-off law, see §§ 43-15-201 et seq.

Absolute affirmative defense to prosecution under this section for parent who voluntarily delivers unharmed child to emergency medical services provider under baby drop-off law, see § 43-15-205.

Guardians, generally, see §§ 93-13-1 et seq.

Criminal sanctions against noncustodial parent or relative for removal of child under age of fourteen from state in violation of court order, see § 97-3-51.

Abandonment of child under six years of age, see § 97-5-1.

Imposition of standard state assessment in addition to all court imposed fines or other penalties for any felony violation, see § 99-19-73.

Additional monetary assessment for violation of this section when committed against a minor to be deposited in Mississippi Children's Trust Fund, see § 99-19-75.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Jurisdiction.
3. Indictment.
4. Bar of limitations.
5. Evidence; generally.
6. —Admissibility.
7. —Presumptions and burden of proof.
8. Witnesses.
9. Instructions.

1. In general.

The retroactive application of the 1995 amendment to the statute, which substantively changed the elements of the crime by deleting the requirement of proving that the children were left in destitute and necessitous circumstances and raising the age of the children protected, violated the constitutional prohibition

against ex post facto laws. *Knowles v. State*, 708 So. 2d 549, 1998 Miss. LEXIS 57 (Miss. 1998).

The court could lawfully convict the defendant for the crime of willful failure to support and maintain his children under the statute without violating the double jeopardy clause, notwithstanding that he had previously been found not to be in civil contempt for failing to make support payments. *Knowles v. State*, 708 So. 2d 549, 1998 Miss. LEXIS 57 (Miss. 1998).

Former wife improperly obtained process over her former husband to enforce judgment for child support arrearage by bringing criminal charges solely for purpose of bringing him to state to obtain personal jurisdiction in civil contempt action; she brought charges against him for desertion of child under age 16, when her youngest child was 24 years of age, solely

to obtain personal jurisdiction. *Shook v. Hopkins*, 697 So. 2d 1162, 1997 Miss. LEXIS 299 (Miss. 1997).

In a prosecution for child desertion under this section the fact that the jury saw the defendant's grievously afflicted child in the corridors of the courthouse did not constitute error, even though the judge had excluded her from the courtroom to avoid undue prejudice against the defendant because of the child's affliction; it would not have been error for the court to permit the jury to see the child since this was clearly relevant to the State's case in proving the child's helpless condition and her dire need of financial support. Additionally, the State made no effort to make a prominent display of the child before the jury and there was no error committed by the jury simply seeing the child. *Bryant v. State*, 567 So. 2d 234, 1990 Miss. LEXIS 558 (Miss. 1990).

One charged under this statute [Code 1942, § 2087] should be permitted to withdraw a plea of guilty entered without an investigation by the trial judge as to whether he has been properly advised. *Lambert v. State*, 245 Miss. 227, 147 So. 2d 480, 1962 Miss. LEXIS 547 (Miss. 1962).

Under this section [Code 1942, § 2087] the gist of the crime is the willful failure to provide for the support and maintenance of the children and the statutory offense is a continuing one. *Kelley v. State*, 218 Miss. 459, 67 So. 2d 459, 1953 Miss. LEXIS 561 (Miss. 1953).

The application of this section [Code 1942, § 2087] is not limited only to cases when father leaves the jurisdiction of the state. *Kelley v. State*, 218 Miss. 459, 67 So. 2d 459, 1953 Miss. LEXIS 561 (Miss. 1953).

Where the husband was guilty of statutory offense of desertion of and willful failure to support his children, and the mother then leaves her husband and moves to a different county, the removal of the children by the wife did not relieve the father of his responsibilities. *Kelley v. State*, 218 Miss. 459, 67 So. 2d 459, 1953 Miss. LEXIS 561 (Miss. 1953).

Where in prosecution for nonsupport of children the fact that the proof showed that the necessitous circumstances of the

children were relieved by their neighbors and church organization and the county welfare department did not preclude the prosecution of the father. *Archer v. State*, 214 Miss. 742, 59 So. 2d 339, 1952 Miss. LEXIS 515 (Miss. 1952).

To establish willful neglect to support minor children state must allege and prove either desertion of children who were in destitute and necessitous circumstances, or willful neglect to support them. *Clark v. State*, 181 Miss. 455, 180 So. 602, 1938 Miss. LEXIS 87 (Miss. 1938).

Father, who had deposited in bank to credit of two children under 16 years of age approximately \$500, available to them, could not be convicted of neglecting to provide for their support. *Ladner v. State*, 165 Miss. 140, 146 So. 888, 1933 Miss. LEXIS 291 (Miss. 1933).

Neglect or refusal to provide for support and maintenance of children, to constitute criminal offense, must be willful. *Page v. State*, 160 Miss. 300, 133 So. 216, 1931 Miss. LEXIS 150 (Miss. 1931).

"Wilful" neglect or refusal to support children means neglect or refusal with stubborn purpose and without justifiable excuse. *Page v. State*, 160 Miss. 300, 133 So. 216, 1931 Miss. LEXIS 150 (Miss. 1931).

2. Jurisdiction.

This section is not an unconstitutional infringement upon chancery court jurisdiction, nor is it imprisonment for debt. The State has a legitimate interest in criminally prosecuting financially able parents who willfully desert or fail to support their children when in destitute or necessitous circumstances. *Bryant v. State*, 567 So. 2d 234, 1990 Miss. LEXIS 558 (Miss. 1990).

This section does not usurp jurisdiction of chancery court. *Kelley v. State*, 218 Miss. 459, 67 So. 2d 459, 1953 Miss. LEXIS 561 (Miss. 1953).

County court to which circuit court has transferred criminal case for trial has right to proceed with prosecution of father for desertion and failure to support child, although chancery court had acquired jurisdiction in matter prior to commencement of prosecution through divorce ac-

tion brought by mother against father. *Williams v. State*, 207 Miss. 816, 43 So. 2d 389, 1949 Miss. LEXIS 391 (Miss. 1949), overruled, *Lenoir v. State*, 237 Miss. 620, 115 So. 2d 731, 1959 Miss. LEXIS 512 (Miss. 1959).

3. Indictment.

The parentage of the child alleged to have been neglected is a material part of the crime defined by this section [Code 1442, § 2087]. *Gladney v. State*, 246 Miss. 584, 151 So. 2d 606, 1963 Miss. LEXIS 484 (Miss. 1963).

In prosecution for desertion and neglecting to provide for minor children, an indictment which charged that the defendant did willfully, unlawfully and feloniously, desert and willfully neglect and refuse to support his minor children of the names and ages as follows, naming them and giving their ages, was sufficient to charge that the defendant was the father of the children. *Fortenberry v. State*, 227 Miss. 666, 86 So. 2d 663, 1956 Miss. LEXIS 739 (Miss. 1956).

Where an indictment, charging a father with neglect to provide for the support and maintenance of his children failed to state the year in which the offense was committed, and where a demurrer was interposed, it was not error for the court to permit an amendment so as to state the year and overrule the demurrer. *Archer v. State*, 214 Miss. 742, 59 So. 2d 339, 1952 Miss. LEXIS 515 (Miss. 1952).

Indictment alleging that father did willfully desert "and neglect" child under age of 16 years, leaving it in destitute and necessitous circumstances, held to charge offense of child desertion, desertion of a child leaving it destitute implying "non-support," words "and neglect" being surplusage. *Horton v. State*, 175 Miss. 687, 166 So. 753, 1936 Miss. LEXIS 36 (Miss. 1936).

4. Bar of limitations.

Offense of child desertion is a continuing one, so that prosecution therefore was not barred by three-year statute of limitations, where father deserted family more than two years before prosecution was commenced, but never returned. *Horton v. State*, 175 Miss. 687, 166 So. 753, 1936 Miss. LEXIS 36 (Miss. 1936).

5. Evidence; generally.

Circuit court properly denied defendant's motion for a new trial because the evidence supported a finding that he refused to remit child support payments in violation of Mississippi law and witnesses testified that he worked at several different places for years, yet he only paid a total of \$40 in child support. *Hasain v. State*, 281 So. 3d 1107, 2019 Miss. App. LEXIS 248 (Miss. Ct. App. 2019).

Evidence held insufficient to establish guilt beyond a reasonable doubt. *Thomas v. State*, 247 Miss. 704, 159 So. 2d 77, 1963 Miss. LEXIS 348 (Miss. 1963).

Evidence held to warrant finding of refusal and neglect to support child. *Evans v. State*, 242 Miss. 428, 135 So. 2d 174, 1961 Miss. LEXIS 579 (Miss. 1961).

In a habeas corpus proceeding by a mother to obtain custody of a minor child, to prove abandonment it is not necessary that the evidence show an abandonment as that term is defined [Code 1942, § 2050], or to show that the parent has been guilty of child desertion, such as would render him liable to criminal prosecution under this section [Code 1942, § 2087]. *Governale v. Haley*, 228 Miss. 271, 87 So. 2d 686, 1956 Miss. LEXIS 513 (Miss. 1956).

In prosecution of parent for failure to support and maintain child, it is incumbent upon prosecution to show beyond every reasonable doubt that child was left in destitute or necessitous circumstances and proof should do more than tend to show that child was in destitute or necessitous circumstances so far as any contribution made to it by defendant is concerned. *Williams v. State*, 207 Miss. 816, 43 So. 2d 389, 1949 Miss. LEXIS 391 (Miss. 1949), overruled, *Lenoir v. State*, 237 Miss. 620, 115 So. 2d 731, 1959 Miss. LEXIS 512 (Miss. 1959).

Where proof shows willful neglect to provide support, desertion within usual and ordinary meaning of term need not be shown. *Clark v. State*, 181 Miss. 455, 180 So. 602, 1938 Miss. LEXIS 87 (Miss. 1938).

Evidence held to sustain conviction for willfully neglecting to support children. *Clark v. State*, 181 Miss. 455, 180 So. 602, 1938 Miss. LEXIS 87 (Miss. 1938).

6. —Admissibility.

It was no error for the state to adduce evidence as to the continued neglect and support of the children after the original desertion, since the offense charged was a continuous one. *Fortenberry v. State*, 227 Miss. 666, 86 So. 2d 663, 1956 Miss. LEXIS 739 (Miss. 1956).

Where a mother was charged under this section [Code 1942, § 2087], evidence that the mother was forced to leave the home where her children and husband lived because of mistreatment by the husband should have been admitted. *Nobles v. State*, 223 Miss. 24, 77 So. 2d 674, 1955 Miss. LEXIS 348 (Miss. 1955), overruled, *Lenoir v. State*, 237 Miss. 620, 115 So. 2d 731, 1959 Miss. LEXIS 512 (Miss. 1959).

Since the offense under this section [Code 1942, § 2087] is a continuing one, evidence of accused's conduct or neglect of a child before and after the time charged was admissible to show intent and motive, and as tending to show the commission of the offense charged, and as to whether or not it was committed at or about the time charged. *Nobles v. State*, 223 Miss. 24, 77 So. 2d 674, 1955 Miss. LEXIS 348 (Miss. 1955), overruled, *Lenoir v. State*, 237 Miss. 620, 115 So. 2d 731, 1959 Miss. LEXIS 512 (Miss. 1959).

Where a premature or a six months baby was begotten after separation of a month, the husband should be permitted to prove non-access to the mother of the child after the separation. *Boone v. State*, 211 Miss. 318, 51 So. 2d 473, 1951 Miss. LEXIS 358 (Miss. 1951).

Testimony offered by prosecution and by defendant which covers period of four and one-half years prior to return of indictment incompetent, since alleged offense is continuing one, and it is error for court to confine testimony on behalf of defendant to period of two years prior to return of indictment. *Williams v. State*, 207 Miss. 816, 43 So. 2d 389, 1949 Miss. LEXIS 391 (Miss. 1949), overruled, *Lenoir v. State*, 237 Miss. 620, 115 So. 2d 731, 1959 Miss. LEXIS 512 (Miss. 1959).

Under indictment charging that defendant father both deserted and failed to provide for support and maintenance of child, it is error to exclude testimony offered by defendant to show facts and cir-

cumstances under which he failed to live with and support child tending to show that he was kept away from it by repeated personal assaults committed on him by his brother-in-law while child was living with its maternal grandmother and mother. *Williams v. State*, 207 Miss. 816, 43 So. 2d 389, 1949 Miss. LEXIS 391 (Miss. 1949), overruled, *Lenoir v. State*, 237 Miss. 620, 115 So. 2d 731, 1959 Miss. LEXIS 512 (Miss. 1959).

It was proper for state to show failure to support children was due to improper diversion of funds. *Clark v. State*, 181 Miss. 455, 180 So. 602, 1938 Miss. LEXIS 87 (Miss. 1938).

Testimony contradicting defendant's denial of misconduct with another woman, held not reversible error where not objected to as attempt to prove separate and distinct offense. *Clark v. State*, 181 Miss. 455, 180 So. 602, 1938 Miss. LEXIS 87 (Miss. 1938).

After state rested its case in chief, in prosecution for child desertion, and defendant had introduced evidence in defense, admitting, in rebuttal, testimony that defendant had admitted he was father of children, held not error. *Roney v. State*, 167 Miss. 827, 150 So. 774, 1933 Miss. LEXIS 158 (Miss. 1933).

7. —Presumptions and burden of proof.

In a prosecution under this section [Code 1942, § 2087], there is a presumption of innocence, and guilt must be proved beyond a reasonable doubt. *Gladney v. State*, 246 Miss. 584, 151 So. 2d 606, 1963 Miss. LEXIS 484 (Miss. 1963).

Burden of proving that there has been willful neglect or refusal to support and maintain child is upon state, and not on accused to prove that his action was excusable or justifiable in such neglect or refusal. *Williams v. State*, 207 Miss. 816, 43 So. 2d 389, 1949 Miss. LEXIS 391 (Miss. 1949), overruled, *Lenoir v. State*, 237 Miss. 620, 115 So. 2d 731, 1959 Miss. LEXIS 512 (Miss. 1959).

Burden of proving that willful neglect or refusal to support children was excusable or justifiable is not on defendant, not being defensive matter. *Page v. State*, 160 Miss. 300, 133 So. 216, 1931 Miss. LEXIS 150 (Miss. 1931).

8. Witnesses.

Where defendant attempted to explain why he was separated from wife and consented to wife stating her side of the matter, error if any in permitting wife to testify held not reversible. *Clark v. State*, 181 Miss. 455, 180 So. 602, 1938 Miss. LEXIS 87 (Miss. 1938).

Wife is incompetent to testify against husband in criminal case, otherwise than as permitted to do so under common law; wife was not competent witness against husband in prosecution under law relating to desertion or refusal to provide for support and maintenance of child. *Ulmer*

v. State, 157 Miss. 807, 128 So. 749, 1930 Miss. LEXIS 337 (Miss. 1930).

9. Instructions.

In a prosecution under this section [Code 1942, § 2087], it is error to instruct the jury as to the presumption of legitimacy of a child born in wedlock, without stating that such presumption is rebuttable, particularly where the evidence of paternity is in sharp conflict and the jury could have decided the case without the benefit of presumptions. *Gladney v. State*, 246 Miss. 584, 151 So. 2d 606, 1963 Miss. LEXIS 484 (Miss. 1963).

RESEARCH REFERENCES**ALR.**

Failure to provide medical attention for child as criminal neglect. 12 A.L.R.2d 1047.

Jurisdiction and venue of criminal charge for child desertion or nonsupport as affected by nonresidence of parent or child. 44 A.L.R.2d 886.

Applicability of criminal statutes relating to offenses against children of a specified age with respect to a child who has passed the anniversary date of such age. 73 A.L.R.2d 874.

Father's criminal liability for desertion of or failure to support child where divorce decree awards custody to another. 73 A.L.R.2d 960.

Application, to illegitimate children, of criminal statutes relating to abandonment, neglect, and nonsupport of children. 99 A.L.R.2d 746.

What voluntary acts of child, other than

marriage or entry into military service, terminate parent's obligation to support. 32 A.L.R.3d 1055.

Parent's involuntary confinement, or failure to care for child as result thereof, as permitting adoption without parental consent. 78 A.L.R.3d 712.

Constitutionality of gender-based classifications in criminal laws proscribing nonsupport of spouse or child. 14 A.L.R.4th 717.

Am. Jur.

23 Am. Jur. 2d, Desertion and Nonsupport §§ 29 et seq.

CJS.

67A C.J.S., Parent and Child §§ 378-381, 384, 385.

Law Reviews.

Family Law At the Turn of the Century, 71 Miss. L.J. 781, Spring, 2002.

§ 97-5-5. Enticing child for concealment, prostitution or marriage.

Every person who shall maliciously, willfully, or fraudulently lead, take, carry away, decoy or entice away, any child under the age of fourteen (14) years, with intent to detain or conceal such child from its parents, guardian, or other person having lawful charge of such child, or for the purpose of prostitution, concubinage, or marriage, shall, on conviction, be imprisoned in the custody of the Department of Corrections for not less than two (2) years nor more than ten (10) years, or fined not more than Ten Thousand Dollars (\$10,000.00), or both. Investigation and prosecution of a defendant under this section does not preclude prosecution of the defendant for a violation of other

applicable criminal laws, including, but not limited to, the Mississippi Human Trafficking Act, Section 97-3-54 et seq.

HISTORY: Codes, Hutchinson's 1848, ch. 64, art. 12, Title 3 (31); 1857, ch. 64, art. 58; 1871, § 2529; 1880, § 2753; 1892, § 1002; 1906, § 1079; Hemingway's 1917, § 806; 1930, § 825; 1942, § 2051; Laws, 2013, ch. 543, § 14, eff from and after July 1, 2013.

Joint Legislative Committee Note — Pursuant to Section 1-1-109, the Joint Legislative Committee on Compilation, Revision and Publication of Legislation corrected a typographical error in a statutory reference at the end of the section by substituting "Section 97-3-54 et seq." for "Sections 97-3-54 et seq." The Joint Committee ratified the correction at its August 1, 2013, meeting.

Cross References — Abduction for purposes of marriage, see § 97-3-1.

Statutory rape, see §§ 97-3-65 et seq.

Seduction of female child, see §§ 97-3-65, 97-3-95, 97-3-101, 97-5-23 and 97-29-55.

Violation of person of child, see § 97-5-23.

Prostitution, see §§ 97-29-49 et seq.

Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see § 97-43-1 et seq.

Additional monetary assessment for violation of this section when committed against a minor to be deposited in Mississippi Children's Trust Fund, see § 99-19-75.

JUDICIAL DECISIONS

1. In general.

Sexual intercourse is not essential to the commission of the offense of taking a 13-year-old girl away for the purpose of concubinage. *Hooks v. State*, 197 So. 2d 238, 1967 Miss. LEXIS 1519 (Miss. 1967).

On the trial of a defendant indicted for the crime of enticing a child under the age of 14 years for the felonious purpose of "concubinage or marriage", it was error for the prosecution to cross examine a witness introduced by the state unless

there was a showing that the prosecuting attorney had been taken by surprise. *Hooks v. State*, 197 So. 2d 238, 1967 Miss. LEXIS 1519 (Miss. 1967).

A father who by agreement surrendered the custody of his minor child to his wife is not guilty of kidnapping because he enticed the child away from the custody of the mother. *State v. Powe*, 107 Miss. 770, 66 So. 207, 1914 Miss. LEXIS 142 (Miss. 1914).

RESEARCH REFERENCES

ALR.

Applicability of criminal statutes relating to offenses against children of a specified age with respect to a child who has passed the anniversary date of such age. 73 A.L.R.2d 874.

Mistake or lack of information as to victim's age as defense to statutory rape. 46 A.L.R.5th 499.

Am. Jur.

63C Am. Jur. 2d, Prostitution §§ 1 et seq.

CJS.

73 C.J.S., Prostitution §§ 1, 8-13, 15-19.

§ 97-5-7. Enticing child for employment.

Any person who shall persuade, entice or decoy away from its father or mother with whom it resides any child under the age of eighteen (18) years,

being unmarried, for the purpose of employing such child without the consent of its parents, or one of them, shall upon conviction be punished by a fine of not more than One Thousand Dollars (\$1,000.00) or imprisoned in the county jail not more than one (1) year, or both. Investigation and prosecution of a defendant under this section does not preclude prosecution of the defendant for a violation of other applicable criminal laws, including, but not limited to, the Mississippi Human Trafficking Act, Section 97-3-54 et seq.

HISTORY: Codes, 1880, § 2755; 1892, § 1003; 1906, § 1080; Hemingway's 1917, § 807; 1930, § 827; 1942, § 2053; Laws, 1980, ch 357; Laws, 2013, ch. 543, § 15, eff from and after July 1, 2013.

Joint Legislative Committee Note — Pursuant to Section 1-1-109, the Joint Legislative Committee on Compilation, Revision and Publication of Legislation corrected a typographical error in a statutory reference at the end of the section by substituting "Section 97-3-54 et seq." for "Sections 97-3-54 et seq." The Joint Committee ratified the correction at its August 1, 2013, meeting.

Cross References — Regulation of child labor, see §§ 71-1-17 et seq.

Additional monetary assessment for violation of this section when committed against a minor to be deposited in Mississippi Children's Trust Fund, see § 99-19-75.

JUDICIAL DECISIONS

1. In general.

Parents permitting minor to remain in another's employment for six weeks after acquiring knowledge thereof must be held

to have "consented" thereto. *Gulf & S. I. R. Co. v. Sullivan*, 155 Miss. 1, 119 So. 501, 1928 Miss. LEXIS 393 (Miss. 1928).

RESEARCH REFERENCES

ALR.

Applicability of statutes relating to offenses against children of a specified age

with respect to a child who has passed the anniversary date of such age. 73 A.L.R.2d 874.

§ 97-5-9. Iceboxes, etc.; abandonment without removing latch prohibited.

If any person shall have on his premises, or shall suffer to be or remain upon his premises, any abandoned chest, icebox, refrigerator, or any other box-type container not in active use, any door to which has a latch or lock which automatically fastens upon the closing of such container's door, and which cannot be readily opened from the inside, he shall remove the latch or lock, or otherwise render it inoperative, and on failure to so do shall be guilty of a misdemeanor.

HISTORY: Codes, 1942, § 2055.5; Laws, 1954, ch. 233; Laws, 1966, ch. 356, § 1, eff from and after passage (approved April 20, 1966).

Cross References — Additional monetary assessment for violation of this section when committed against a minor to be deposited in Mississippi Children's Trust Fund, see § 99-19-75.

RESEARCH REFERENCES

ALR.

Liability for injury or death of child in refrigerator. 86 A.L.R.2d 709.

§ 97-5-11. Pool room or billiard hall; certain minors prohibited from entering.

No person under the age of eighteen (18) years shall be allowed to enter and remain in any poolroom or billiard hall except that municipalities shall have the discretion to establish a lower minimum age. However, no person under the age of eighteen (18) years shall be allowed to enter and remain in any poolroom or billiard hall in which beer is sold or consumed. No owner or manager of any poolroom or billiard hall, and no agent or employee of any such owner or manager, shall permit or allow any person under the age of eighteen (18) years to enter and remain in any such poolroom or billiard hall except when a municipality has established a lower minimum age, and provided that in such municipality beer is neither sold nor consumed in such poolroom or billiard hall. Any manager or owner of any poolroom or billiard hall, and any agent or employee of such owner or manager, shall for each offense, upon conviction, be fined not more than one hundred dollars (\$100.00).

For the purposes of this section, a poolroom or billiard hall shall not be deemed to include a place of amusement, either for profit or otherwise, wherein the operation of pool and billiard tables is not the main attraction held out to the public, or the primary amusement engaged in by the participants and wherein less than fifteen percent (15%) of the gross revenue derived directly from the operation of such amusement or recreation center within the same room or immediately connecting and adjacent rooms shall be derived directly or indirectly from the operation of such pool or billiard tables and further, all nonprofit corporations, associations and organizations, and educational and religious institutions, shall not be considered as operating poolrooms or billiard halls for the purposes of this section.

HISTORY: Codes, Hemingway's 1917, § 1067; 1930, § 1098; 1942, § 2331; Laws, 1910, ch. 166; Laws, 1918, ch. 150; Laws, 1968, ch. 354; Laws, 1972, ch. 353, § 1; Laws, 1977, ch. 316, eff from and after passage (approved February 23, 1977).

Cross References — Wagers generally, see §§ 97-33-1 et seq.
Slot machines, etc., see § 97-33-7.

Additional monetary assessment for violation of this section when committed against a minor to be deposited in Mississippi Children's Trust Fund, see § 99-19-75.

OPINIONS OF THE ATTORNEY GENERAL

The fifteen-percent revenue requirement for prosecuting minors in pool or billiard halls is not a provable element of the offense but an affirmative defense. Segars, March 20, 1998, A.G. Op. #98-0118.

§§ 97-5-13 through 97-5-19. Repealed.

Repealed by Laws, 1979, ch. 475, § 4, eff from and after July 1, 1979.

§ 97-5-13. [Codes, 1942, § 2674-21; Laws, 1968, ch. 349, § 1]

§ 97-5-15. [Codes, 1942, § 2674-22; Laws, 1968, ch. 349, § 2, eff from and after passage (approved July 25, 1968)]

§ 97-5-17. [Codes, 1942, § 2674-23; Laws, 1968, ch. 349, § 3, eff from and after passage (approved July 25, 1968)]

§ 97-5-19. [Codes, 1942, § 2674-24; Laws, 1968, ch. 349, § 4, eff from and after passage (approved July 25, 1968)]

Editor's Notes — Former § 97-5-13 was entitled: Sale or exhibition of obscene material to minors – definitions.

Former § 97-5-15 was entitled: Sale or exhibition of obscene material to minors – unlawful sales or loans.

Former § 97-5-17 was entitled: Sale or exhibition of obscene material to minors – unlawful exhibition or shows.

Former § 97-5-19 was entitled: Sale or exhibition of obscene material to minors – penalties.

§ 97-5-21. Repealed.

Repealed by Laws, 1998, ch. 549, § 7, eff from and after July 1, 1998.

§ 97-5-21. [Codes, 1857, ch. 64, art. 59; 1871, § 2530; 1880, § 2754; 1892, § 1004; 1906, § 1081; Hemingway's 1917, § 808; 1930, § 828; 1942, § 2054; Laws, 1980, ch. 392; Laws, 1985, ch. 389, § 2]

Editor's Notes — Former § 97-5-21 specified the crime of seduction of a child under the age of eighteen and provided penalties for such crime. See now, §§ 97-3-65, 97-3-95, 97-5-23 and 97-3-101.

For judicial decision notes under former § 97-5-21 relating to the seduction of persons under eighteen, see § 97-3-65.

§ 97-5-23. Touching, handling, etc., child, mentally defective or incapacitated person or physically helpless person.

(1) Any person above the age of eighteen (18) years, who, for the purpose of gratifying his or her lust, or indulging his or her depraved licentious sexual desires, shall handle, touch or rub with hands or any part of his or her body or any member thereof, or with any object, any child under the age of sixteen (16) years, with or without the child's consent, or a mentally defective, mentally incapacitated or physically helpless person as defined in Section 97-3-97, shall be guilty of a felony and, upon conviction thereof, shall be fined in a sum not less than One Thousand Dollars (\$1,000.00) nor more than Five Thousand Dollars (\$5,000.00), or be committed to the custody of the State Department of Corrections not less than two (2) years nor more than fifteen (15) years, or be punished by both such fine and imprisonment, at the discretion of the court.

(2) Any person above the age of eighteen (18) years, who, for the purpose of gratifying his or her lust, or indulging his or her depraved licentious sexual desires, shall handle, touch or rub with hands or any part of his or her body or

any member thereof, any child younger than himself or herself and under the age of eighteen (18) years who is not such person's spouse, with or without the child's consent, when the person occupies a position of trust or authority over the child shall be guilty of a felony and, upon conviction thereof, shall be fined in a sum not less than One Thousand Dollars (\$1,000.00) nor more than Five Thousand Dollars (\$5,000.00), or be committed to the custody of the State Department of Corrections not less than two (2) years nor more than fifteen (15) years, or be punished by both such fine and imprisonment, at the discretion of the court. A person in a position of trust or authority over a child includes without limitation a child's teacher, counselor, physician, psychiatrist, psychologist, minister, priest, physical therapist, chiropractor, legal guardian, parent, stepparent, aunt, uncle, scout leader or coach.

(3) Upon a second conviction for an offense under this section or a substantially similar offense under the laws of another state, the person so convicted shall be punished by commitment to the State Department of Corrections for a term not to exceed twenty (20) years.

HISTORY: Codes, Hemingway's 1921 Supp. § 1142c; 1930, § 826; 1942, § 2052; Laws, 1920, ch. 215; Laws, 1958, ch. 276; Laws, 1980, ch. 387; Laws, 1985, ch. 389, § 1; Laws, 1993, ch. 512, § 4; Laws, 1995, ch. 487, § 1; Laws, 1998, ch. 549, § 5; Laws, 2015, ch. 409, § 1, eff from and after July 1, 2015.

Joint Legislative Committee Note — Pursuant to Section 1-1-109, the Joint Legislative Committee on Compilation, Revision and Publication of Legislation corrected a typographical error in (3). The phrase "however, upon conviction and sentencing" was deleted at the end. The Joint Committee ratified the correction at its August 17, 2015, meeting.

Cross References — Applicability of certain evidentiary rules in criminal prosecutions for child abuse, see § 13-1-401.

Notification of Department of Education that certificated person has been convicted of sex offense, see § 37-3-51.

Definition of "unlawful activity" pursuant to requirement of principal, teacher or other school employee to report unlawful activity, see § 37-11-29.

Prohibition of person convicted of crimes affecting children or other violent crimes from being licensed as foster parent or a foster home, see § 43-15-6.

Conduct within meaning of this section as domestic abuse, see § 93-21-3.

Criminal sexual conduct committed against minor constituting abuse for purposes of §§ 93-21-101 through 93-21-113 on domestic violence shelters, see § 93-21-101.

Abduction of females, see § 97-3-1.

Gratification of lust, as provided in this section, defined as crime of violence, see § 97-3-2.

Statutory rape, see §§ 97-3-65 et seq.

Sexual battery, see §§ 97-3-95 through 97-3-103.

Enticing children for prostitution or marriage, see § 97-5-5.

Carnal knowledge of step or adopted child or child of cohabitating partner, see § 97-5-41.

Mandatory reporting of offense under this section relating to the touching of a child, mentally defective or incapacitate person or physically helpless person for lustful purposes when committed by an adult against a minor under the age of sixteen, see § 97-5-51.

Time limitation on prosecution, see § 99-1-5.

Additional monetary assessment for violation of this section when committed against

a minor to be deposited in Mississippi Children's Trust Fund, see § 99-19-75.

Testing for HIV and AIDS of any person convicted under this section, see §§ 99-19-201 and 99-19-203.

Federal Aspects — Victims of Child Abuse Act of 1990, P. L. 101-647 §§ 201 et seq., 34 USCS § 20301 et seq.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Indictment.
3. Evidence.
4. Sentence.
5. Defense.
6. Ineffective assistance of counsel.
7. Lesser nonincluded offenses.
8. Jury instructions.
9. Federal Offense.

1. In general.

Trial court did not err in denying defendant's motion for a directed verdict because the victim's testimony showed gratification of lust, and the jury found the victim to be credible and returned a verdict of guilty. *Ford v. State*, 205 So. 3d 1172, 2016 Miss. App. LEXIS 514 (Miss. Ct. App. 2016), cert. denied, — So. 3d —, 2017 Miss. LEXIS 115 (Miss. 2017).

Defendant's right against double-jeopardy was not violated because, while the counts for fondling, under Miss. Code Ann. § 97-5-23(1), and the attempted-sexual-battery, under Miss. Code Ann. § 97-1-7, stemmed from the same encounter, the elements of the crimes were not the same as each count contained an element not contained in the other. Attempted sexual battery did not contain the element of gratification of lust, while fondling did not require the element of penetration. *Moore v. State*, 112 So. 3d 1084, 2013 Miss. App. LEXIS 207 (Miss. Ct. App. 2013).

Evidence was sufficient to support defendant's convictions where the jury obviously found the victims' testimony and the other evidence supporting the pattern of sexual abuse more credible than defendant's defense, there was no injustice in allowing the jury's verdicts to stand. *Faulkner v. State*, 109 So. 3d 142, 2013 Miss. App. LEXIS 75 (Miss. Ct. App. 2013).

Denial of defendant's motion for post-conviction relief on grounds that his guilty plea was not knowing and intelligent was proper as he was not prejudiced by his alleged lack of understanding of the proper sentencing range when he only received a 12-year sentence for each of three counts, to run concurrently, of touching a child for lustful purposes, when he could have received over 30 years. *Pope v. State*, 922 So. 2d 828, 2006 Miss. App. LEXIS 122 (Miss. Ct. App.), cert. dismissed, 929 So. 2d 923, 2006 Miss. LEXIS 234 (Miss. 2006).

Trial court conducted a hearing outside the presence of the jury to determine whether the eight-year-old fondling victim was competent to testify as a witness and the victim testified that she knew the difference between a lie and the truth and that telling a lie was wrong. She also stated that she knew why she was in court, knew that she would be questioned by attorneys, remembered most of what had occurred, and would be able to say she did not remember if asked a question about a matter in which she had no recollection; as a result, the trial judge properly found that the victim was a competent witness. *Barnes v. State*, 906 So. 2d 16, 2004 Miss. App. LEXIS 971 (Miss. Ct. App. 2004), cert. denied, 904 So. 2d 184, 2005 Miss. LEXIS 430 (Miss. 2005).

In a child fondling case, the State's objection to defendant's proffered instruction which explained that the victim's knowledge of sexual matters was acquired from persons or experiences other than defendant, on the basis that it was a comment on the weight of the evidence, was properly upheld by the trial court; defendant's proffered instruction, which set forth, in part, his contention that he did not have access to the child so as to have committed the offense, was also properly rejected, as access was not an element of the offense nor was it a de-

fense. *Barnes v. State*, 906 So. 2d 16, 2004 Miss. App. LEXIS 971 (Miss. Ct. App. 2004), cert. denied, 904 So. 2d 184, 2005 Miss. LEXIS 430 (Miss. 2005).

Trial judge mistakenly determined the crime of molestation under Miss. Code Ann. § 97-5-23 to be a lesser-included offense of sexual battery, Miss. Code Ann. § 97-3-95; molestation was recognized as a separate offense from sexual battery, as defendants were frequently charged with both crimes simultaneously; to allow defendant to be convicted of a crime for which he was never charged would have created an injustice, as the legislature felt it necessary to construct two separate and distinct statutes regarding sexual battery and molestation. *Friley v. State*, 856 So. 2d 654, 2003 Miss. App. LEXIS 584 (Miss. Ct. App. 2003), rev'd, 2004 Miss. LEXIS 998 (Miss. Aug. 5, 2004).

Evidence was sufficient to sustain defendant's conviction of fondling a child under the age of 16 when the victim testified that defendant had touched her "pee-pee," the victim was four years old at the time of the incident, and a physician testified that the child had an enlarged hymen. *Voyles v. State*, 822 So. 2d 353, 2002 Miss. App. LEXIS 417 (Miss. Ct. App. 2002).

The court properly refused an instruction on simple assault as a lesser included offense because even if the jury found that defendant pinched the child victim between the legs, no evidence warranted finding defendant guilty of simple assault, which required an attempt to cause bodily injury. *Goodnite v. State*, 799 So. 2d 64, 2001 Miss. LEXIS 286 (Miss. 2001).

In order to support a conviction under this section, there must be some evidence to give rise to an inference that an undisputed act of touching was for the purpose of satisfying the defendant's depraved sexual desires. *Bradford v. State*, 743 So. 2d 421, 1999 Miss. App. LEXIS 303 (Miss. Ct. App. 1999).

The elements of fondling or unlawful touching are: (1) a handling or touching or rubbing with any part of the assailant's body or any member thereof, (2) of a child under the age of 14 years, (3) by a person above the age of 18 years, (4) for the purposes of gratifying the lust or indulg-

ing licentious sexual desires of the assailant. *Brady v. State*, 722 So. 2d 151, 1998 Miss. App. LEXIS 699 (Miss. Ct. App. 1998).

Fondling is not a lesser included offense of sexual battery. *Brady v. State*, 722 So. 2d 151, 1998 Miss. App. LEXIS 699 (Miss. Ct. App. 1998).

Prosecution for fondling under amendment to statute of limitations extending limitation period in effect at time of crime was not ex post facto violation; statute of limitations is procedural and does not come within recognized exception creating substantive right as fondling statute is separate from limitations period statute, defendant's acts were criminal at time of their commission, and defendant was not subjected to longer punishment by prosecution under lengthier limitations period. *Christmas v. State*, 700 So. 2d 262, 1997 Miss. LEXIS 246 (Miss. 1997).

It is possible in some circumstances to commit forcible rape without committing child fondling, and thus child fondling under this section is not a necessarily included offense of forcible rape under § 97-3-65(2) as it read prior to amendment in 1985. *Hailey v. State*, 537 So. 2d 411, 1988 Miss. LEXIS 632 (Miss. 1988).

In absence of legislative standard for determining "crime of violence," a separate standard of determining violence applies when the victim is a child, and, thus, one of the 2 prior offenses of defendant, assault with attempt to commit sodomy, was a crime that was violent per se, and defendant was subject to sentencing as a habitual offender. *Bandy v. State*, 495 So. 2d 486, 1986 Miss. LEXIS 2654 (Miss. 1986).

Imposition of a life sentence in prison without parole or probation imposed upon defendant who was convicted of child fondling, and who had 2 prior convictions-one for assault with intent to commit sodomy and the other for indecency with a child-did not constitute cruel and unusual punishment. *Bandy v. State*, 495 So. 2d 486, 1986 Miss. LEXIS 2654 (Miss. 1986).

At trial of charge of child fondling, the court properly refused defendant's proposed jury instruction that testimony of child of tender years should be received with caution. *Bandy v. State*, 495 So. 2d 486, 1986 Miss. LEXIS 2654 (Miss. 1986).

Forty-six year old male who engages in wholly consensual sexual intercourse with 13 year old female may not be convicted under child seduction statute (former § 97-5-21) where child has previously been intimate with at least 2 other men; nor may he be convicted under this section on basis of foreplay leading to intercourse. *McBrayer v. State*, 467 So. 2d 647, 1985 Miss. LEXIS 1856, 1985 Miss. LEXIS 2065 (Miss. 1985).

The decision invalidating the fondling statute would be given prospective effect only. *Harrell v. State*, 386 So. 2d 390, 1980 Miss. LEXIS 2047 (Miss. 1980).

Defendant was improperly convicted under this section since it is applicable only to males and therefore violates equal protection. *Carley v. State*, 382 So. 2d 1090, 1980 Miss. LEXIS 1980 (Miss. 1980).

A conviction for fondling would be reversed since this section is unconstitutional. *Catchot v. State*, 374 So. 2d 807, 1979 Miss. LEXIS 2393 (Miss. 1979).

The fondling statute is void since it discriminates against males and denies them equal protection of the law. *Tatro v. State*, 372 So. 2d 283, 1979 Miss. LEXIS 2080 (Miss. 1979).

A conviction under this section [Code 1942, § 2052] was set aside where attorney retained by defendant withdrew on the day of the trial and defendant, on being denied a continuance to the next term of court, was granted only a few minutes to find another attorney, and failed to do so. *Mabry v. State*, 245 Miss. 143, 149 So. 2d 25, 1963 Miss. LEXIS 517 (Miss. 1963).

The phrase, "for the purpose of," was incorporated in this section [Code 1942, § 2052] in order to exclude from its coverage affectionate, lawful caresses of a child. *Kendall v. State*, 244 Miss. 618, 145 So. 2d 924, 1962 Miss. LEXIS 485 (Miss. 1962).

Voluntary drunkenness is no defense to a prosecution under this section [Code 1942, § 2052], where not of a degree as to render accused unable to understand what he was doing. *Kendall v. State*, 244 Miss. 618, 145 So. 2d 924, 1962 Miss. LEXIS 485 (Miss. 1962).

The offense of indecent assault upon a female child is a statutory and not a

common-law crime. *Love v. State*, 211 Miss. 606, 52 So. 2d 470, 1951 Miss. LEXIS 392 (Miss. 1951).

The age of accused is an affirmative fact which must be charged and proved by the state. *Love v. State*, 211 Miss. 606, 52 So. 2d 470, 1951 Miss. LEXIS 392 (Miss. 1951).

In prosecution for violation of the person of a female child under thirteen years of age, question of prosecuting attorney, in examining witness, containing suggestion that defendant might have been guilty of previous offenses with other children held improper but not to require reversal, where court sustained objections to testimony. *Allen v. State*, 175 Miss. 745, 166 So. 922, 1936 Miss. LEXIS 46 (Miss. 1936).

2. Indictment.

Although defendant claimed that the indictment was defective because of the broad date ranges identified, the date range was narrowed to two years and the State of Mississippi could not narrow the date range provided in the indictment counts any more than it already did as the alleged acts were recurrent over a period of years, which prevented the minor victim from recalling exact dates and times. *Shoemaker v. State*, 256 So. 3d 604, 2018 Miss. App. LEXIS 105 (Miss. Ct. App.), cert. denied, 256 So. 3d 593, 2018 Miss. LEXIS 449 (Miss. 2018).

Indictment against defendant for sexual battery and fondling was sufficient to put defendant on notice of the charges against defendant because the indictment tracked the statutory language for each offense, provided the time range and location of each offense, identified the victim and the ages of defendant and the victim, and alleged that the acts were committed willfully, unlawfully, and feloniously. *Walker v. State*, 262 So. 3d 560, 2018 Miss. App. LEXIS 302 (Miss. Ct. App. 2018), cert. denied, 260 So. 3d 798, 2019 Miss. LEXIS 42 (Miss. 2019).

Defendant's indictment was not defective because each count tracked the language of the statutes under which he was convicted, fondling and sexual battery; therefore, the indictment provided a clear description of the charges from which de-

fendant could prepare his defense. *Graves v. State*, 216 So. 3d 1152, 2016 Miss. LEXIS 150 (Miss. 2016).

Indictment charging Miss. Code Ann. § 97-5-23(1) fondling and Miss. Code Ann. § 97-3-95(1)(d) sexual battery was not defective, under Miss. Unif. Cir. & Cty. R. 7.06, because statutory language was tracked. *Graves v. State*, — So. 3d —, 2015 Miss. LEXIS 542 (Miss. Oct. 29, 2015), op. withdrawn, sub. op., 216 So. 3d 1152, 2016 Miss. LEXIS 150 (Miss. 2016).

Indictment charged defendant with one count of touching a child for lustful purposes pursuant to Miss. Code Ann. § 97-5-23(1) and one count of sexual battery pursuant to Miss. Code Ann. § 97-3-95(1)(d), and the crimes formed a common scheme of sexual misconduct and all the crimes occurred over a period of time against the same victim in a similar manner; thus, the court rejected defendant's claim that it was error for him to be tried on a multi-count indictment, for purposes of Miss. Code Ann. § 99-7-2, plus the court noted that the trial court instructed the jury to evaluate each count separately and return separate verdicts. *Wilson v. State*, 990 So. 2d 798, 2008 Miss. App. LEXIS 572 (Miss. Ct. App. 2008).

Indictment for fondling and sexual battery was not defective for failing to provide the specific dates that the offenses occurred, as the state had narrowed the time frame sufficiently to put defendant on notice of the nature and cause of the charges against him. *Hodgin v. State*, 964 So. 2d 492, 2007 Miss. LEXIS 406 (Miss. 2007).

In defendant's prosecution for fondling a child victim, his argument that the indictment failed to properly advise him of the date of the offense because it alleged that the offense occurred over more than a two-year period, and deprived him of a fair opportunity to prepare defense, was rejected; the indictment was amended at the conclusion of the State's case to narrow, to a three-month window, the time period, and the child was very specific as to the dates of the offense. *Barnes v. State*, 906 So. 2d 16, 2004 Miss. App. LEXIS 971 (Miss. Ct. App. 2004), cert. denied, 904 So. 2d 184, 2005 Miss. LEXIS 430 (Miss. 2005).

A trial court did not err in allowing the State to amend an indictment charging the defendant with touching a child for a lustful purpose under this section by changing the dates on which the offenses occurred since the change was one of mere form rather than substance. *Baine v. State*, 604 So. 2d 258, 1992 Miss. LEXIS 350 (Miss. 1992).

An indictment which specified the principal charge against the defendant, a violation of this section, and went on to cite with specificity the other 2 previous convictions against him, without ever informing him that the state sought to sentence him as a habitual offender under § 99-19-83, was inadequate, but the inadequacy of the indictment did not require reversal where the defendant had notice of the habitual offender charge, because his attorney had gleaned from the indictment that defendant was charged under § 99-19-83. *Bandy v. State*, 495 So. 2d 486, 1986 Miss. LEXIS 2654 (Miss. 1986).

In a prosecution for fondling a child, the failure of the original indictment to specifically charge that the defendant was a male person was a formal defect which was properly cured by granting the state's motion to amend. *Peterson v. State*, 357 So. 2d 113, 1978 Miss. LEXIS 2482 (Miss. 1978).

An indictment that charged the defendant with indecent assault on a female child under the age of thirteen years, was insufficient because of the failure to charge that the defendant was a male person above the age of eighteen years. *Love v. State*, 211 Miss. 606, 52 So. 2d 470, 1951 Miss. LEXIS 392 (Miss. 1951).

3. Evidence.

Sufficient evidence supported defendant's fondling conviction because (1) the evidence showed defendant was 19 at the time of the incident and the victim was eight, (2) the victim testified defendant put defendant's penis on the victim's bottom, (3) the victim had the same sexually transmitted disease as defendant, and (4) defendant's lustful intent could be inferred from defendant's acts. *Shead v. State*, 294 So. 3d 655, 2020 Miss. App. LEXIS 61 (Miss. Ct. App. 2020).

Defendant's fondling conviction was not against the weight of the evidence because

the victim's uncontradicted testimony and forensic interview, and other testimony and evidence, proved fondling. *Shead v. State*, 294 So. 3d 655, 2020 Miss. App. LEXIS 61 (Miss. Ct. App. 2020).

Sufficient evidence existed to convict defendant for touching a child for lustful purposes because the victim described the incident for which defendant was indicted in great detail, and her testimony was consistent with the testimony provided by other State witnesses; the essential elements of touching a child for lustful purposes could have been found by a rational juror based on the evidence presented at trial. *Richards v. State*, 283 So. 3d 1151, 2019 Miss. App. LEXIS 165 (Miss. Ct. App.), cert. denied, 283 So. 3d 734, 2019 Miss. LEXIS 434 (Miss. 2019), cert. denied, — So. 3d —, 2019 Miss. LEXIS 460 (Miss. 2019).

Circuit court did not err in denying defendant's motion for a new trial because the verdict was not so contrary to the overwhelming weight of the evidence that to allow the verdict to stand would sanction an unconscionable injustice; the conflicting portions of the victim's testimony were thoroughly presented to the jury, and the jury properly resolved the conflicting testimony and found defendant guilty of touching a child for lustful purposes. *Richards v. State*, 283 So. 3d 1151, 2019 Miss. App. LEXIS 165 (Miss. Ct. App.), cert. denied, 283 So. 3d 734, 2019 Miss. LEXIS 434 (Miss. 2019), cert. denied, — So. 3d —, 2019 Miss. LEXIS 460 (Miss. 2019).

There was no abuse of discretion in the trial court's denial of defendant's motion for a new trial because the trial court did not sanction an unconscionable injustice as the 12 year-old victim testified at defendant's trial for fondling by an authority figure that defendant, who was 50 years old and married to the victim's relative, put defendant's hands on the inside of the victim's clothing and touched the victim's private area and the victim's parent testified that the victim told the parent that defendant had just touched the victim. *Green v. State*, 282 So. 3d 529, 2019 Miss. App. LEXIS 296 (Miss. Ct. App. 2019).

Trial court properly sentenced defendant to seven years after a jury convicted him of fondling an 11-year-old child be-

cause the victim's statements were properly admitted under the tender-years hearsay exception where defendant admitted that she was a child of tender years, the court made an on-the-record finding of reliability and specifically addressed the applicable factors, and, while the victim's trial testimony differed the statements she had made a year before, the jury heard her testimony both live and by video and resolved any conflicts in favor of the State, and her testimony was corroborated by her mother, the friend's mother, and the note the victim wrote prior to being questioned by anyone at all. *Crawford v. State*, 282 So. 3d 1230, 2019 Miss. App. LEXIS 487 (Miss. Ct. App. 2019).

Verdict finding defendant guilty of one count of fondling and two counts of sexual battery was not against the overwhelming weight of the evidence as the testimony of the victim, defendant's step-granddaughter, itself was sufficient to find him guilty; and an investigator testified about his interview with defendant, in which defendant admitted to sexual contact with the victim but disputed the details and time frame. *Scarborough v. State*, 270 So. 3d 1026, 2018 Miss. App. LEXIS 489 (Miss. Ct. App. 2018).

Jury could reasonably have inferred that defendant was over the age of 18 at the time of the alleged event, as required, because testimony was put forth that defendant had a fourteen-year-old child and that defendant and defendant's ex-spouse had been separated for 15 years. Moreover, the jury observed defendant during the trial. *Palmer v. State*, 270 So. 3d 1008, 2018 Miss. App. LEXIS 468 (Miss. Ct. App. 2018).

Defendant's conviction for gratification of lust was not contrary to the weight of the evidence because the minor victim testified that defendant started rubbing the victim's shoulder, touched the victim's chest over and under the victim's shirt, and touched the victim below the waist inside of the victim's underwear; the victim ran home through the woods in distress despite the victim's fear of spiders; and an investigator stated that the victim's behavior during an interview was consistent with the actions of a victim of a

sex crime. *Palmer v. State*, 270 So. 3d 1008, 2018 Miss. App. LEXIS 468 (Miss. Ct. App. 2018).

Evidence, including the victim's detailed testimony regarding the first and last times that defendant fondled and sexually assaulted him, was sufficient to support a finding that defendant sexually assaulted and fondled the victim. *Hales v. State*, 213 So. 3d 511, 2017 Miss. LEXIS 75 (Miss. 2017).

Jury verdict of guilty on the charges of gratification of lust and sexual battery was upheld on appeal based on the testimony of two victims because the material portions of the testimonies necessary to support the convictions were not contradicted or discredited, despite some inconsistencies. *Lindsey v. State*, 212 So. 3d 44, 2017 Miss. LEXIS 24 (Miss. 2017).

Circuit court properly denied defendant's motion for a judgment notwithstanding the verdict, or alternatively, for a new trial because, while no medical examination of the child was conducted to determine if the child had been molested and defendant testified that he never touched her, the verdict of fondling was not against the overwhelming weight of the evidence where the child affirmed that defendant had touched her "in places he shouldn't have," and a forensic interviewer corroborated her testimony, explicitly stating that his findings were consistent with that of a child who has been sexually abused. *Bozeman v. State*, 208 So. 3d 1091, 2017 Miss. App. LEXIS 21 (Miss. Ct. App. 2017).

Evidence supported defendant's conviction for child fondling because the testimony by the victim as to defendant inappropriately touching the victim was corroborated by the victim's mother and the victim's aunt and was consistent with the information which the victim provided to various child-advocate professionals, all of whom found that the victim's claims were credible. Moreover, one of the child-advocate professionals opined that the results of the victim's forensic interview were consistent with that of a sexually abused child. *Clements v. State*, 237 So. 3d 175, 2017 Miss. App. LEXIS 674 (Miss. Ct. App. 2017).

Evidence that defendant called the victim into his officer and touched her outer

and inner thigh, an inch and a half from her crotch, was sufficient to support defendant's conviction for gratifying lust. *Roberson v. State*, 287 So. 3d 219, 2017 Miss. App. LEXIS 526 (Miss. Ct. App. 2017), cert. denied, 246 So. 3d 67, 2018 Miss. LEXIS 239 (Miss. 2018).

In a case in which a jury found defendant guilty of four counts of touching a child for lustful purposes, the trial court did not abuse its discretion by admitting into evidence the molestation victims' pre-trial statements under the tender years exception to the hearsay rule. The record reflected that the trial court rendered sufficient findings on the record to conclude that the time, content, and circumstances of the pretrial statements provided substantial indicia of reliability. *Mason v. State*, 203 So. 3d 732, 2016 Miss. App. LEXIS 715 (Miss. Ct. App. 2016).

Evidence presented at trial sufficiently supported defendant's convictions for fondling and sexual battery because the victim testified in detail regarding the two times defendant fondled and sexually assaulted her; the victim's testimony was not substantially contradicted, and witnesses corroborated her testimony. *Graves v. State*, 216 So. 3d 1152, 2016 Miss. LEXIS 150 (Miss. 2016).

Evidence was sufficient to support defendant's Miss. Code Ann. §§ 97-5-23(1) and 97-3-95(1)(a) convictions where the victim testified that he sexually assaulted several times a week while she was attending high school, her testimony was not discredited or contradicted by any evidence except defendant's testimony, and given that this was a weight-of-the-evidence determination, deference was owed to the factfinder. *Different v. State*, 179 So. 3d 1078, 2015 Miss. LEXIS 589 (Miss. 2015).

Sufficient evidence supported defendant's convictions for fondling and sexual battery because the victim testified in detail about two occasions when defendant fondled and sexually assaulted her. *Graves v. State*, — So. 3d —, 2015 Miss. LEXIS 542 (Miss. Oct. 29, 2015), op. withdrawn, sub. op., 216 So. 3d 1152, 2016 Miss. LEXIS 150 (Miss. 2016).

Based on the victim's testimony and her earlier statements to her mother and phy-

sicians, along with the physical examinations by the physicians, there was sufficient evidence to support defendant's convictions for sexual battery and gratification of lust; the victim acknowledged multiple times that defendant touched her, and she admitted on cross-examination that she told the prosecutor of the sexual assault *Mitchum v. State*, 164 So. 3d 477, 2014 Miss. App. LEXIS 514 (Miss. Ct. App. 2014), cert. denied, 163 So. 3d 301, 2015 Miss. LEXIS 244 (Miss. 2015).

Evidence was sufficient to convict defendant of gratification of lust and the verdict was not against the overwhelming weight of the evidence because defendant was 26 years old at the time of the December incident, and the victim was 14 years old; defendant forced the victim to touch his privates; and the victim's brother corroborated the victim's testimony that defendant forced her to touch defendant's privates. *Sims v. State*, 127 So. 3d 307, 2013 Miss. App. LEXIS 861 (Miss. Ct. App. 2013).

Trial court did not err in denying defendant's motion for a new trial because the evidence was such that allowing the verdict to stand would not sanction an unconscionable justice; several witnesses, including the victim, testified to the elements of fondling, while defendant called no witnesses of his own and pointed to no evidence in the record that preponderated heavily against the verdict. *Jenkins v. State*, 131 So. 3d 544, 2013 Miss. LEXIS 569 (Miss. 2013), modified, 2014 Miss. LEXIS 133 (Miss. Feb. 20, 2014).

Trial court did not err in denying defendant's motions for directed verdict and judgment notwithstanding the verdict because the victim's testimony was sufficient to establish the elements of fondling beyond a reasonable doubt; the victim's therapist testified that the victim's conduct was consistent with one who was the victim of a sex crime, and the victim gave consistent statements to her stepmother, a deputy sheriff, and a nurse, who each testified to her description of the abuse. *Jenkins v. State*, 131 So. 3d 544, 2013 Miss. LEXIS 569 (Miss. 2013), modified, 2014 Miss. LEXIS 133 (Miss. Feb. 20, 2014).

Jury's verdict finding defendant guilty of child fondling of his fourteen-year-old

daughter was sufficiently supported by the evidence and not against the overwhelming weight of the evidence because the victim testified that defendant had touched her vagina several times between June 2010 and September 2010 with his hands, mouth, penis, and a vibrator, and DNA evidence inside and outside the victim's vagina did not eliminate defendant as a potential source. *Weeks v. State*, 123 So. 3d 373, 2013 Miss. LEXIS 427 (Miss. 2013).

Evidence was sufficient to sustain defendant's conviction for touching a child for lustful purposes because an expert opined that the child's examination was consistent with a child who had suffered "an inappropriate act," and the child stated at trial that defendant had never gone more than a year without touching her inappropriately. *Bateman v. State*, 125 So. 3d 616, 2013 Miss. LEXIS 416 (Miss. 2013).

Victim's testimony that she believed defendant to be 42 years old at the time of the crime was sufficient to prove that defendant was over the age of 18. *Campbell v. State*, 125 So. 3d 46, 2013 Miss. LEXIS 394 (Miss. 2013).

Evidence that the victim believed that defendant was her foster father, she lived with defendant and his wife for several months, she had her own bedroom in defendant's residence, she went on family vacations with defendant and his wife, and defendant and his wife imposed rules on the victim was sufficient for the jury to conclude that defendant, while not the victim's foster parent, was in a position of trust or authority over the victim. *Campbell v. State*, 125 So. 3d 46, 2013 Miss. LEXIS 394 (Miss. 2013).

Victim's testimony that defendant put his penis in her hand, it was wet, and she wiped it on her mattress, and that defendant's semen was recovered from the mattress was sufficient to support defendant's conviction for touching a child for lustful purposes. *Gerhold v. State*, 127 So. 3d 1116, 2013 Miss. App. LEXIS 241 (Miss. Ct. App. 2013), cert. denied, 131 So. 3d 577, 2014 Miss. LEXIS 17 (Miss. 2014).

Defendant's conviction of fondling was affirmed, as the jury's acceptance of the complainant's testimony over defendant's

testimony was not against the overwhelming weight of the evidence so as to sanction an unconscionable injustice. *Fortune v. State*, 110 So. 3d 831, 2013 Miss. App. LEXIS 119 (Miss. Ct. App. 2013).

Unsupported and uncontradicted testimony of a minor child that defendant had fondled him on three separate occasions was sufficient to support defendant's conviction of three counts of fondling. *Perilloux v. State*, 113 So. 3d 603, 2012 Miss. App. LEXIS 812 (Miss. Ct. App. 2012), cert. dismissed, 202 So. 3d 616, 2016 Miss. LEXIS 312 (Miss. 2016).

In a prosecution for fondling a minor child, the trial court did not err in admitting testimony consistent with the victim's statements through three additional witnesses, as those statements were necessary to tell a rational and coherent story of what happened, and the trial court conducted a proper Miss. R. Evid. 403 balancing test. *Perilloux v. State*, 113 So. 3d 603, 2012 Miss. App. LEXIS 812 (Miss. Ct. App. 2012), cert. dismissed, 202 So. 3d 616, 2016 Miss. LEXIS 312 (Miss. 2016).

Fact that the jury did not find defendant guilty of sexual battery did not vitiate the evidence as to touching; it simply meant that the jury was discerning and did not find sufficient evidence to support the sexual battery charges. *Dubose v. State*, 22 So. 3d 340, 2009 Miss. App. LEXIS 784 (Miss. Ct. App. 2009).

Sexual penetration is not required to prove an unlawful touching. *Dubose v. State*, 22 So. 3d 340, 2009 Miss. App. LEXIS 784 (Miss. Ct. App. 2009).

Verdict was not against the overwhelming weight of the evidence; all three children testified in graphic detail that defendant touched them. The children were removed from the home, and they were later taken to a pediatrician who testified that all three children had injuries consistent with their account of sexual abuse. *Dubose v. State*, 22 So. 3d 340, 2009 Miss. App. LEXIS 784 (Miss. Ct. App. 2009).

Defendant's conviction of sexual battery and child fondling was supported by sufficient evidence where the victim, defendant's stepdaughter, testified that defendant fondled her breasts and genitals, inserted a vibrator into her vagina, and attempted vaginal penetration with his

penis when she was between the ages of nine and ten years old. Further, the victim's grandmother testified that the victim admitted that defendant was "touching her" and that she took the victim to a doctor specializing in gynecology for a physical, and the doctor testified that her examination of the victim revealed tears in her hymen, which were consistent with and evidence of trauma. *Tate v. State*, 20 So. 3d 623, 2009 Miss. LEXIS 529 (Miss. 2009).

Defendant was properly convicted of sexual battery in violation of Miss. Code Ann. § 97-3-95(d)(1) and unlawful touching of a child under the age of sixteen in violation of Miss. Code Ann. § 97-5-23 because his rights under the Double Jeopardy Clause were not violated when the record clearly evinced two separate acts of touching, and the State presented separate and independent proof of each charge; defendant sexually assaulted the victim in her living room when he committed statutory rape and sexually assaulted her again when he committed sexual battery by inserting his finger into her anus, and evidence was presented by numerous witnesses that the victim consistently described a second act of touching at a different time and in a different location of the house. *Woods v. State*, 30 So. 3d 362, 2009 Miss. App. LEXIS 617 (Miss. Ct. App. 2009).

Court found a factual basis to establish the charges against an inmate for voyeurism under Miss. Code Ann. § 97-29-61 and touching a child for lustful purposes under Miss. Code Ann. § 97-5-23(1), given that (1) the inmate admitted the facts that surrounded the elements for both of the crimes, (2) the inmate's daughter reported the same story to her grandmother and others, and (3) the daughter provided sufficient facts and detail to support the charges. *Gaddy v. State*, 21 So. 3d 677, 2009 Miss. App. LEXIS 236 (Miss. Ct. App. 2009), cert. denied, 559 U.S. 1078, 130 S. Ct. 2115, 176 L. Ed. 2d 741, 2010 U.S. LEXIS 3422 (U.S. 2010).

Evidence was sufficient to convict defendant of fondling, although defendant argued that if he touched the victim at all on the breasts, the touching was accidental; the circumstances of the case were suffi-

cient for a reasonable jury to infer that defendant's intent in touching the victim was to satisfy his lustful desires. *Wright v. State*, 9 So. 3d 447, 2009 Miss. App. LEXIS 243 (Miss. Ct. App. 2009).

There was no factual basis for defendant's guilty plea to touching a child for lustful purposes; while defendant admitted to positioning a blanket that was covering the child and taking pictures of the child's clothed buttocks while the child slept, defendant only touched the blanket. *Carreiro v. State*, 5 So. 3d 1170, 2009 Miss. App. LEXIS 165 (Miss. Ct. App. 2009).

Denial of defendant's motion for a new trial after he was convicted of statutory rape and unlawful touching of a child for lustful purposes, in violation of Miss. Code Ann. §§ 97-3-65(1)(b) and 97-5-23(1), was appropriate because defendant's argument on appeal raised the same points that were part of his trial defense. Defendant also failed to point to anything in the record negating the State's evidence. *Paramore v. State*, 5 So. 3d 1074, 2009 Miss. LEXIS 128 (Miss. 2009).

Trial court did not err in denying defendant's motion for a new trial because the evidence supported defendant's convictions for touching a child for lustful purposes, in violation of Miss. Code Ann. § 97-5-23(1), and kidnapping; the victim testified as to what transpired and identified both defendant and defendant's vehicle. *Nix v. State*, 8 So. 3d 141, 2009 Miss. LEXIS 74 (Miss. 2009).

Where the fourteen-year-old victim testified that she was visiting her grandparent's house when defendant inappropriately touched her, the evidence was sufficient to support the jury's verdict convicting defendant of lustful touching of a child pursuant to Miss. Code Ann. § 97-5-23; the victim never returned to her grandparent's home after the alleged incident occurred. While the victim delayed three weeks in reporting the alleged incident, her actions were consistent with the conduct of a person victimized by a sex crime; therefore, the trial court did not err by denying defendant's motion for a judgment notwithstanding the verdict. *Massey v. State*, 992 So. 2d 1161, 2008 Miss. LEXIS 522 (Miss. 2008).

Jury was faced with the victim's account of the crime versus defendant's denial and weighing the evidence in the light most favorable to the verdict, the court could not find that allowing defendant's conviction under Miss. Code Ann. §§ 97-5-23(1), 97-3-95(1)(d) to stand would sanction an unconscionable injustice. *Wilson v. State*, 990 So. 2d 798, 2008 Miss. App. LEXIS 572 (Miss. Ct. App. 2008).

There was testimony from the victim. that defendant had an erection during one of the encounters and thus a rational juror could have found that defendant's actions were lustful, for purposes of his fondling conviction under Miss. Code Ann. § 97-5-23(1). *Wilson v. State*, 990 So. 2d 798, 2008 Miss. App. LEXIS 572 (Miss. Ct. App. 2008).

Evidence was sufficient to convict a defendant of fondling, notwithstanding the defendant's contention that there was no physical evidence, because the victim testified that she was fondled by the defendant and a witness testified that she saw the defendant fondling the victim. *Miller v. State*, 982 So. 2d 995, 2008 Miss. App. LEXIS 307 (Miss. Ct. App. 2008).

Defendant's conviction for fondling was appropriate based on the victim's testimony that defendant touched or poked her "private area" and based on a detective's testimony that defendant made several incriminating statements during an interview with the detective. In part, the detective testified that defendant acknowledged that he was just trying to see if he could get away with touching the victim. *Richardson v. State*, 990 So. 2d 247, 2008 Miss. App. LEXIS 253 (Miss. Ct. App. 2008).

Defendant's conviction for fondling his seven-year-old daughter was appropriate, in part because the jury heard the child's testimony that defendant performed a sexual act on her while she was playing on the computer. Any inconsistencies or contradictions in her testimony were obviously resolved by the jury in favor of the state. *Golden v. State*, 984 So. 2d 1026, 2008 Miss. App. LEXIS 91 (Miss. Ct. App. 2008).

While defendant was spending the evening at the house, the eleven-year-old victim testified that someone came into

her bedroom and rubbed her breasts and buttocks and rubbed his penis against her legs, with his legs wrapped around her; the victim's sister testified that she saw defendant in the bedroom. The evidence was sufficient to support defendant's conviction for gratification of lust with a child under the age of sixteen in violation of Miss. Code Ann. § 97-5-23(1). *Boone v. State*, 973 So. 2d 237, 2008 Miss. LEXIS 58 (Miss. 2008).

Defendant's conviction for fondling a child under the age of 18 was appropriate because the evidence was sufficient. The jury had before it defendant's confession and the victim's testimony regarding the events and the fondling. *Pool v. Pool*, 989 So. 2d 920, 2008 Miss. App. LEXIS 33 (Miss. Ct. App.), cert. denied, 993 So. 2d 832, 2008 Miss. LEXIS 383 (Miss. 2008).

State adequately proved that defendant intended to gratify his lust when he molested the victim because the evidence indicated that defendant put his hand down the victim's shirt and touched her bare breast, and the victim testified that she tried to get away from defendant but that he restrained her. Under such circumstances, the jury was permitted to draw a reasonable inference that defendant had an improper purpose in mind; touching of this fashion went beyond innocent "prankish" touching or affectionate behavior. *Foxworth v. State*, 982 So. 2d 453, 2007 Miss. App. LEXIS 751 (Miss. Ct. App. 2007), cert. denied, 981 So. 2d 298, 2008 Miss. LEXIS 241 (Miss. 2008).

Sufficient evidence supported defendant's conviction for two counts of gratification of lust, a violation of Miss. Code Ann. § 97-5-23(2), because the victim, defendant's daughter, testified that defendant inserted his finger into her vagina and rubbed his hands under both her swimsuit top and bottom, while witnesses at the scene saw defendant place his hands under the victim's swimsuit and rub her in inappropriate places, and the intent to gratify his lust could easily be inferred from defendant's actions. *McDonald v. State*, 976 So. 2d 942, 2007 Miss. App. LEXIS 621 (Miss. Ct. App. 2007), cert. denied, 977 So. 2d 343, 2008 Miss. LEXIS 96 (Miss. 2008), cert. denied, 555 U.S. 846, 129 S. Ct. 90, 172 L. Ed. 2d 77, 2008 U.S. LEXIS 7290 (U.S. 2008).

Trial court did not err by not allowing defendant to introduce evidence concerning the circumstances of his divorce and custody battle with his daughter's mother because he produced no evidence, other than his assertions, that his ex-wife was involved in the actions leading up to defendant's conviction for molesting his daughter under Miss. Code Ann. § 97-5-23(2); the ex-wife was not a witness to the incident nor was she involved in bringing charges against defendant, and a close mother-daughter relationship was not sufficient evidence to show that either the ex-wife instructed her daughter to inform the authorities of the molestation or that the daughter fabricated the charge on her own. *McDonald v. State*, 976 So. 2d 942, 2007 Miss. App. LEXIS 621 (Miss. Ct. App. 2007), cert. denied, 977 So. 2d 343, 2008 Miss. LEXIS 96 (Miss. 2008), cert. denied, 555 U.S. 846, 129 S. Ct. 90, 172 L. Ed. 2d 77, 2008 U.S. LEXIS 7290 (U.S. 2008).

Evidence was sufficient to convict defendant of fondling of a child where there was ample evidence to support the jury's verdict; the jury heard the victim's testimony in which she described the various inappropriate ways defendant touched her, and the jury also heard defendant's recorded phone conversations with the victim. *Williams v. State*, 970 So. 2d 727, 2007 Miss. App. LEXIS 577 (Miss. Ct. App. 2007).

At trial for fondling and sexual battery, it was not error under the circumstances presented to accept a witness as an expert in the field of child abuse, allow an unre-dacted videotape of the child victim's interview to be admitted into evidence, or to allow the victim's mother to testify as to statements that the victim made to her. *Hodgin v. State*, 964 So. 2d 492, 2007 Miss. LEXIS 406 (Miss. 2007).

Although defendant alleged that he was not allowed to demonstrate bias or prejudice, the trial court did not abuse its discretion in determining that the mother's motive of money was a collateral matter that would not help the jury decide whether the statutory rape or fondling occurred; thus, pursuant to Miss. R. Evid. 103(a), the trial court did not err in excluding that evidence. *Poynor v. State*, 962

So. 2d 68, 2007 Miss. App. LEXIS 292 (Miss. Ct. App.), cert. denied, 962 So. 2d 38, 2007 Miss. LEXIS 416 (Miss. 2007).

Directed verdict was properly denied for a conviction under Miss. Code Ann. § 97-5-23(1) because a child testified that defendant rubbed his bare behind in a vehicle, and despite the fact that no baby oil was found on his body, the child testified that defendant had masturbated with the baby oil; it did not matter that the victim did not inform people of the incident when defendant made several stops. *Potts v. State*, 955 So. 2d 913, 2007 Miss. App. LEXIS 256 (Miss. Ct. App. 2007).

Trial court did not err by denying defendant's motion for judgment notwithstanding the verdict because there was sufficient evidence to convict defendant of both sexual battery and fondling; the victim testified that, *inter alia*: (1) defendant licked her everywhere, including between her legs and her chest; (2) defendant penetrated the victim's vagina with his tongue; (3) defendant pulled off the victim's panties in order to fondle and lick her; (4) defendant pulled up her shirt to lick her chest; (5) defendant tried to insert his thumb inside the victim; (6) and the victim was 13 years old at the time, and defendant was her stepfather. *Ivy v. State*, 949 So. 2d 748, 2007 Miss. LEXIS 40 (Miss. 2007).

Trial court did not err by denying defendant's motion for a new trial because the evidence weighed in the light most favorable to the verdict supported the jury's resolution of the conflicting testimony; the evidence presented in defendant's trial for sexual battery and fondling included: (1) the victim's testimony in graphic detail as to the licking and touching that she endured from defendant; (2) defendant exercised his right to testify and testified that he did nothing wrong to the victim, his stepdaughter, but that the victim just wanted him out of the house; and (3) an investigator testified regarding what defendant stated in his written statement as well as statements defendant made that he did not want in the written statement. *Ivy v. State*, 949 So. 2d 748, 2007 Miss. LEXIS 40 (Miss. 2007).

Where a doctor who examined the victim testified that the victim's rectum was

swollen and there was a tear on the opening into the rectum, and he stated that those injuries were consistent with sexual battery, the evidence clearly indicated that the victim was sexually penetrated pursuant to the sexual battery statute, Miss. Code Ann. § 97-3-95(1)(d); with regard to the statement by the victim's grandmother that the victim had told lies before, the evidence did not rise to the level of conflicting evidence warranting a lustful touching jury instruction, and thus the trial court did not err in denying the jury instruction on the lesser-included offense of lustful touching. *Divine v. State*, 947 So. 2d 1017, 2007 Miss. App. LEXIS 23 (Miss. Ct. App. 2007).

Defendant was not entitled to reversal of his conviction for fondling a child in violation of Miss. Code Ann. § 97-5-23 because, *inter alia*: (1) the evidence was sufficient to enable a reasonable juror to find defendant guilty beyond a reasonable doubt, (2) the trial court did not improperly limit cross-examination of the victim in violation of defendant's rights under USCS Const. Amend. 6 and Miss. Const. Art. III, § 26, because testimony concerning the victim's past sexual behavior was properly excluded under Miss. R. Evid. 412; (3) since defendant failed to object at trial to the qualification of an expert witness under Miss. R. Evid. 702, the issue was waived; and (4) under Miss. R. Evid. 615(3), the expert witness was properly allowed to remain in the court room so that she could base her opinion on facts learned at the trial pursuant to Miss. R. Evid. 703. *Aguilar v. State*, 955 So. 2d 386, 2006 Miss. App. LEXIS 903 (Miss. Ct. App. 2006).

Evidence was sufficient to convict defendant of fondling the 15-year-old victim under Miss. Code Ann. § 97-5-23 because: (1) the state offered direct evidence in the form of the victim's testimony and defendant's statement to the police; and (2) recognition that defendant touched the victim to satisfy his lustful desires could arise from the circumstances of the encounter. *Mingo v. State*, 944 So. 2d 18, 2006 Miss. LEXIS 679 (Miss. 2006).

Insured, an agent, and two owners were not entitled to coverage under a commercial general liability policy with regard to

lawsuits filed against them, which alleged that the insured, the agent, and the owners acted negligently by allowing an officer to sexually molest certain females, as the policy contained an exclusion for injuries that arose out of a willful violation of a penal statute, and the officer's alleged sexual misconduct violated Miss. Code Ann. § 97-5-23. *Md. Cas. Co. v. Lab Disc. Drug, Inc.*, 468 F. Supp. 2d 862, 2006 U.S. Dist. LEXIS 83682 (S.D. Miss. 2006).

Defendant's conviction for two counts of child fondling, in violation of Miss. Code Ann. § 97-5-23(2), was supported by substantial evidence where defendant's 13- and 14-year-old daughters testified that he rubbed his penis on their thighs; one daughter also testified that defendant eventually ejaculated on her. *Boykin v. State*, 941 So. 2d 892, 2006 Miss. App. LEXIS 809 (Miss. Ct. App. 2006).

Defendant's conviction for fondling was appropriate because the fact that the victim's father was in prison for child molestation was not relevant evidence under Miss. R. Evid. 401 since the evidence regarding the victim's father did not affect the credibility of the victim and she had not seen her father in over four years; thus, the father was not responsible for committing the crime, contrary to defendant's suggestion. *Higdon v. State*, 938 So. 2d 340, 2006 Miss. App. LEXIS 699 (Miss. Ct. App. 2006).

Eleven-year-old victim testified that defendant propositioned her to play a deviant game of hide-and-seek and began touching her on the thigh; that conduct clearly constituted touching and handling a child for lustful purposes under the provisions of Miss. Code Ann. § 97-5-23. Also, the corroborated testimony of the victim provided a sound basis for the jury's determination of guilt; thus, the evidence was sufficient to convict defendant of touching and handling a child for lustful purposes. *Smith v. State*, 925 So. 2d 825, 2006 Miss. LEXIS 119 (Miss. 2006).

Where defendant appealed his conviction of three counts of fondling child victims, asserting that the testimony of the State's expert forensic interviewer should not have been allowed because the forensic interviewer could not cite evidence

that her methods had ever been independently tested, nor could she shed any light on the rate of error regarding her interviewing methods, and the expert's methods were unreliable, as there was no single accrediting or sanctioning body for the field of forensic interviewing, and the State properly countered that (1) the area of investigations of sexual abuse cases, especially through interviews, was a competent area of expertise, (2) the expert's testimony was based upon sufficient facts and data, as she testified in detail how she conducted her interview with the victim and what the victim told her; (3) the testimony was the product of reliable principles and methods, despite the general consensus within the field that there was no single "right way" to conduct an interview; and (4) the expert applied the principles and methods of her interviewing skills reliably to the facts of the case, the trial court did not abuse its discretion in admitting the expert testimony. *Mooneyham v. State*, 915 So. 2d 1102, 2005 Miss. App. LEXIS 989 (Miss. Ct. App. 2005).

Evidence was sufficient to have convicted defendant of touching a child for lustful purposes, where: (1) defendant was forty-six years old when the incident occurred; (2) the victim, who was twelve years old when the incident occurred, gave compelling testimony and other witnesses for the State testified that the mother screamed and yelled at defendant as he was lying on the floor next to the mattress where the victim slept that night; and (3) the jury chose to believe the testimony of the victim as to what happened and could have reasonably inferred that defendant's actions were prompted by the need to gratify his lust or indulge his depraved sexual desires. *Weathersby v. State*, 919 So. 2d 1146, 2005 Miss. App. LEXIS 754 (Miss. Ct. App. 2005).

Where defendant was convicted of touching a child for lustful purposes, the trial court did not abuse its discretion in denying his motion for a new trial because although there were two versions of what happened, it was the function of the jury to pass upon the credibility of the evidence, and the jury obviously found the State's version more credible; from the

evidence presented at trial, reasonable jurors could have found beyond a reasonable doubt that defendant was guilty of touching a child for lustful purposes. *Weathersby v. State*, 919 So. 2d 1146, 2005 Miss. App. LEXIS 754 (Miss. Ct. App. 2005).

Evidence was sufficient to convict defendant of two counts of touching a child for lustful purposes where, even though the minor victims' testimony slightly differed regarding the events of the sexual abuse, the word of the victim of a sex crime, even if unsupported, was sufficient to support a guilty verdict when that testimony had not been discredited or contradicted by credible evidence; based on the evidence presented, the jury decided which testimony to accept and which to reject and returned a reasonable verdict. *Bradley v. State*, 921 So. 2d 385, 2005 Miss. App. LEXIS 865 (Miss. Ct. App. 2005).

From the colloquies set forth in the record, the child psychologist did not offer a direct opinion that the child fondling victim was telling the truth. However, whether his testimony ran afoul of the prohibition against syndrome testimony was a closer question; while the psychologist did not specifically testify that the victim displayed the "so-called typical characteristics" of child-victims of sexual abuse, he came very close, but there was no reversible error because defendant never objected to the testimony on the basis that he urged on appeal. *Barnes v. State*, 906 So. 2d 16, 2004 Miss. App. LEXIS 971 (Miss. Ct. App. 2004), cert. denied, 904 So. 2d 184, 2005 Miss. LEXIS 430 (Miss. 2005).

Court of appeals erred when it reversed defendant's conviction for molestation where molestation was a lesser included offense of sexual battery; defendant's actions were done with the purpose of gratifying his lust, and the victim was under the age of 14 at the time of the incident, and defendant's acts of grabbing the victim, touching her genital area, and touching himself, demonstrated that he was gratifying his lust, and intent could be inferred from a defendant's actions. *Friley v. State*, 879 So. 2d 1031, 2004 Miss. LEXIS 1010 (Miss. 2004).

Defendant's conviction was affirmed; the 13-year-old victim's testimony that

defendant massaged her nipple the entire time they were riding a three-wheeler together was sufficient to prove defendant touched for the purpose of satisfying his lustful desires. *Ladnier v. State*, 878 So. 2d 926, 2004 Miss. LEXIS 623 (Miss. 2004).

Jury's verdict that defendant was guilty of gratification of lust was not against the weight of the evidence, where the evidence showed that defendant surreptitiously entered the bedroom where children were sleeping, and touched the body of one of the girls; when he was observed, he ran from the room; and he later returned and grabbed the legs of the child, tried to pull her from the bed, then again ran from the room after being observed by others. *Jordan v. State*, 868 So. 2d 1065, 2004 Miss. App. LEXIS 222 (Miss. Ct. App. 2004).

Where nine-year-old victim testified that defendant kissed the victim on her lips, touched the victim's breasts, asked the victim if it felt good, and told her not to tell anyone, while defendant asserted the touching was not sexually motivated, credibility was a jury issue, the evidence was sufficient to sustain defendant's conviction for unlawful touching of a child for lustful purposes, and defendant's motion for a new trial was properly denied. *Smith v. State*, 867 So. 2d 276, 2004 Miss. App. LEXIS 174 (Miss. Ct. App. 2004).

Discrepancies in a child's prior statements regarding sexual abuse by defendant, a male relative, were not so damaging to the child's credibility as to have compelled the conclusion that the jury had abused its discretion in finding that she had truthfully related the events of the two encounters with defendant that led to the charges; the examining doctor testified, based on her professional experience, that it was not uncommon for a child sexual abuse victim to give different versions of events when talking to different people because, among other considerations, a child in that situation was often inclined to conceal or even deny matters if the child was made uncomfortable or fearful of the person making inquiry. *Sharp v. State*, 862 So. 2d 576, 2004 Miss. App. LEXIS 7 (Miss. Ct. App. 2004).

There certainly was evidence to support conviction of one count of touching a child

for lustful purposes, a violation of former Miss. Code Ann. § 97-5-23(1), where, during the child's testimony, she stated that defendant had touched her all over her body with his hands. *Peters v. State*, 864 So. 2d 983, 2004 Miss. App. LEXIS 16 (Miss. Ct. App. 2004).

Each of the minor victims testified to being fondled by defendant and the testimony of the minor victims was corroborated and given credence by defendant's statements to the police that defendant had homosexual tendencies and defendant's admissions to touching the genital area of each of the minor victims; thus, the evidence was sufficient to sustain defendant's convictions for fondling, and a new trial was not warranted. *Poe v. State*, 872 So. 2d 686, 2003 Miss. App. LEXIS 1150 (Miss. Ct. App. 2003), cert. denied, 873 So. 2d 1032, 2004 Miss. LEXIS 519 (Miss. 2004).

Evidence was sufficient to convict defendant of touching of a child for lustful purposes where the unsupported word of the victim was sufficient to support a guilty verdict where the testimony was not discredited or contradicted by other credible evidence, especially if the conduct of the victim was consistent with the conduct of one who had been victimized by a sex crime; the victim's testimony was not discredited or contradicted. *Byars v. State*, 835 So. 2d 965, 2003 Miss. App. LEXIS 215 (Miss. Ct. App. 2003).

Evidence was sufficient where the 10-year-old victim gave a statement to the police, alleging that defendant had committed sexual acts on her; the child was not presumed to be dishonest; and the McClain standard was not met and reversal was thus not required. *Parker v. State*, 825 So. 2d 59, 2002 Miss. App. LEXIS 473 (Miss. Ct. App. 2002).

Evidence was sufficient to establish that the defendant fondled a child where the victim, her sister, and a school counselor who the victim spoke to shortly after the incident all testified that the defendant approached the victim from behind while unclothed, rubbed her breasts with his hands, and rubbed his penis on her buttocks. *Peet v. State*, 811 So. 2d 380, 2001 Miss. App. LEXIS 57 (Miss. Ct. App. 2001).

Evidence was sufficient to support a conviction where (1) the defendant was over 18 years old and the victim was 14 years old at the time of the incident at issue, (2) the victim testified that she awakened to find the defendant on top of her and that he "put his private part inside of [her] and started moving around," and (3) a nurse testified that her physical examination of the victim revealed that there were no signs of sexual penetration, but that there were numerous signs of external contact that could be related to sexual molestation. *Jones v. State*, 783 So. 2d 771, 2000 Miss. App. LEXIS 556 (Miss. Ct. App. 2000).

Evidence was sufficient to support a conviction where the victim testified that the defendant fondled her breasts and genitalia and that she suffered from Huntington's disease, notwithstanding defendant's assertion that he merely tried to help her get up from where she had fallen on the floor; thus, the defendant was not entitled to judgment notwithstanding the verdict or a new trial. *Sherrod v. State*, 755 So. 2d 569, 2000 Miss. App. LEXIS 82 (Miss. Ct. App. 2000).

Evidence was insufficient to support a conviction under this section where (1) the only evidence of the defendant's activities consisted of testimony that, in a car crowded with children, he was engaged in a game involving contact of only the briefest duration consisting of a pinch that was followed by a laughing attempt to place the blame for the contact on one of the other children, (2) there was no evidence of any attempt to grope or rub either of the children in a sexually suggestive manner, and (3) there was no evidence that the defendant was unnaturally aroused or sexually excited by this seemingly prankish behavior. *Bradford v. State*, 743 So. 2d 421, 1999 Miss. App. LEXIS 303 (Miss. Ct. App. 1999).

In a prosecution for touching a child for a lustful purpose under this section, arising from the defendant's sexual molestation of a child who attended his wife's daycare center, evidence of other crimes concerning other children was admissible since the defendant's conduct toward other children at the daycare center was integrally related in time, place and fact

to his conduct toward the victim. *Baine v. State*, 604 So. 2d 258, 1992 Miss. LEXIS 350 (Miss. 1992).

In a prosecution for child fondling, testimony that the defendant had exposed himself to children other than the victim was not admissible to show the defendant's custom of criminal action and lustful disposition toward children in general; evidence of other sexual relations is limited to those between the defendant and the particular victim to show the lustful, lascivious disposition of the defendant toward that victim. *Mitchell v. State*, 539 So. 2d 1366, 1989 Miss. LEXIS 141 (Miss. 1989), overruled in part, *Derouen v. State*, 994 So. 2d 748, 2008 Miss. LEXIS 587 (Miss. 2008).

In proving gratification of lust pursuant to this section, which prohibits a person over the age of 18 from having contact with a child under the age of 14 for lustful purposes, the state bears the burden of proving that the person so charged was above 18 years of age. *Crenshaw v. State*, 520 So. 2d 131, 1988 Miss. LEXIS 126 (Miss. 1988).

Defendant's intent to commit crime of gratification of lust can be determined from acts of accused and his conduct and inferences of guilt may be fairly deducible from all circumstances, where testimony showed that on numerous occasions over course of one to 2 years, defendant had rubbed vaginal area of 9-year-old female. *Shive v. State*, 507 So. 2d 898, 1987 Miss. LEXIS 2548 (Miss. 1987).

At trial of child fondling charge, the age of the child-victim was properly proved by testimony of the victim and of her mother, while the defendant's age was in his admission to arresting officers. *Bandy v. State*, 495 So. 2d 486, 1986 Miss. LEXIS 2654 (Miss. 1986).

There was ample evidence for the jury to find that defendant was guilty of the crime of fondling a child, given the admission of defendant's statement and the testimony of the prosecuting witness. *Harrell v. State*, 357 So. 2d 643, 1978 Miss. LEXIS 2586 (Miss. 1978).

In a prosecution under this section [Code 1942, § 2052] testimony of the outraged female does not require corroboration. *Pittman v. State*, 236 Miss. 592, 111

So. 2d 415, 1959 Miss. LEXIS 353 (Miss. 1959).

Evidence held sufficient to sustain conviction for violation of the person of a female child under 13 years of age. *Mad-dox v. State*, 230 Miss. 529, 93 So. 2d 649, 1957 Miss. LEXIS 394 (Miss. 1957).

Evidence held sufficient to sustain conviction for violation of the person of a female child under thirteen years of age. *Allen v. State*, 175 Miss. 745, 166 So. 922, 1936 Miss. LEXIS 46 (Miss. 1936).

4. Sentence.

Sentences which defendant received for sexual battery and fondling of a child were beyond the maximum sentences for the offenses at the time the offenses were committed. Therefore, remand for re-sentencing in accordance with the applicable statute was necessary. *Masters v. State*, 285 So. 3d 192, 2019 Miss. App. LEXIS 563 (Miss. Ct. App. 2019).

Appellant's sentences for the sexual exploitation of a minor in violation of Miss. Code Ann. § 97-5-33(6) and fondling in violation of Miss. Code Ann. § 97-5-23(2) were within the limits prescribed by the statutes; appellant faced up to eighty-five years in prison, and the circuit court sentenced him to the maximum sentence on all charges but required the sentences to run concurrently, effectively reducing appellant's sentence by forty-five years. *Argol v. State*, 155 So. 3d 848, 2013 Miss. App. LEXIS 143 (Miss. Ct. App. 2013), cert. denied, 131 So. 3d 577, 2014 Miss. LEXIS 59 (Miss. 2014), cert. denied, 131 So. 3d 577, 2014 Miss. LEXIS 60 (Miss. 2014).

Defendant's sentence was not illegal because, for the fondling count, defendant was sentenced to twelve years, with three years post-release supervision, which, when combined, was for fifteen years and was within the statutory limits. *Moore v. State*, 112 So. 3d 1084, 2013 Miss. App. LEXIS 207 (Miss. Ct. App. 2013).

Defendant's motion for postconviction relief was properly dismissed because it was untimely under Miss. Code Ann. § 99-39-5(2) and defendant's sentence was not illegal since it was undeniably less than the 15-year maximum sentence for touching a child for lustful purposes

under Miss. Code Ann. § 97-5-23(1). *Desemar v. State*, 99 So. 3d 279, 2012 Miss. App. LEXIS 635 (Miss. Ct. App. 2012).

Terms of an inmate's sentences were within the statutory limits of Miss. Code Ann. §§ 97-29-61, 97-5-23(1) and thus the claim that the trial court erred in sentencing the inmate to maximum sentences was without merit. *Gaddy v. State*, 21 So. 3d 677, 2009 Miss. App. LEXIS 236 (Miss. Ct. App. 2009), cert. denied, 559 U.S. 1078, 130 S. Ct. 2115, 176 L. Ed. 2d 741, 2010 U.S. LEXIS 3422 (U.S. 2010).

Denial of appellant's, an inmate's, motion for postconviction relief was appropriate because his sentence was within the prescribed limits of Miss. Code Ann. § 97-5-23 and it did not exceed the maximum term allowed by statute. *Bowling v. State*, 12 So. 3d 607, 2009 Miss. App. LEXIS 395 (Miss. Ct. App. 2009).

Denial of defendant's motion for post-conviction relief on grounds that his guilty plea was not voluntary was proper as he was not prejudiced by his lack of understanding of the proper sentencing range; he only received a 12-year sentence for each of three counts, to run concurrently, of touching a child for lustful purposes, when he could have received over 30 years. *Pope v. State*, 922 So. 2d 828, 2006 Miss. App. LEXIS 122 (Miss. Ct. App.), cert. dismissed, 929 So. 2d 923, 2006 Miss. LEXIS 234 (Miss. 2006).

In a case where defendant was convicted of three counts of fondling the 15-year-old victim under Miss. Code Ann. § 97-5-23, defendant's three 10-year consecutive sentences under Miss. Code Ann. § 99-19-21 were not disproportionate to defendant's crimes, were within the limits set by statute, and did not violate the Eighth Amendment. *Mingo v. State*, 944 So. 2d 18, 2006 Miss. LEXIS 679 (Miss. 2006).

Where defendant was sentenced to five years of incarceration, a 10 year suspended sentence, and five years post-release supervision, defendant's sentence was well within the statutory maximum of Miss. Code Ann. § 97-5-23 because a defendant's period of supervised release was not counted toward the defendant's time served. *Hobson v. State*, 910 So. 2d 1139, 2005 Miss. App. LEXIS 212 (Miss. Ct. App. 2005).

The retroactive application of an amendment to the statute pertaining to sentencing was an ex post facto violation where it resulted in a longer sentence than that allowed under the version of the statute that existed at the time of the crime. *McGowan v. State*, 742 So. 2d 1183, 1999 Miss. App. LEXIS 334 (Miss. Ct. App. 1999).

5. Defense.

The defense of mistake of age is not available to a person accused of fondling a child under the age of 14. *Todd v. State*, 806 So. 2d 1086, 2001 Miss. LEXIS 305 (Miss. 2001).

6. Ineffective assistance of counsel.

Denial of post-conviction relief was proper as the sentence imposed was within the statutory mandate, the petitioner failed to claim his guilty plea to touching a child for lustful purposes under Miss. Code Ann. § 97-5-23(1) was not freely, voluntarily, and intelligently given, and he did not request a reversal of his guilty plea due to his trial counsel's alleged ineffective assistance. *Lewis v. State*, 988 So. 2d 942, 2008 Miss. App. LEXIS 472 (Miss. Ct. App. 2008).

Where there was nothing in the record before the appellate court that would have permitted a meaningful analysis of what uncalled witnesses might have testified to or whether there might have been compelling reasons not to call them even if they were prepared to offer the testimony defendant in his brief contended they would, defendant's ineffective assistance of counsel claim could only be raised by means of a motion for postconviction relief. *Sharp v. State*, 862 So. 2d 576, 2004 Miss. App. LEXIS 7 (Miss. Ct. App. 2004).

7. Lesser nonincluded offenses.

Sex between a teacher and pupil is not a lesser-included offense of touching a child for lustful purposes as it is possible to be guilty of touching a child for lustful purposes without also being guilty of sex between a teacher and pupil because touching a child for lustful purposes does not include all of the elements of sex between teacher and pupil as sex between a teacher and pupil contains elements

pertaining to sexual intercourse which requires penetration, and touching a child for lustful purposes does not. *Dewitt v. State*, 269 So. 3d 388, 2018 Miss. App. LEXIS 231 (Miss. Ct. App.), cert. denied, 258 So. 3d 286, 2018 Miss. LEXIS 528 (Miss. 2018).

Evidence was insufficient to support separate and distinct acts of molestation and sexual battery because it showed penetration was achieved by touching a child under the age of fourteen; thus, molestation was a lesser-included offense and merged with the sexual-battery charge, and defendant's conviction for molestation violated the Double Jeopardy Clause. *Stewart v. State*, 228 So. 3d 872, 2017 Miss. App. LEXIS 57 (Miss. Ct. App.), cert. denied, 229 So. 3d 119, 2017 Miss. LEXIS 400 (Miss. 2017).

Evidence was insufficient to support a conviction for a second count of sexual battery as it related to defendant's alleged penetration of a victim's anus with his penis; the victim's ambiguous statements did not suggest penetration to the extent that it was proven beyond a reasonable doubt. However, there was enough evidence to convict defendant for the lesser included offense of gratification of lust based on his act of rubbing his penis between the victim's buttocks. *Ringer v. State*, 203 So. 3d 794, 2016 Miss. App. LEXIS 288 (Miss. Ct. App. 2016).

Where defendant was indicted for sexual battery, it was not plain error for the trial court to convict defendant of the crime of touching and handling a child for lustful purposes; unlawful touching was not a lesser-included offense of sexual battery, however, unlike in *Friley v. State*; not only did defendant not object to the lesser offense instruction, defendant offered an instruction on the form of verdict that asked the jury to determine whether defendant was guilty of the lesser crime of touching and handling a child for lustful purposes. *Dupuis v. State*, 2003 Miss. App. LEXIS 1268 (Miss. Ct. App. June 24, 2003).

8. Jury instructions.

Lesser-included-offense instruction on fondling did not err because required lustful intent could be inferred from defen-

dant's acts as testified to by the victim and described in the victim's forensic interview. *Shead v. State*, 294 So. 3d 655, 2020 Miss. App. LEXIS 61 (Miss. Ct. App. 2020).

Defendant was not entitled to a jury instruction that sex between a teacher and pupil was a lesser-included offense of touching a child for lustful purposes because the offense of sex between a teacher and pupil contained elements pertaining to sexual intercourse which required penetration, and the offense of touching a child for lustful purposes did not; defendant was found to be in a position of trust or authority over the victim, and she was found guilty of handling, touching or rubbing the victim for the purpose of gratifying her lust, which were not elements of the offense of sex between a teacher and pupil. *Dewitt v. State*, 269 So. 3d 388, 2018 Miss. App. LEXIS 231 (Miss. Ct. App.), cert. denied, 258 So. 3d 286, 2018 Miss. LEXIS 528 (Miss. 2018).

Trial court did not err by refusing defendant's jury instruction for the lesser-nonincluded offense of contributing to the delinquency of a minor because the parties agreed that contributing to the delinquency of a minor was not a lesser-included offense of gratification of lust. *Ford v. State*, 205 So. 3d 1172, 2016 Miss. App. LEXIS 514 (Miss. Ct. App. 2016), cert. denied, — So. 3d —, 2017 Miss. LEXIS 115 (Miss. 2017).

Trial court did not err by giving a lesser-included-offense jury instruction regarding fondling under the count charging defendant with sexual battery because ample evidence supported the lesser-included offense of fondling, and the intent element of fondling could be inferred from defendant's actions. *Jenkins v. State*, 131 So. 3d 544, 2013 Miss. LEXIS 569 (Miss. 2013), modified, 2014 Miss. LEXIS 133 (Miss. Feb. 20, 2014).

Where defendant claimed his medication rendered him unconscious of his alleged fondling of a child, the trial court did not err in refusing his instruction on "legal unconsciousness due to involuntary intoxication," as it charged the jury on the requisite mens rea and gave defendant the opportunity to present his defense that any inappropriate act was due to

effects of the medication. *Fortune v. State*, 110 So. 3d 831, 2013 Miss. App. LEXIS 119 (Miss. Ct. App. 2013).

In a prosecution for fondling, an instruction stating that whether the molestation was accomplished by force or violence was immaterial was proper, as force and violence were not required to prove fondling, and the jury instructions as a whole adequately stated the law. *Perilloux v. State*, 113 So. 3d 603, 2012 Miss. App. LEXIS 812 (Miss. Ct. App. 2012), cert. dismissed, 202 So. 3d 616, 2016 Miss. LEXIS 312 (Miss. 2016).

Where a child testified that defendant sodomized him while they were in a chicken house in Lena, Mississippi, which the boy believed was in Scott County, as Lena was in fact in Leake County, and the jury was never instructed that it had to find beyond a reasonable doubt that the crime had occurred in Scott County—an essential element of the offense—defendant's conviction of fondling the child was reversed. *Rogers v. State*, 95 So. 3d 623, 2012 Miss. LEXIS 399 (Miss. 2012).

In a case in which defendant appealed his conviction for fondling a child under the age of 16, in violation of Miss. Code Ann. § 97-5-23, he argued unsuccessfully that he was denied a fair trial because jury instruction number five impermissibly shifted the burden of proof from the State to him, thereby requiring him to prove his innocence. Jury instruction number five did not impermissibly shift

the burden of proof to defendant, and when that instruction was considered in combination with instructions seven and eight, his presumption of innocence and the State's burden of proof were fairly and accurately announced and any potential for juror confusion was removed. *Johnson v. State*, 19 So. 3d 145, 2009 Miss. App. LEXIS 672 (Miss. Ct. App. 2009).

9. Federal Offense.

Defendant's convictions for sexual battery and gratification of lust did not violate defendant's right against double jeopardy as the gratification-of-lust conviction did not merge with the sexual-battery conviction because the State of Mississippi presented sufficient evidence through the minor victim's testimony to support separate and distinct acts of fondling and sexual battery by defendant. *Shoemaker v. State*, 256 So. 3d 604, 2018 Miss. App. LEXIS 105 (Miss. Ct. App.), cert. denied, 256 So. 3d 593, 2018 Miss. LEXIS 449 (Miss. 2018).

Court correctly classified defendant as a Tier III offender because defendant's argument that this provision was not comparable to the federal offense of sexual abusive contact failed since the relevant offenses contained comparable elements. *United States v. Young*, 872 F.3d 742, 2017 U.S. App. LEXIS 19602 (5th Cir. Miss. 2017), cert. denied, — U.S. —, 139 S. Ct. 53, 202 L. Ed. 2d 40, 2018 U.S. LEXIS 4838 (U.S. 2018).

RESEARCH REFERENCES

ALR.

Assault with intent to commit unnatural sex act upon minor as affected by latter's consent. 65 A.L.R.2d 748.

Applicability of criminal statutes relating to offenses against children of a specified age with respect to a child who has passed the anniversary date of such age. 73 A.L.R.2d 874.

Mistake or lack of information as to victim's age as defense to statutory rape. 46 A.L.R.5th 499.

Law Reviews.

1979 Mississippi Supreme Court Re-

view: *Criminal Law and Procedure*. 50 Miss. L. J. 763, December, 1979.

1985 Mississippi Supreme Court Review—*Criminal Law*. 55 Miss. L. J. 789, December, 1985.

Recent amendments to the Mississippi Rules of Evidence—the rights of the victim v. the rights of the accused in child abuse prosecutions and dependency or neglect proceedings. 61 Miss. L. J. 367 (Fall, 1991).

Practice References.

Anthony Morosco, *The Prosecution and Defense of Sex Crimes* (Matthew Bender).

Sexual Assault Trials, Second Edition
(Michie).

§ 97-5-24. Sexual involvement of school employee with student; duty to report; penalties for failure to report; immunity from civil liability for report made in good faith.

If any person eighteen (18) years or older who is employed by any public school district or private school in this state is accused of fondling or having any type of sexual involvement with any child under the age of eighteen (18) years who is enrolled in such school, the principal of such school and the superintendent of such school district shall timely notify the district attorney with jurisdiction where the school is located of such accusation, the Mississippi Department of Education and the Department of Human Services, provided that such accusation is reported to the principal and to the school superintendent and that there is a reasonable basis to believe that such accusation is true. Any superintendent, or his designee, who fails to make a report required by this section shall be subject to the penalties provided in Section 37-11-35. Any superintendent, principal, teacher or other school personnel participating in the making of a required report pursuant to this section or participating in any judicial proceeding resulting therefrom shall be presumed to be acting in good faith. Any person reporting in good faith shall be immune from any civil liability that might otherwise be incurred or imposed.

HISTORY: Laws, 1994, ch. 595, § 11; Laws, 2011, ch. 514, § 2, eff from and after passage (approved Apr. 26, 2011).

Editor's Notes — Laws of 1994, ch. 595, § 10, effective from and after July 1, 1994, provides as follows:

“SECTION 10. Unless otherwise prohibited or restricted by other laws or constitutional provisions of this state, the provisions of Section 97-5-24 shall apply to both public and private schools.”

Cross References — Additional monetary assessment for violation of this section when committed against a minor to be deposited in Mississippi Children's Trust Fund, see § 99-19-75.

JUDICIAL DECISIONS

ANALYSIS

1. Duty not triggered.
2. Applicable standard.

1. Duty not triggered.

Judgment was properly entered for a school district in a case alleging negligence per se and other causes of action because an unsubstantiated rumor of an inappropriate relationship between a teacher and a student, without more, was insufficient to trigger a reporting duty

under Miss. Code Ann. § 97-5-24; Miss. Code Ann. § 43-21-353 did not apply since the teacher was not a person responsible for the student's care or support, and there was no evidence that the type of conduct applicable to § 43-21-353 had occurred. *Brown v. Pontotoc County Sch. Dist.* (In re Doe), 957 So. 2d 410, 2007 Miss. App. LEXIS 337 (Miss. Ct. App. 2007).

2. Applicable standard.

Standard enunciated in *T.M. v. Noblitt*,

650 So. 2d 1340 (Miss. 1995), was applied to a case where a school district did not report a relationship between a teacher and a student; under the “personal judgment and discretion” standard, a trial court did not err in determining that the

district did not know of the relationship between them based on one unsubstantiated rumor. *Brown v. Pontotoc County Sch. Dist.* (In re Doe), 957 So. 2d 410, 2007 Miss. App. LEXIS 337 (Miss. Ct. App. 2007).

RESEARCH REFERENCES

Practice References.

The Prosecution and Defense of Sex Crimes (Matthew Bender).

Sexual Assault Trials, Second Edition (Michie).

§ 97-5-25. Repealed.

Repealed by Laws, 1997, ch. 578, § 16, eff from and after February 1, 1998.

§ 97-5-25. [Codes, 1892, § 1005; 1906, § 1082; Hemingway’s 1917, § 809; 1930, § 829; 1942, § 2055; Laws, 1994, ch. 486, § 8]

Editor’s Notes — Former § 97-5-25 prohibited the sale or gift of tobacco to children. For provisions in effect after February 1, 1998, see Mississippi Juvenile Tobacco Access Prevention Act, § 97-32-1 et seq.

§ 97-5-27. Dissemination of sexually oriented material to persons under eighteen years of age; use of computer for purpose of luring or inducing persons under eighteen years of age to engage in sexual contact.

(1) Any person who intentionally and knowingly disseminates sexually oriented material to any person under eighteen (18) years of age shall be guilty of a misdemeanor and, upon conviction, shall be fined for each offense not less than Five Hundred Dollars (\$500.00) nor more than Five Thousand Dollars (\$5,000.00) or be imprisoned for not more than one (1) year in the county jail, or be punished by both such fine and imprisonment. A person disseminates sexually oriented material within the meaning of this section if he:

(a) Sells, delivers or provides, or offers or agrees to sell, deliver or provide, any sexually oriented writing, picture, record or other representation or embodiment that is sexually oriented; or

(b) Presents or directs a sexually oriented play, dance or other performance or participates directly in that portion thereof which makes it sexually oriented; or

(c) Exhibits, presents, rents, sells, delivers or provides, or offers or agrees to exhibit, present, rent or to provide any sexually oriented still or motion picture, film, filmstrip or projection slide, or sound recording, sound tape or sound track or any matter or material of whatever form which is a representation, embodiment, performance or publication that is sexually oriented.

(2) For purposes of this section, any material is sexually oriented if the material contains representations or descriptions, actual or simulated, of

masturbation, sodomy, excretory functions, lewd exhibition of the genitals or female breasts, sadomasochistic abuse (for the purpose of sexual stimulation or gratification), homosexuality, lesbianism, bestiality, sexual intercourse, or physical contact with a person's clothed or unclothed genitals, pubic area, buttocks, or the breast or breasts of a female for the purpose of sexual stimulation, gratification or perversion.

(3)(a) A person is guilty of computer luring when:

(i) Knowing the character and content of any communication of sexually oriented material, he intentionally uses any computer communication system allowing the input, output, examination or transfer of computer data or computer programs from one (1) computer to another, to initiate or engage in such communication with a person under the age of eighteen (18); and

(ii) By means of such communication he importunes, invites or induces a person under the age of eighteen (18) years to engage in sexual intercourse, deviant sexual intercourse or sexual contact with him, or to engage in a sexual performance, obscene sexual performance or sexual conduct for his benefit.

(b) A person who engages in the conduct proscribed by this subsection (3) is presumed to do so with knowledge of the character and content of the material.

(c) In any prosecution for computer luring, it shall be a defense that:

(i) The defendant made a reasonable effort to ascertain the true age of the minor and was unable to do so as a result of actions taken by the minor; or

(ii) The defendant has taken, in good faith, reasonable, effective and appropriate actions under the circumstances to restrict or prevent access by minors to the materials prohibited, which may involve any appropriate measures to restrict minors from access to such communications, including any method which is feasible under available technology; or

(iii) The defendant has restricted access to such materials by requiring use of a verified credit card, debit account, adult access code or adult personal identification number; or

(iv) The defendant has in good faith established a mechanism such that the labeling, segregation or other mechanism enables such material to be automatically blocked or screened by software or other capabilities reasonably available to responsible adults wishing to effect such blocking or screening and the defendant has not otherwise solicited minors not subject to such screening or blocking capabilities to access that material or to circumvent any such screening or blocking.

(d) In any prosecution for computer luring:

(i) No person shall be held to have violated this subsection (3) solely for providing access or connection to or from a facility, system, or network not under that person's control, including transmission, downloading, intermediate storage, access software or other related capabilities that are incidental to providing such access or connection that do not include the creation of the content of the communication.

(ii) No employer shall be held liable for the actions of an employee or agent unless the employee's or agent's conduct is within the scope of his employment or agency or the employer, having knowledge of such conduct, authorizes or ratifies such conduct, or recklessly disregards such conduct.

(iii) The limitations provided by this paragraph (d) shall not be applicable to a person who is a conspirator with an entity actively involved in the creation or knowing distribution of communications that violate such provisions, or who knowingly advertises the availability of such communications, nor to a person who provides access or connection to a facility, system or network engaged in the violation of such provisions that is owned or controlled by such person.

(e) Computer luring is a felony, and any person convicted thereof shall be punished by commitment to the custody of the Department of Corrections for a term not to exceed three (3) years and by a fine not to exceed Ten Thousand Dollars (\$10,000.00).

(4) Investigation and prosecution of a defendant under this section does not preclude prosecution of the defendant for a violation of other applicable criminal laws, including, but not limited to, the Mississippi Human Trafficking Act, Section 97-3-54 et seq.

HISTORY: Laws, 1979, ch. 475, § 1; Laws, 2002, ch. 319, § 1; Laws, 2013, ch. 543, § 16, eff from and after July 1, 2013.

Cross References — Notification of Department of Education that certificated person has been convicted of sex offense, see § 37-3-51.

Carnal knowledge of step or adopted child or child of cohabitating partner, see § 97-5-41.

Effect of prior conviction for violation of this section on penalty for violation of § 97-29-101 or § 97-29-103, see § 97-29-109.

Additional monetary assessment for violation of this section when committed against a minor to be deposited in Mississippi Children's Trust Fund, see § 99-19-75.

Testing for HIV and AIDS of any person convicted under this section, see §§ 99-19-201 and 99-19-203.

Imposition of standard state assessment in addition to all court imposed fines or other penalties for any misdemeanor violation, see § 99-19-73.

JUDICIAL DECISIONS

1. Jury instructions.

Trial court did not abuse its discretion by refusing defendant's proposed jury instruction regarding computer luring because the elements of computer luring and the charged crime of exploitation of a child were practically identical and defendant could not be found guilty of the lesser offense computer luring and exploitation

of a child. Further, no reasonable juror could find defendant not guilty of exploitation and then under the same proof and same elements find him guilty of computer luring. *Jackson v. State*, 299 So. 3d 823, 2020 Miss. App. LEXIS 5 (Miss. Ct. App.), cert. denied, 300 So. 3d 43, 2020 Miss. LEXIS 303 (Miss. 2020).

RESEARCH REFERENCES

ALR.

Applicability of criminal statutes relating to offenses against children of a specified age with respect to a child who as passed the anniversary date of such age. 73 A.L.R.2d 874.

Validity, construction, and effect of statutes or ordinances prohibiting the sale of obscene materials to minors. 93 A.L.R.3d 297. Validity and application of statute exempting nonmanagerial nonfinancially

interested employees from obscenity prosecution. 35 A.L.R.4th 1237.

Obscenity prosecutions: statutory exemption based on dissemination to persons or entities having scientific, educational, or similar justification for possession of such materials. 13 A.L.R.5th 567.

Am. Jur.

50 Am. Jur. 2d, Lewdness, Indecency, and Obscenity, § 30.

§ 97-5-29. Public display of sexually oriented materials.

(1) Any person who intentionally and knowingly places sexually oriented materials upon public display, or who knowingly and intentionally fails to take prompt action to remove such a display from property in his possession after learning of its existence shall be guilty of a misdemeanor and upon conviction shall be fined for each offense not less than Five Hundred Dollars (\$500.00) nor more than Five Thousand Dollars (\$5,000.00) or be imprisoned for not more than one (1) year in the county jail, or be punished by both such fine and imprisonment.

(2) For purposes of this section any material is sexually oriented if the material consists of representations or descriptions of actual or simulated masturbation, sodomy, excretory functions, lewd exhibition of the genitals or female breasts, sadomasochistic abuse (for the purpose of sexual stimulation or gratification), homosexuality, lesbianism, bestiality, sexual intercourse or physical contact with a person's clothed or unclothed genitals, pubic area, buttocks or the breast or breasts of a female for the purpose of sexual stimulation, gratification or perversion.

(3) A person places sexually oriented material upon public display within the meaning of this section if he places the material on or in a billboard, viewing screen, theater stage or marquee, newsstand, display rack, window, showcase, display case or other similar place, including a viewing screen in a vehicle, so that sexually oriented material is easily visible from a public street, public road or sidewalk or from areas of public businesses in which minors are normally business invitees.

HISTORY: Laws, 1979, ch. 475, § 2; Laws, 2005, ch. 491, § 4, eff from and after July 1, 2005.

Cross References — Carnal knowledge of step or adopted child or child of cohabitating partner, see § 97-5-41.

Effect of prior conviction for violation of this section on penalty for violation of § 97-29-101 or § 97-29-103, see § 97-29-109.

Imposition of standard state assessment in addition to all court imposed fines or other penalties for any misdemeanor violation, see § 99-19-73.

Additional monetary assessment for violation of this section when committed against a minor to be deposited in Mississippi Children's Trust Fund, see § 99-19-75.

OPINIONS OF THE ATTORNEY GENERAL

Playing sexually oriented material on an electronic media device in an automobile where the viewing screen is easily visible to individuals on the public street,

road or sidewalk would be a violation of this section. Pepper, May 28, 2004, A.G. Op. 04-0234.

RESEARCH REFERENCES

ALR.

Applicability of criminal statutes relating of offenses against children of a specified age with respect to a child who has passed the anniversary date of such age. 73 A.L.R.2d 874.

Validity and application of statute exempting nonmanagerial nonfinancially in-

terested employees from obscenity prosecution. 35 A.L.R.4th 1237.

Musical sound recording as punishable obscenity. 30 A.L.R.5th 718.

Am. Jur.

50 Am. Jur. 2d, Lewdness, Indecency, and Obscenity §§ 1, 2, 16.

§ 97-5-31. Exploitation of children; definitions.

As used in Sections 97-5-33 through 97-5-37, the following words and phrases shall have the meanings given to them in this section:

(a) "Child" means any individual who has not attained the age of eighteen (18) years.

(b) "Sexually explicit conduct" means actual or simulated:

(i) Oral genital contact, oral anal contact, or sexual intercourse, as defined in Section 97-3-65, whether between persons of the same or opposite sex;

(ii) Bestiality;

(iii) Masturbation;

(iv) Sadistic or masochistic abuse;

(v) Lascivious exhibition of the genitals or pubic area of any person;

or

(vi) Fondling or other erotic touching of the genitals, pubic area, buttocks, anus or breast.

(c) "Producing" means producing, directing, manufacturing, issuing, publishing or advertising.

(d) "Visual depiction" includes, without limitation, developed or undeveloped film and video tape or other visual unaltered reproductions by computer.

(e) "Computer" has the meaning given in Title 18, United States Code, Section 1030.

(f) "Simulated" means any depicting of the genitals or rectal areas that gives the appearance of sexual conduct or incipient sexual conduct.

HISTORY: Laws, 1979, ch. 479, § 1; Laws, 1995, ch. 484, § 1; Laws, 2003, ch. 562, § 1; Laws, 2013, ch. 543, § 17, eff from and after July 1, 2013.

Cross References — Carnal knowledge of step or adopted child or child of

cohabitating partner, see § 97-5-41.

Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see § 97-43-1 et seq.

Crime of cyberstalking, see § 97-45-15.

Additional monetary assessment for violation of this section when committed against a minor to be deposited in Mississippi Children's Trust Fund, see § 99-19-75.

JUDICIAL DECISIONS

ANALYSIS

1. Evidence.
2. "Sexually explicit conduct."

1. Evidence.

Evidence was sufficient to support defendant's conviction of exploitation of a child where the investigator who seized defendant's cell phone verified that it contained sexually explicit photographs of the 15-year-old victim and the victim identified the phone as belonging to defendant and the photographs as the ones he had taken of her as he was sexually assaulting her. *Moore v. State*, 160 So. 3d 728, 2015 Miss. App. LEXIS 182 (Miss. Ct. App. 2015).

Jury was justified in its finding that the images it viewed depicted "sexually explicit conduct" because one tape showed numerous close-ups of only the genitals of

young boys, which was the only focal point; another tape also showed children's genitals in almost every depiction and from numerous angles. *Hood v. State*, 17 So. 3d 548, 2009 Miss. LEXIS 379 (Miss. 2009).

2. "Sexually explicit conduct."

On review of defendant's conviction of the exploitation of children based upon his possession of a videotape depicting nude male children and showing closeups of their genitals, the court rejected defendant's argument that his conviction could not stand because the children were not engaged in sexually explicit conduct and held that the jury properly concluded that the children were engaged in sexually explicit behavior because the depictions were designed to elicit a sexual response in the viewer. *Hood v. State*, 17 So. 3d 548, 2009 Miss. LEXIS 379 (Miss. 2009).

RESEARCH REFERENCES

ALR.

Sexual child abuser's civil liability to child's parent. 54 A.L.R.4th 93.

view: *Criminal Law and Procedure*. 50 Miss. L. J. 763, December, 1979.

Law Reviews.

1979 Mississippi Supreme Court Re-

§ 97-5-33. Exploitation of children; prohibitions.

(1) No person shall, by any means including computer, cause, solicit or knowingly permit any child to engage in sexually explicit conduct or in the simulation of sexually explicit conduct for the purpose of producing any visual depiction of such conduct.

(2) No person shall, by any means including computer, photograph, film, video tape or otherwise depict or record a child engaging in sexually explicit conduct or in the simulation of sexually explicit conduct.

(3) No person shall, by any means including computer, knowingly send, transport, transmit, ship, mail or receive any photograph, drawing, sketch,

film, video tape or other visual depiction of an actual child engaging in sexually explicit conduct.

(4) No person shall, by any means including computer, receive with intent to distribute, distribute for sale, sell or attempt to sell in any manner any photograph, drawing, sketch, film, video tape or other visual depiction of an actual child engaging in sexually explicit conduct.

(5) No person shall, by any means including computer, knowingly possess or knowingly access with intent to view any photograph, drawing, sketch, film, video tape or other visual depiction of an actual child engaging in sexually explicit conduct.

(6) No person shall, by any means including computer, knowingly entice, induce, persuade, seduce, solicit, advise, coerce, or order a child to meet with the defendant or any other person for the purpose of engaging in sexually explicit conduct.

(7) No person shall by any means, including computer, knowingly entice, induce, persuade, seduce, solicit, advise, coerce or order a child to produce any visual depiction of adult sexual conduct or any sexually explicit conduct.

(8) The fact that an undercover operative or law enforcement officer posed as a child or was involved in any other manner in the detection and investigation of an offense under this section shall not constitute a defense to a prosecution under this section.

(9) For purposes of determining jurisdiction, the offense is committed in this state if all or part of the conduct described in this section occurs in the State of Mississippi or if the transmission that constitutes the offense either originates in this state or is received in this state.

HISTORY: Laws, 1979, ch. 479, § 2; Laws, 1988, ch. 558; Laws, 1995, ch. 484, § 2; Laws, 2003, ch. 562, § 2; Laws, 2005, ch. 467, § 1; Laws, 2005, ch. 491, § 1; Laws, 2007, ch. 376, § 1; Laws, 2013, ch. 412, § 1, eff from and after July 1, 2013.

Joint Legislative Committee Note — Section 1 of ch. 467 Laws, 2005, effective July 1, 2005 (approved March 29, 2005), amended this section. Section 1 of ch. 491, Laws, 2005, effective July 1, 2005 (approved April 19, 2005), also amended this section. As set out above, this section reflects the language of Section 1 of ch. 491, Laws, 2005, pursuant to Section 1-3-79 which provides that whenever the same section of law is amended by different bills during the same legislative session, and the effective dates of the amendments are the same, the amendment with the latest approval date shall supersede all other amendments to the same section approved on an earlier date.

Cross References — Notification of Department of Education that certificated person has been convicted of sex offense, see § 37-3-51.

Exploitation of child, as provided in this section, defined as crime of violence, see § 97-3-2.

Carnal knowledge of step or adopted child or child of cohabitating partner, see § 97-5-41.

Mandatory reporting of offense under this section relating to exploitation of children when committed by an adult against a minor under the age of sixteen, see § 97-5-51.

Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see § 97-43-1 et seq.

Time limitation on prosecution, see § 99-1-5.

Additional monetary assessment for violation of this section when committed against

a minor to be deposited in Mississippi Children's Trust Fund, see § 99-19-75.

Testing for HIV and AIDS of any person convicted under this section, see §§ 99-19-201 and 99-19-203.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Testimony.
3. Evidence.
4. Cross examination.
5. Mens rea.
6. Closing arguments.
7. Jury instructions.
8. Sentence.

1. In general.

Trial court properly considered the appropriate factors before denying defendant's motion to sever the two counts of the indictment; even in separate trials, the evidence would be admissible to prove the other count. *Donaldson v. State*, 262 So. 3d 1135, 2018 Miss. App. LEXIS 303 (Miss. Ct. App. 2018), cert. denied, 260 So. 3d 800, 2019 Miss. LEXIS 59 (Miss. 2019).

Trial court did not err in granting the State's motion to amend the indictment charging defendant with exploitation of a minor by possessing child pornography because the defense defendant had prior to the amendment was not diminished by the amendment; the fact that defendant performed multiple searches for child pornography and persisted in the behavior over time and accessed many images would have been competent, admissible evidence to show lack of mistake. *Travelstead v. State*, 232 So. 3d 752, 2017 Miss. App. LEXIS 323 (Miss. Ct. App. 2017).

No plain error existed as to defendant's arguments concerning jury instructions where the jury was instructed on all of the essential elements of the crime of child exploitation by three jury instructions tracking the language of Miss. Code Ann. § 97-5-33(2); although one instruction was erroneously given, no injustice occurred as the jury instructions, when read as a whole, fairly announced the law of the case and did not create an injustice. *Blackwell v. State*, 915 So. 2d 453, 2005 Miss. App. LEXIS 193 (Miss. Ct. App.), cert. denied, 921 So. 2d 1279, 2005 Miss. LEXIS 777 (Miss. 2005).

Producers of child pornography may be convicted under Federal Protection of Children Against Sexual Exploitation Act of 1977, which prohibits interstate transportation, shipment, distribution, receipt, or reproduction of visual depictions of minors engaged in sexually explicit conduct, without proof that producers had actual knowledge of fact that performer was a minor. *United States v. X-Citement Video*, 513 U.S. 64, 115 S. Ct. 464, 130 L. Ed. 2d 372, 1994 U.S. LEXIS 8601 (U.S. 1994).

State was permitted under First Amendment to ban possession and viewing of child pornography because state did not rely on paternalistic interest in regulating person's mind but sought to serve compelling state interest in protecting victims of child pornography, and it was reasonable for state to conclude that such proscriptions were necessary to decrease production of child pornography; statute as construed by state Supreme Court to include elements of scienter and lewd exhibition was not constitutionally overboard, and state Supreme Court properly applied its narrowed construction of statute to accused's conduct; but it was necessary to remand case for new trial to insure that conviction stemmed from finding that prosecution had proved each of elements of offense. *Osborne v. Ohio*, 495 U.S. 103, 110 S. Ct. 1691, 109 L. Ed. 2d 98, 1990 U.S. LEXIS 2036 (U.S. 1990).

2. Testimony.

Defendant's argument that since the victim was the actual procurer of the obscene photographs, his conviction under Miss. Code Ann. § 97-5-33(2) was improper, and was procedurally barred, Miss. R. App. P. 28(a)(6), because defendant's only source of authority was an opinion supporting nothing other than the assertion that he was convicted under an anti-pornography law. *Minor v. State*, 904 So. 2d 1164, 2004 Miss. App. LEXIS 1037 (Miss. Ct. App. 2004).

3. Evidence.

Circuit court did not err by denying defendant's motion for new trial because the verdict against defendant does not sanction an unconscionable injustice, as defendant presented no proof that the victim manipulated the screen shots by deleting some of defendant's and the victim's messages and the undeleted messages from defendant to the victim, offering the victim up to \$275 to receive oral sex, clearly showed that defendant was in violation of this section. *Jackson v. State*, 299 So. 3d 823, 2020 Miss. App. LEXIS 5 (Miss. Ct. App.), cert. denied, 300 So. 3d 43, 2020 Miss. LEXIS 303 (Miss. 2020).

Evidence was sufficient to support defendant's conviction of five counts of exploitation of a child for possession of child pornography because it showed that five videos depicting child pornography were recovered from defendant's laptop, his girlfriend and her daughter testified that defendant was the owner of the laptop and that he accessed it using a particular account that he told them not to use, the daughter testified that defendant had taken the laptop to work, and the day some of the videos were purportedly downloaded defendant had clocked in to work and was unsupervised. *Lowe v. State*, 269 So. 3d 244, 2018 Miss. App. LEXIS 141 (Miss. Ct. App.), cert. denied, 258 So. 3d 285, 2018 Miss. LEXIS 521 (Miss. 2018), cert. denied, — So. 3d —, 2018 Miss. LEXIS 510 (Miss. 2018), cert. denied, — U.S. —, 139 S. Ct. 1639, 203 L. Ed. 2d 914, 2019 U.S. LEXIS 3074 (U.S. 2019).

Trial court did not err by denying defendant's motion to dismiss on the basis that the State's expert witness was unable to provide how the child pornography got onto defendant's laptop or where it originated because this section did not require the State to show how a defendant came to possess child pornography or where it originated. *Lowe v. State*, 269 So. 3d 244, 2018 Miss. App. LEXIS 141 (Miss. Ct. App.), cert. denied, 258 So. 3d 285, 2018 Miss. LEXIS 521 (Miss. 2018), cert. denied, — So. 3d —, 2018 Miss. LEXIS 510 (Miss. 2018), cert. denied, — U.S. —, 139 S. Ct. 1639, 203 L. Ed. 2d 914, 2019 U.S. LEXIS 3074 (U.S. 2019).

Defendant's conviction of possession of child pornography was affirmed; a person using a specific internet protocol (IP) address downloaded a large number of suspected child pornography files, the IP address was assigned to defendant, a forensic examination of his laptop found a total of 157 child pornography videos and 16 child pornography images, and child pornography files were accessed while investigators conducted surveillance of defendant's house and he was the only person inside. *Donaldson v. State*, 262 So. 3d 1135, 2018 Miss. App. LEXIS 303 (Miss. Ct. App. 2018), cert. denied, 260 So. 3d 800, 2019 Miss. LEXIS 59 (Miss. 2019).

Trial court did not err in granting the motion in limine and determining that the warrant issuing judge's testimony had no relevance to defendant's investigation for possession of child pornography; while defense counsel claimed the judge's testimony would prove motive against defendant, the investigation was initiated solely by the Cyber Crime Unit and no one talked to law enforcement, judges, or the district attorney's office about the investigation before the search warrant was obtained and executed. *Donaldson v. State*, 262 So. 3d 1135, 2018 Miss. App. LEXIS 303 (Miss. Ct. App. 2018), cert. denied, 260 So. 3d 800, 2019 Miss. LEXIS 59 (Miss. 2019).

Despite not being allowed to show the investigator an example from his laptop and software, defendant was still able to cross-examine the investigator regarding the date that the internet protocol address of the subject laptop was assigned to defendant, and there was no error in this regard. *Donaldson v. State*, 262 So. 3d 1135, 2018 Miss. App. LEXIS 303 (Miss. Ct. App. 2018), cert. denied, 260 So. 3d 800, 2019 Miss. LEXIS 59 (Miss. 2019).

Defendant questioned the investigators regarding the documents in question and was not deprived of a meaningful opportunity to present his defense. *Donaldson v. State*, 262 So. 3d 1135, 2018 Miss. App. LEXIS 303 (Miss. Ct. App. 2018), cert. denied, 260 So. 3d 800, 2019 Miss. LEXIS 59 (Miss. 2019).

Because documents were cumulative to the files defendant had already presented, the trial court did not abuse its discretion

in excluding the documents. *Donaldson v. State*, 262 So. 3d 1135, 2018 Miss. App. LEXIS 303 (Miss. Ct. App. 2018), cert. denied, 260 So. 3d 800, 2019 Miss. LEXIS 59 (Miss. 2019).

Evidence that a photograph of the victim depicted only an erect penis, which was sexually suggestive, fully nude, and likely intended to elicit a sexual response from the viewer constituted sexually explicit conduct sufficient to support defendant's conviction for enticing a child to produce a visual depiction of sexually explicit conduct. *Strickland v. State*, 220 So. 3d 1027, 2016 Miss. App. LEXIS 453 (Miss. Ct. App. 2016), cert. denied, 220 So. 3d 980, 2017 Miss. LEXIS 274 (Miss. 2017).

In prosecution of defendant for exploitation of a child, defendant was procedurally barred from arguing that the trial court abused its discretion by admitting social media and text messages into evidence that the State failed to properly authenticate, as defendant failed to object to the items' admission at trial. Notwithstanding the bar, defendant's contentions were meritless. *Boyd v. State*, 175 So. 3d 1, 2015 Miss. LEXIS 204 (Miss. 2015).

Trial court did not abuse its discretion by denying defendant's motion to sever the sexual battery count from the child exploitation count where both charges were based on the same act or transaction, namely defendant's sexual assault of the victim that he photographed. *Moore v. State*, 160 So. 3d 728, 2015 Miss. App. LEXIS 182 (Miss. Ct. App. 2015).

Evidence was sufficient to support defendant's conviction of exploitation of a child where the investigator who seized defendant's cell phone verified that it contained sexually explicit photographs of the 15-year-old victim and the victim identified the phone as belonging to defendant and the photographs as the ones he had taken of her as he was sexually assaulting her. *Moore v. State*, 160 So. 3d 728, 2015 Miss. App. LEXIS 182 (Miss. Ct. App. 2015).

Evidence was sufficient to convict defendant of violating Miss. Code Ann. § 97-5-33(6) because the child victim identified defendant and testified that defendant approached him and asked to perform a

sexual act upon him, and the mother's testimony of the events related to her by the child and their subsequent actions was properly admitted as non-hearsay or as a hearsay exception under Miss. R. Evid. 803(1). *Dunn v. State*, 111 So. 3d 114, 2013 Miss. App. LEXIS 181 (Miss. Ct. App. 2013).

Sufficient evidence supported defendant's conviction for enticement of a child for sexual purposes, Miss. Code Ann. § 97-5-33(6), even though an overt request for sexual activity was not made in defendant's letter to the victim, because a jury could find that a request by a middle aged man to "visit" with an underage boy in a hotel room, against his parents' wishes, satisfactorily met the elements of the crime charged. *Westbrook v. State*, 109 So. 3d 609, 2013 Miss. App. LEXIS 117 (Miss. Ct. App. 2013).

Evidence was sufficient to support defendant's child-exploitation conviction, under Miss. Code Ann. § 97-5-33(6), because the jury could have reasonably inferred that defendant was trying to entice or solicit a minor child to meet defendant to engage in sexually explicit activity in that, at trial, defendant admitted to sending a series of late-night text messages to the minor child of defendant's paramour expressing defendant's sexual attraction to the child and that defendant wanted to touch the child's behind. Defendant was inside the young child's residence, just down the hall from the child's bedroom, when defendant sent these messages. *Harris v. State*, 107 So. 3d 1075, 2013 Miss. App. LEXIS 72 (Miss. Ct. App. 2013).

Defendant's conviction for the possession of child pornography in violation of Miss. Code Ann. § 97-5-33(5) was appropriate because there was no evidence that any of the computer viruses or other programs that defendant's computer expert described as being on defendant's computer actually transferred any of the images of child pornography. Further, that expert's testimony was in stark contrast to other testimony stating that viruses or "Trojan" programs were not responsible for placing the pornographic images of children onto defendant's computer. *Renfrow v. State*, 34 So. 3d 617, 2009 Miss.

App. LEXIS 775 (Miss. Ct. App. 2009), cert. dismissed, 31 So. 3d 1217, 2010 Miss. LEXIS 213 (Miss. 2010).

On review of defendant's conviction of the exploitation of children based upon his possession of a videotape depicting nude male children and showing closeups of their genitals, the court rejected defendant's argument that his conviction could not stand because the children were not engaged in sexually explicit conduct and held that the jury properly concluded that the children were engaged in sexually explicit behavior because the depictions were designed to elicit a sexual response in the viewer. *Hood v. State*, 17 So. 3d 548, 2009 Miss. LEXIS 379 (Miss. 2009).

Where defendant testified that he received images of child pornography via an email, admitted that he created a folder in his computer, and placed fourteen images in that folder, there was direct evidence that he possessed child pornography; he was not entitled to a jury instruction on circumstantial evidence. The evidence was sufficient to support his conviction for fourteen counts of the exploitation of children in violation of Miss. Code Ann. § 97-5-33(5). *Argo v. State*, 13 So. 3d 849, 2009 Miss. App. LEXIS 447 (Miss. Ct. App. 2009).

There was no factual basis for defendant's guilty plea to exploitation of a child under Miss. Code Ann. § 97-5-33(2); while defendant admitted to positioning a blanket that was covering the child and taking pictures of the child's clothed buttocks while the child slept, the child did not engage in lascivious conduct. *Carreiro v. State*, 5 So. 3d 1170, 2009 Miss. App. LEXIS 165 (Miss. Ct. App. 2009).

Where defendant was convicted of felonious sexual intercourse with a child under the age of 14, felonious sexual penetration with a child less than 18, and possession of materials depicting children under the age of 18 engaging in sexually explicit conduct, the circuit had not erred in not granting his pretrial motion to suppress evidence obtained by a search warrant based on the statements of the child victim, because she specifically stated that defendant had showed her pictures of nude people on his computer screen doing things she described as

"gross." She used language to describe acts performed on her and by her in relation to defendant in such sexually explicit terms that veracity could easily be inferred. *Foley v. State*, 914 So. 2d 677, 2005 Miss. LEXIS 586 (Miss. 2005).

4. Cross examination.

Where the purported purpose of the prosecution's question to defendant's father was to impeach the credibility of the witness using a prior inconsistent statement made by defendant, the circuit court sustained the objection but denied a mistrial because it determined that the statements would not affect the ultimate issue of the case and could be removed from the minds of the jury by a verbal instruction to disregard. *Foley v. State*, 914 So. 2d 677, 2005 Miss. LEXIS 586 (Miss. 2005).

5. Mens rea.

In a case in which defendant was convicted of exploitation of a child, defendant's motion for post-conviction relief was properly denied because, although, at the time of his indictment and conviction, the former version of this statute lacked the element of scienter, the indictment read that defendant willfully possessed visual depictions of actual children, under the age of 18 years, engaging in sexually explicit conduct; and defendant admitted to knowingly possessing child pornography. *Ishee v. State*, 248 So. 3d 841, 2017 Miss. App. LEXIS 650 (Miss. Ct. App. 2017), cert. denied, 247 So. 3d 1265, 2018 Miss. LEXIS 305 (Miss. 2018), cert. denied, — U.S. —, 139 S. Ct. 580, 202 L. Ed. 2d 406, 2018 U.S. LEXIS 6839 (U.S. 2018).

Defendant's conviction for the possession of child pornography was appropriate because the State charged him with willful possession of child pornography and the indictment contained language that included an allegation that defendant willfully possessed child pornography; by including that language, the State imposed a mens rea requirement, and it was obligated to prove that aspect of the charge beyond a reasonable doubt. Consequently, it was irrelevant that Miss. Code Ann. § 97-5-33(5) did not include a mens rea element. *Renfrow v. State*, 34 So. 3d

617, 2009 Miss. App. LEXIS 775 (Miss. Ct. App. 2009), cert. dismissed, 31 So. 3d 1217, 2010 Miss. LEXIS 213 (Miss. 2010).

6. Closing arguments.

In a case in which defendant was convicted of enticing a child for sexual purposes, defense counsel's discontinuance of his reasonable doubt argument was not trial court error but rather a choice on the part of defense counsel; even assuming that the trial court impermissibly prohibited defense counsel's reasonable doubt argument, the error was harmless because of the overwhelming evidence of defendant's guilt. *Delashmit v. State*, 991 So. 2d 1215, 2008 Miss. LEXIS 501 (Miss. 2008).

Where one of defendant's primary defenses was the possibility that someone else had placed the pornographic images on his computer, trial court did not err in denying a mistrial because of comments made by the prosecutor concerning the failure of the defense to call a witness; there was overwhelming evidence, including testimony by a number of witnesses and the actual presence of pornographic images on defendant's computer. *Foley v. State*, 914 So. 2d 677, 2005 Miss. LEXIS 586 (Miss. 2005).

Statements by the prosecutor during cross-examination of a witness and during his closing statements did not warrant a mistrial because the remark had not created negative inferences based upon defendant's choice to exercise his right not to testify. It was clear from the context of the sentences that the prosecutor was referring to the attorneys and not defendant. *Foley v. State*, 914 So. 2d 677, 2005 Miss. LEXIS 586 (Miss. 2005).

7. Jury instructions.

Trial court did not abuse its discretion by refusing defendant's proposed jury instruction regarding computer luring because the elements of computer luring and the charged crime of exploitation of a child were practically identical and defendant could not be found guilty of the lesser offense computer luring and exploitation of a child. Further, no reasonable juror could find defendant not guilty of exploitation and then under the same proof and

same elements find him guilty of computer luring. *Jackson v. State*, 299 So. 3d 823, 2020 Miss. App. LEXIS 5 (Miss. Ct. App.), cert. denied, 300 So. 3d 43, 2020 Miss. LEXIS 303 (Miss. 2020).

Essential element of the crime of possession of child pornography was not altered by the language of the indictment because requiring the trial court to add the phrase "via the internet" to the jury instructions would have required the jury to find beyond what this section provided. *Lowe v. State*, 269 So. 3d 244, 2018 Miss. App. LEXIS 141 (Miss. Ct. App.), cert. denied, 258 So. 3d 285, 2018 Miss. LEXIS 521 (Miss. 2018), cert. denied, — So. 3d —, 2018 Miss. LEXIS 510 (Miss. 2018), cert. denied, — U.S. —, 139 S. Ct. 1639, 203 L. Ed. 2d 914, 2019 U.S. LEXIS 3074 (U.S. 2019).

Trial court did not abuse its discretion in denying defendant's request for a circumstantial evidence instruction, given that the evidence established that someone accessed child pornography on defendant's computer on the morning the search warrant was executed, defendant was alone in his house at the time the child pornography was accessed, the jury saw the video of the minor victim using the bathroom, which showed defendant setting up the computer before she entered, and then showed defendant entering the bathroom again after the victim exited. *Donaldson v. State*, 262 So. 3d 1135, 2018 Miss. App. LEXIS 303 (Miss. Ct. App. 2018), cert. denied, 260 So. 3d 800, 2019 Miss. LEXIS 59 (Miss. 2019).

Defendant was not entitled to a two-theory circumstantial jury instruction; the State presented the video that showed defendant in possession of the laptop just before recording the minor victim, and there was also evidence that defendant was alone at the house at the time child pornography was accessed on his computer. *Donaldson v. State*, 262 So. 3d 1135, 2018 Miss. App. LEXIS 303 (Miss. Ct. App. 2018), cert. denied, 260 So. 3d 800, 2019 Miss. LEXIS 59 (Miss. 2019).

Trial court reversibly erred by failing to instruct the jury on the element of venue where while there was some proof of venue elicited during the trial, the jury was never instructed that it had to find

that the crimes occurred in the county. *Chesney v. State*, 165 So. 3d 498, 2015 Miss. App. LEXIS 277 (Miss. Ct. App. 2015).

In a case in which defendant was convicted of enticing a child for sexual purposes, defendant was not entitled to a lesser included offense instruction on misdemeanor indecent exposure; based on the overwhelming evidence, no reasonable jury could have found defendant not guilty of any element of the principal charge. *Delashmit v. State*, 991 So. 2d 1215, 2008 Miss. LEXIS 501 (Miss. 2008).

Circuit had not erred in not giving defendant's proposed instructions that dealt with instructing the jury on circumstantial evidence because the child rape victim's statements about being shown pornography were introduced through the testimony of doctors who examined her and the child was, of course, an eyewitness to the pornography, and that direct evidence alone allowed the jury to be given direct evidence instructions only. *Foley v. State*, 914 So. 2d 677, 2005 Miss. LEXIS 586 (Miss. 2005).

8. Sentence.

In a 28 U.S.C.S. § 2254 proceeding in

which the inmate asserted that his appellate counsel was ineffective for failing to raise the proportionality of his sentence on appeal; his 25-year sentence for violating Miss. Code § 97-5-33 was within the statutory range of five to 40 years set forth in Miss. Code § 97-5-35. *Shaffer v. Mississippi*, — F. Supp. 3d —, 2015 U.S. Dist. LEXIS 159275 (S.D. Miss. Nov. 25, 2015).

Appellant's sentences for the sexual exploitation of a minor in violation of Miss. Code Ann. § 97-5-33(6) and fondling in violation of Miss. Code Ann. § 97-5-23(2) were within the limits prescribed by the statutes; appellant faced up to eighty-five years in prison, and the circuit court sentenced him to the maximum sentence on all charges but required the sentences to run concurrently, effectively reducing appellant's sentence by forty-five years. *Argol v. State*, 155 So. 3d 848, 2013 Miss. App. LEXIS 143 (Miss. Ct. App. 2013), cert. denied, 131 So. 3d 577, 2014 Miss. LEXIS 59 (Miss. 2014), cert. denied, 131 So. 3d 577, 2014 Miss. LEXIS 60 (Miss. 2014).

OPINIONS OF THE ATTORNEY GENERAL

Defendant charged with exploitation of children under subsection (2) of this section is not eligible for non-adjudication

under § 99-15-26. *Terry*, Sept. 5, 2003, A.G. Op. 03-0450.

RESEARCH REFERENCES

ALR.

Validity, construction, and application of statutes or ordinances regulating sexual performance by child. 21 A.L.R.4th 239.

Propriety of civil or criminal forfeiture of computer hardware or software. 39 A.L.R.5th 87.

Validity, construction, and application of state statutes or ordinances regulating sexual performance by child. 42 A.L.R.5th 291.

Am. Jur.

50 Am. Jur. 2d, Lewdness, Indecency, and Obscenity §§ 28 et seq.

10 Am. Jur. Trials, Obscenity Litigation §§ 1 et seq.

CJS.

67 C.J.S. Obscenity § 2.

Law Reviews.

1979 Mississippi Supreme Court Review: Criminal Law and Procedure. 50 Miss. L. J. 763, December, 1979.

§ 97-5-35. Exploitation of children; penalties.

Any person who violates any provision of Section 97-5-33 shall be guilty of a felony and upon conviction shall be fined not less than Fifty Thousand Dollars (\$50,000.00) nor more than Five Hundred Thousand Dollars (\$500,000.00) and shall be imprisoned for not less than five (5) years nor more than forty (40) years. Any person convicted of a second or subsequent violation of Section 97-5-33 shall be fined not less than One Hundred Thousand Dollars (\$100,000.00) nor more than One Million Dollars (\$1,000,000.00) and shall be confined in the custody of the Department of Corrections for life or such lesser term as the court may determine, but not less than twenty (20) years.

HISTORY: Laws, 1979, ch. 479, § 3; Laws, 1995, ch. 484, § 3; Laws, 2003, ch. 562, § 3; Laws, 2005, ch. 467, § 2; Laws, 2005, ch. 491, § 2, eff from and after July 1, 2005.

Joint Legislative Committee Note — Section 2 of ch. 467 Laws, 2005, effective July 1, 2005 (approved March 29, 2005), amended this section. Section 2 of ch. 491, Laws, 2005, effective July 1, 2005 (approved April 19, 2005), also amended this section. As set out above, this section reflects the language of Section 2 of ch. 491, Laws, 2005, pursuant to Section 1-3-79 which provides that whenever the same section of law is amended by different bills during the same legislative session, and the effective dates of the amendments are the same, the amendment with the latest approval date shall supersede all other amendments to the same section approved on an earlier date.

Cross References — Applicability of certain evidentiary rules in criminal prosecutions for child abuse, see § 13-1-401.

Prohibition of person convicted of crimes affecting children or other violent crimes from being licensed as foster parent or a foster home, see § 43-15-6.

Imposition and collection of separate laboratory analysis fee in addition to any other assessments and costs imposed by statute on every individual convicted of a felony in a case where Crime Laboratory provided forensic science or laboratory services in connection with the case, see § 45-1-29.

Carnal knowledge of step or adopted child or child of cohabitating partner, see § 97-5-41.

Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see § 97-43-1 et seq.

Imposition of standard state assessment in addition to all court imposed fines or other penalties for any felony violation, see § 99-19-73.

Additional monetary assessment for violation of this section when committed against a minor to be deposited in Mississippi Children's Trust Fund, see § 99-19-75.

Federal Aspects — Victims of Child Abuse Act of 1990, P. L. 101-647 §§ 201 et seq., 34 USCS 20301 et seq.

JUDICIAL DECISIONS

1. Sentence.

In a 28 U.S.C.S. § 2254 proceeding in which the inmate asserted that his appellate counsel was ineffective for failing to raise the proportionality of his sentence on appeal; his 25-year sentence for violating Miss. Code § 97-5-33 was within the statutory range of five to 40 years set forth

in Miss. Code § 97-5-35. *Shaffer v. Mississippi*, — F. Supp. 3d —, 2015 U.S. Dist. LEXIS 159275 (S.D. Miss. Nov. 25, 2015).

In a child exploitation case, the trial court did not abuse its discretion in imposing a 40-year sentence, even though defendant was 61 years old at the time of sentencing. *Triplett v. State*, 207 So. 3d

1288, 2016 Miss. App. LEXIS 496 (Miss. Ct. App. 2016).

RESEARCH REFERENCES

Am. Jur.

50 Am. Jur. 2d, Lewdness, Indecency, and Obscenity §§ 28 et seq.

10 Am. Jur. Trials, Obscenity Litigation §§ 1 et seq.

CJS.

67 C.J.S. Obscenity § 2.

Law Reviews.

1979 Mississippi Supreme Court Review: Criminal Law and Procedure. 50 Miss. L. J. 763, December, 1979.

§ 97-5-37. Exploitation of children; other remedies.

The provisions of Sections 97-5-31 through 97-5-37 are supplemental to any statute relating to child abuse or neglect, obscenity, enticement of children or contributing to delinquency of a minor and acquittal or conviction pursuant to any other statute shall not be a bar to prosecution under Sections 97-5-31 through 97-5-37. Acquittal or conviction under Sections 97-5-31 through 97-5-37 shall not be a bar to prosecution and conviction under other statutes defining crimes or misdemeanors, nor to any civil or administrative remedy otherwise available.

HISTORY: Laws, 1979, ch. 479, § 4, eff from and after July 1, 1979.

Cross References — Carnal knowledge of step or adopted child or child of cohabitating partner, see § 97-5-41.

Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see § 97-43-1 et seq.

Additional monetary assessment for violation of this section when committed against a minor to be deposited in Mississippi Children's Trust Fund, see § 99-19-75.

RESEARCH REFERENCES

Am. Jur.

50 Am. Jur. 2d, Lewdness, Indecency, and Obscenity §§ 28 et seq.

10 Am. Jur. Trials, Obscenity Litigation §§ 1 et seq.

CJS.

67 C.J.S. Obscenity § 2.

§ 97-5-39. Contributing to the neglect or delinquency of a child; felonious abuse and/or battery of a child.

(1)(a) Except as otherwise provided in this section, any parent, guardian or other person who intentionally, knowingly or recklessly commits any act or omits the performance of any duty, which act or omission contributes to or tends to contribute to the neglect or delinquency of any child or which act or omission results in the abuse of any child, as defined in Section 43-21-105(m) of the Youth Court Law, or who knowingly aids any child in escaping or absenting himself from the guardianship or custody of any person, agency or

institution, or knowingly harbors or conceals, or aids in harboring or concealing, any child who has absented himself without permission from the guardianship or custody of any person, agency or institution to which the child shall have been committed by the youth court shall be guilty of a misdemeanor, and upon conviction shall be punished by a fine not to exceed One Thousand Dollars (\$1,000.00), or by imprisonment not to exceed one (1) year in jail, or by both such fine and imprisonment.

(b) For the purpose of this section, a child is a person who has not reached his eighteenth birthday. A child who has not reached his eighteenth birthday and is on active duty for a branch of the armed services, or who is married, is not considered a child for the purposes of this statute.

(c) If a child commits one (1) of the proscribed acts in subsection (2)(a), (b) or (c) of this section upon another child, then original jurisdiction of all such offenses shall be in youth court.

(d) If the child's deprivation of necessary clothing, shelter, health care or supervision appropriate to the child's age results in substantial harm to the child's physical, mental or emotional health, the person may be sentenced to imprisonment in custody of the Department of Corrections for not more than five (5) years or to payment of a fine of not more than Five Thousand Dollars (\$5,000.00), or both.

(e) A parent, legal guardian or other person who knowingly permits the continuing physical or sexual abuse of a child is guilty of neglect of a child and may be sentenced to imprisonment in the custody of the Department of Corrections for not more than ten (10) years or to payment of a fine of not more than Ten Thousand Dollars (\$10,000.00), or both.

(2) Any person shall be guilty of felonious child abuse in the following circumstances:

(a) Whether bodily harm results or not, if the person shall intentionally, knowingly or recklessly:

(i) Burn any child;

(ii) Physically torture any child;

(iii) Strangle, choke, smother or in any way interfere with any child's breathing;

(iv) Poison a child;

(v) Starve a child of nourishments needed to sustain life or growth;

(vi) Use any type of deadly weapon upon any child;

(b) If some bodily harm to any child actually occurs, and if the person shall intentionally, knowingly, or recklessly:

(i) Throw, kick, bite, or cut any child;

(ii) Strike a child under the age of fourteen (14) about the face or head with a closed fist;

(iii) Strike a child under the age of five (5) in the face or head;

(iv) Kick, bite, cut or strike a child's genitals; circumcision of a male child is not a violation under this subparagraph (iv);

(c) If serious bodily harm to any child actually occurs, and if the person shall intentionally, knowingly or recklessly:

- (i) Strike any child on the face or head;
- (ii) Disfigure or scar any child;
- (iii) Whip, strike, or otherwise abuse any child;

(d) Any person, upon conviction under paragraph (a) or (c) of this subsection, shall be sentenced by the court to imprisonment in the custody of the Department of Corrections for a term of not less than five (5) years and up to life, as determined by the court. Any person, upon conviction under paragraph (b) of this subsection shall be sentenced by the court to imprisonment in the custody of the Department of Corrections for a term of not less than two (2) years nor more than ten (10) years, as determined by the court. For any second or subsequent conviction under this subsection (2), the person shall be sentenced to imprisonment for life.

(e) For the purposes of this subsection (2), “bodily harm” means any bodily injury to a child and includes, but is not limited to, bruising, bleeding, lacerations, soft tissue swelling, and external or internal swelling of any body organ.

(f) For the purposes of this subsection (2), “serious bodily harm” means any serious bodily injury to a child and includes, but is not limited to, the fracture of a bone, permanent disfigurement, permanent scarring, or any internal bleeding or internal trauma to any organ, any brain damage, any injury to the eye or ear of a child or other vital organ, and impairment of any bodily function.

(g) Nothing contained in paragraph (c) of this subsection shall preclude a parent or guardian from disciplining a child of that parent or guardian, or shall preclude a person in loco parentis to a child from disciplining that child, if done in a reasonable manner, and reasonable corporal punishment or reasonable discipline as to that parent or guardian’s child or child to whom a person stands in loco parentis shall be a defense to any violation charged under paragraph (c) of this subsection.

(h) Reasonable discipline and reasonable corporal punishment shall not be a defense to acts described in paragraphs (a) and (b) of this subsection or if a child suffers serious bodily harm as a result of any act prohibited under paragraph (c) of this subsection.

(3) Nothing contained in this section shall prevent proceedings against the parent, guardian or other person under any statute of this state or any municipal ordinance defining any act as a crime or misdemeanor. Nothing in the provisions of this section shall preclude any person from having a right to trial by jury when charged with having violated the provisions of this section.

(4)(a) A parent, legal guardian or caretaker who endangers a child’s person or health by knowingly causing or permitting the child to be present where any person is selling, manufacturing or possessing immediate precursors or chemical substances with intent to manufacture, sell or possess a controlled substance as prohibited under Section 41-29-139 or 41-29-313, is guilty of child endangerment and may be sentenced to imprisonment for not more than ten (10) years or to payment of a fine of not more than Ten Thousand Dollars (\$10,000.00), or both.

(b) If the endangerment results in substantial harm to the child's physical, mental or emotional health, the person may be sentenced to imprisonment for not more than twenty (20) years or to payment of a fine of not more than Twenty Thousand Dollars (\$20,000.00), or both.

(5) Nothing contained in this section shall prevent proceedings against the parent, guardian or other person under any statute of this state or any municipal ordinance defining any act as a crime or misdemeanor. Nothing in the provisions of this section shall preclude any person from having a right to trial by jury when charged with having violated the provisions of this section.

(6) After consultation with the Department of Human Services, a regional mental health center or an appropriate professional person, a judge may suspend imposition or execution of a sentence provided in subsections (1) and (2) of this section and in lieu thereof require treatment over a specified period of time at any approved public or private treatment facility. A person may be eligible for treatment in lieu of criminal penalties no more than one (1) time.

(7) In any proceeding resulting from a report made pursuant to Section 43-21-353 of the Youth Court Law, the testimony of the physician making the report regarding the child's injuries or condition or cause thereof shall not be excluded on the ground that the physician's testimony violates the physician-patient privilege or similar privilege or rule against disclosure. The physician's report shall not be considered as evidence unless introduced as an exhibit to his testimony.

(8) Any criminal prosecution arising from a violation of this section shall be tried in the circuit, county, justice or municipal court having jurisdiction; provided, however, that nothing herein shall abridge or dilute the contempt powers of the youth court.

HISTORY: Laws, 1979, ch. 506, § 75; Laws, 1980, ch. 550, § 28; Laws, 1986, ch. 383; Laws, 1989, ch. 566, § 3; Laws, 2005, ch. 467, § 3; Laws, 2005, ch. 491, § 3; Laws, 2013, ch. 483, § 1, eff from and after July 1, 2013.

Joint Legislative Committee Note — Section 3 of ch. 467 Laws, 2005, effective July 1, 2005 (approved March 29, 2005), amended this section. Section 3 of ch. 491, Laws, 2005, effective July 1, 2005 (approved April 19, 2005), also amended this section. As set out above, this section reflects the language of Section 3 of ch. 491, Laws, 2005, pursuant to Section 1-3-79 which provides that whenever the same section of law is amended by different bills during the same legislative session, and the effective dates of the amendments are the same, the amendment with the latest approval date shall supersede all other amendments to the same section approved on an earlier date.

Editor's Notes — Laws of 1979, ch. 506, §§ 76, 77 and 79, effective from and after July 1, 1979, provide as follows:

“SECTION 76. Codification. The attorney general of the State of Mississippi is hereby directed to contact those persons responsible for the codification of laws into the Mississippi Code of 1972, and the assigning of code section numbers thereto in order to ensure that section 75 of this act is included with Chapter 5, Title 97, Mississippi Code of 1972. Further, it is the intent of the legislature that sections 1 through 69 and sections 71 through 74 be codified as Chapter 21, Title 43, Mississippi Code of 1972.”

“SECTION 77. Article numbers and headings; section headings. The article numbers and headings and the section headings appearing in this act are for reference purposes and are not a part of this act.”

“SECTION 79. This act shall apply only to offenses committed after the effective date

of this act.”

Chapter 483, Laws of 2013, which amended this section, is known as the “Lonnie Smith Act.”

Subsections (3) and (5) are identical. The section is set out above as amended by Section 1 of Chapter 483, Laws of 2013.

Cross References — Applicability of certain evidentiary rules in criminal prosecutions for child abuse, see § 13-1-401.

Applicability of this section for the failure of a parent, guardian or custodian of a compulsory-school age child to comply with the Mississippi Compulsory School Attendance Law, see § 37-13-91.

Prohibition of person convicted of crimes affecting children or other violent crimes from being licensed as foster parent or a foster home, see § 43-15-6.

Proceedings for protection from domestic abuse, see §§ 93-21-1 et seq.

Felonious neglect, as provided in this section, defined as crime of violence, see § 97-3-2.

Death caused by one in violation of this section, see § 97-3-19.

Penalties for condoning child abuse, see § 97-5-40.

Carnal knowledge of step or adopted child or child of cohabitating partner, see § 97-5-41.

Time limitation on prosecution, see § 99-1-5.

Imposition of standard state assessment in addition to all court imposed fines or other penalties for any misdemeanor violation, see § 99-19-73.

Additional monetary assessment for violation of this section when committed against a minor to be deposited in Mississippi Children’s Trust Fund, see § 99-19-75.

Consideration of violation of this section in proceeding to impose death penalty, see § 99-19-101.

Federal Aspects — Victims of Child Abuse Act of 1990, P. L. 101-647 §§ 201 et seq., 34 USCS § 20301 et seq.

JUDICIAL DECISIONS

ANALYSIS

I. UNDER CURRENT LAW.

1. In general.
2. Indictment.
3. Lesser included offenses.
4. Evidence.
5. Serious bodily harm.
6. Sentence and punishment.
7. Jury instructions.
8. Capital murder.
- 9-10. [Reserved for future use.]

II. UNDER FORMER LAW.

11. In general.
12. Jurisdiction.
13. What constitutes offense.
14. Instructions.
15. Sentence and punishment.

I. UNDER CURRENT LAW.

1. In general.

By its plain language the statute does

not require proof that the child was placed into any danger beyond the inherent danger of being in the presence of the chemical substances while they are possessed with the requisite intent, by statutory definition, one endangers a child’s person or health by knowingly causing or permitting the child to be present with the drugs or precursors. *Jones v. State*, 257 So. 3d 285, 2018 Miss. App. LEXIS 142 (Miss. Ct. App.), cert. denied, 256 So. 3d 595, 2018 Miss. LEXIS 458 (Miss. 2018).

Defendant was not subjected to double jeopardy by being prosecuted for two counts of child abuse under the same statute because (1) one count alleged defendant caused the victim’s broken leg, and the other count alleged defendant caused the victim to suffer bruises and lacerations, so one count required proof of a fact not found in the other count, and (2) the dates of the occurrences were distinct. *Byers v. State*, 157 So. 3d 98, 2014 Miss. App. LEXIS 399 (Miss. Ct. App. 2014),

cert. denied, 157 So. 3d 835, 2015 Miss. LEXIS 74 (Miss. 2015).

Jurisprudence allows an accused to assert a defense theory based upon a mistake-of-fact defense for the offense of felony child deprivation, pursuant to Miss. Code Ann. § 97-5-39(1)(b), if reasonably raised by the evidence. *Lenard v. State*, 51 So. 3d 239, 2011 Miss. App. LEXIS 16 (Miss. Ct. App. 2011).

To prove the offense of felony child deprivation, pursuant to Miss. Code Ann. § 97-5-39(1)(b), the State must prove that the acts or omissions were negligent or intentional. Therefore, this offense does not constitute strict liability. *Lenard v. State*, 51 So. 3d 239, 2011 Miss. App. LEXIS 16 (Miss. Ct. App. 2011).

Parent's acts of omission, including allowing a two-year-old child to become dehydrated and malnourished, was adequate to constitute felony child abuse. *Buffington v. State*, 824 So. 2d 576, 2002 Miss. LEXIS 206 (Miss. 2002).

Miss. Code Ann. § 97-5-39(2) does not require that the abuse be dispensed over a period of time before a charge for felonious abuse will arise; the intentional act of murdering a child by any manner or form constitutes felonious child abuse and, therefore, constitutes capital murder under Miss. Code Ann. § 97-3-19(2); the murder of a child constitutes serious child abuse, and the murder may be elevated to capital murder. *Stevens v. State*, 806 So. 2d 1031, 2001 Miss. LEXIS 234 (Miss. 2001), cert. denied, 537 U.S. 1232, 123 S. Ct. 1384, 155 L. Ed. 2d 195, 2003 U.S. LEXIS 1755 (U.S. 2003).

"Serious bodily harm," as it pertains to this section, means bodily injury that creates a substantial risk of death, or permanent or temporary disfigurement, or impairment of any bodily organ or function. *Wolfe v. State*, 743 So. 2d 380, 1999 Miss. LEXIS 269 (Miss. 1999).

There was sufficient evidence that defendant committed underlying offense of felonious abuse or battery of child victim to support his capital murder conviction, where evidence suggested that defendant had gone to victim's house to have sex with victim, victim's nude body was discovered in house with her bra pulled behind her head, and victim had multiple

wounds on body in addition to fatal chop wound to her head. *Brown v. State*, 690 So. 2d 276, 1996 Miss. LEXIS 681 (Miss. 1996), cert. denied, 522 U.S. 849, 118 S. Ct. 136, 139 L. Ed. 2d 85, 1997 U.S. LEXIS 5165 (U.S. 1997), rev'd, — So. 3d —, 2017 Miss. LEXIS 524 (Miss. 2017).

One act alone may constitute felonious abuse and/or battery of child; statute does not require that abuse be dispensed over period of time before charge for felonious abuse will arise. *Brown v. State*, 690 So. 2d 276, 1996 Miss. LEXIS 681 (Miss. 1996), cert. denied, 522 U.S. 849, 118 S. Ct. 136, 139 L. Ed. 2d 85, 1997 U.S. LEXIS 5165 (U.S. 1997), rev'd, — So. 3d —, 2017 Miss. LEXIS 524 (Miss. 2017).

During penalty phase of capital murder prosecution involving murder of child victim while engaging in felonious abuse and/or battery, it was proper to instruct jury that it could consider as aggravating factor that murder had occurred during commission of crime of felonious abuse and/or battery of child. *Brown v. State*, 690 So. 2d 276, 1996 Miss. LEXIS 681 (Miss. 1996), cert. denied, 522 U.S. 849, 118 S. Ct. 136, 139 L. Ed. 2d 85, 1997 U.S. LEXIS 5165 (U.S. 1997), rev'd, — So. 3d —, 2017 Miss. LEXIS 524 (Miss. 2017).

Elements necessary to prove felonious child abuse are whether defendant did: (1) willfully (2) cause (3) serious bodily harm (4) to child. *Yates v. State*, 685 So. 2d 715, 1996 Miss. LEXIS 683 (Miss. 1996), overruled in part, *Buffington v. State*, 824 So. 2d 576, 2002 Miss. LEXIS 206 (Miss. 2002).

Welfare worker exceeded scope of her knowledge and expertise, in prosecution for manslaughter of 11-month-old child, by testifying as lay witness that she was certain the child was given cocaine overdose, which was one cause of child's death, from an adult and through a vaporizer; welfare worker was not proffered as expert on methods of cocaine ingestion, and she had no personal knowledge of how cocaine got into child's bloodstream. *Jones v. State*, 678 So. 2d 707, 1996 Miss. LEXIS 411 (Miss. 1996).

Jury could have reasonably found, in prosecution for manslaughter of 11-month-old child, that defendants were culpably negligent in failing to obtain prompt

medical attention and in failing to supervise their child with result that child ingested cocaine, regardless of how child ingested cocaine; it was the presence of cocaine in an 11-month-old child and not necessarily the way in which it got there that evidenced culpable negligence. *Jones v. State*, 678 So. 2d 707, 1996 Miss. LEXIS 411 (Miss. 1996).

It was not harmless error, in prosecution for manslaughter of 11-month old child, to admit welfare worker's testimony that she was certain about method by which child ingested cocaine which caused death by overdose, even though such testimony was not necessary to establish culpable negligence; given welfare worker's certainty and her official capacity, her testimony likely was instrumental in the jury's decision. *Jones v. State*, 678 So. 2d 707, 1996 Miss. LEXIS 411 (Miss. 1996).

Defendants were not harmed, in prosecution for manslaughter of their 11-month-old child, by admission of police officer's testimony that he had asked one defendant whether cocaine had been used to quiet the child, where officer qualified the statement by testifying that defendant had denied using cocaine in that way or in any other way. *Jones v. State*, 678 So. 2d 707, 1996 Miss. LEXIS 411 (Miss. 1996).

The crime of misdemeanor child neglect is not encompassed within the definition of the more serious crime of felonious child abuse. *Payton v. State*, 642 So. 2d 1328, 1994 Miss. LEXIS 442 (Miss. 1994).

The evidence was sufficient to support a conviction of felonious child abuse under this section where there was evidence that the defendant's beating of his 9-year-old son had left scars on the child's back, and no evidence or testimony was introduced at trial by the defendant. *Ahmad v. State*, 603 So. 2d 843, 1992 Miss. LEXIS 321 (Miss. 1992).

This section does not require a showing of "continuing" abuse toward the child. *Ahmad v. State*, 603 So. 2d 843, 1992 Miss. LEXIS 321 (Miss. 1992).

In a prosecution for felonious child abuse arising from the defendant's beating of his 9-year-old son, the defendant's constitutional right to confront his accuser was not violated, in spite of the

defendant's argument that his accuser was his wife and that he was not allowed to "confront" her, where the defendant's wife was not a witness at the trial, the defendant was allowed to fully cross-examine all State witnesses against him, and the record did not indicate that the defendant's wife ever accused him of felonious child abuse. *Ahmad v. State*, 603 So. 2d 843, 1992 Miss. LEXIS 321 (Miss. 1992).

There is no requirement that a pattern of child abuse be established before a defendant can be said to have committed felony child abuse. *Monk v. State*, 532 So. 2d 592, 1988 Miss. LEXIS 501 (Miss. 1988).

Defendant's act of throwing child to pavement which resulted in skull fractures and broken bones clearly was intended to be classified as felonious abuse of child; statute does not require that abuse be dispensed over period of time before charge for felonious abuse will arise. *Faraga v. State*, 514 So. 2d 295, 1987 Miss. LEXIS 2656 (Miss. 1987), cert. denied, 487 U.S. 1210, 108 S. Ct. 2858, 101 L. Ed. 2d 894, 1988 U.S. LEXIS 2778 (U.S. 1988).

Intent of legislature was that serious child abusers would be guilty of capital murder if child died. *Faraga v. State*, 514 So. 2d 295, 1987 Miss. LEXIS 2656 (Miss. 1987), cert. denied, 487 U.S. 1210, 108 S. Ct. 2858, 101 L. Ed. 2d 894, 1988 U.S. LEXIS 2778 (U.S. 1988).

Statute was not vague at time of defendant's trial, although legislature subsequently amended statute to insert word "or", at which point defendant contended statute could previously have been read to mean "and", because to allow defendant's construction to stand would advocate pummeling and mutilation of children as long as neither torture nor burning was involved. *Faraga v. State*, 514 So. 2d 295, 1987 Miss. LEXIS 2656 (Miss. 1987), cert. denied, 487 U.S. 1210, 108 S. Ct. 2858, 101 L. Ed. 2d 894, 1988 U.S. LEXIS 2778 (U.S. 1988).

Indictment charging attempted child abuse may be amended to reflect code section under which defendant is charged and need not use precise words of statute. *Watson v. State*, 483 So. 2d 1326, 1986 Miss. LEXIS 2366 (Miss. 1986).

Photographs of injuries of child are admissible, in prosecution of parent for attempted child abuse, on issue of whether fall resulting in injuries was accidental or result of parent's deliberate act. *Watson v. State*, 483 So. 2d 1326, 1986 Miss. LEXIS 2366 (Miss. 1986).

2. Indictment.

Indictment was sufficient to fully notify defendant of the nature and cause of the accusation against her because the elements of the statute were set out in full and with specificity in defendant's indictment; the indictment stated defendant knowingly allowed the victim's continuing physical or sexual abuse by her stepfather. *Richards v. State*, 283 So. 3d 1151, 2019 Miss. App. LEXIS 165 (Miss. Ct. App.), cert. denied, 283 So. 3d 734, 2019 Miss. LEXIS 434 (Miss. 2019), cert. denied, — So. 3d —, 2019 Miss. LEXIS 460 (Miss. 2019).

Defendant's indictment was not fatally defective; he was charged with capital murder as a result of felonious child abuse, which was a crime at the time of the commission of the offense and at the time of his indictment. *Cozart v. State*, 226 So. 3d 639, 2016 Miss. App. LEXIS 270 (Miss. Ct. App. 2016).

The court erred by allowing the case to go to the jury on the element of torture, which was not mentioned in the indictment, after finding that there was insufficient evidence to support the element of serious bodily harm, which was mentioned in the indictment. *Wolfe v. State*, 743 So. 2d 380, 1999 Miss. LEXIS 269 (Miss. 1999).

3. Lesser included offenses.

The misdemeanor offense of contributing to neglect of a child in violation of Miss. Code Ann. § 97-5-39(1) was not a lesser included offense of felony child abuse in violation of Miss. Code Ann. § 97-5-39(2), but was a lesser non-included offense as the same facts would have supported both charges; defendant charged with only the felony offense waived any objection based on the giving of the misdemeanor instruction as defendant not only failed to object to the giving of the instruction but had requested it be

given. *Moore v. State*, 799 So. 2d 89, 2001 Miss. LEXIS 276 (Miss. 2001).

Trial court's failure to give any manslaughter instructions in prosecution for capital murder during course of felonious child abuse was reversible error; jury was given no choice other than convicting defendant's of capital murder or acquitting him and, at the time, statutes were indistinguishable. (Per Pittman, J., with two Justices concurring, two Justices concurring in the result only, and one Justice concurring in part.) *Kolberg v. State*, 704 So. 2d 1307, 1997 Miss. LEXIS 697 (Miss. 1997).

State Supreme Court's *Butler* decision, under which defendant was entitled to manslaughter instructions in prosecution for capital murder during course of felonious child abuse, applied retroactively, even though it had been reversed on appeal on other grounds; rule was not specifically designated as "purely prospective" in nature, and failure to give manslaughter instruction was overwhelmingly prejudicial where jury ultimately found that defendant had caused child's death, but not that he either attempted to kill child or intended death. (Per Pittman, J., with two Justices concurring, two Justices concurring in the result only, and one Justice concurring in part.) *Kolberg v. State*, 704 So. 2d 1307, 1997 Miss. LEXIS 697 (Miss. 1997).

Defendant charged with felonious child abuse was entitled to instruction on lesser-included offense of misdemeanor child abuse where evidence adduced at trial was such that jury could have found that defendant inflicted nonaccidental physical injury on victim rather than serious bodily harm; evidence indicated that victim, who was two-year-old child of defendant's live-in girlfriend, had superficial bruises and contusions on buttocks and right thigh and that defendant admitted spanking victim with belt on buttocks but denied bruising victim's thigh. *Yates v. State*, 685 So. 2d 715, 1996 Miss. LEXIS 683 (Miss. 1996), overruled in part, *Buffington v. State*, 824 So. 2d 576, 2002 Miss. LEXIS 206 (Miss. 2002).

Evidence did not establish that defendant, who admittedly spanked his live-in girlfriend's two-year-old child three times

with belt, inflicted serious bodily harm, rather than nonaccidental physical injury, and thus, evidence was such that reasonable jury could find defendant not guilty of child abuse but guilty of misdemeanor child abuse; evidence included examining physician's testimony that child's bruises were superficial and did not require medical treatment. *Yates v. State*, 685 So. 2d 715, 1996 Miss. LEXIS 683 (Miss. 1996), overruled in part, *Buffington v. State*, 824 So. 2d 576, 2002 Miss. LEXIS 206 (Miss. 2002).

Trial court's failure, in prosecution of defendant for felonious child abuse against his live-in girlfriend's two-year-old child, to give instruction on lesser-included offense of misdemeanor child abuse, though error because evidence adduced at trial was such that reasonable jury could have found defendant guilty of misdemeanor child abuse but not guilty of felonious child abuse, did not require new trial, but only required remand for resentencing, where Supreme Court found that the evidence sufficiently established defendant's guilt of misdemeanor child abuse, thus obviating need for child, his family, defendant, or state to be required to endure additional expense and draining of emotions of another trial. *Yates v. State*, 685 So. 2d 715, 1996 Miss. LEXIS 683 (Miss. 1996), overruled in part, *Buffington v. State*, 824 So. 2d 576, 2002 Miss. LEXIS 206 (Miss. 2002).

In a prosecution for felony child abuse arising from an infant's ingestion of glass slivers in her food, the evidence was insufficient to support an instruction on the lesser-included offense of misdemeanor child abuse, since no reasonable juror could find that broken glass slivers in an infant's food does not constitute a means likely to cause "serious" bodily injury. *Payton v. State*, 642 So. 2d 1328, 1994 Miss. LEXIS 442 (Miss. 1994).

In a prosecution for felony child abuse arising from an infant's ingestion of glass slivers in her food, the evidence was insufficient to support an instruction on the lesser-included offense of simple assault, since no reasonable juror could find that the glass slivers were not used in "such a manner as to cause serious bodily harm," and there was no evidence from which a

juror could conclude that the infant accidentally ingested the glass. *Payton v. State*, 642 So. 2d 1328, 1994 Miss. LEXIS 442 (Miss. 1994).

4. Evidence.

Evidence was sufficient to support defendant's conviction of felony child abuse because his identity as the person who struck the victim was established by the victim's own testimony at trial and her previous identification of him during the photographic lineup. Proof of the victim's serious bodily injury included her medical records and testimony from a neurosurgeon who treated her when she arrived at the hospital, who found she had significant brain trauma to the skull, including a commuted skull fracture to the left side which required immediate surgery. *Sullivan v. State*, 281 So. 3d 1146, 2019 Miss. App. LEXIS 267 (Miss. Ct. App. 2019).

Defendant's conviction for child endangerment was supported by sufficient evidence because defendant's daughter was present with synthetic marijuana, which defendant possessed with intent to distribute; the statute required only that the daughter be present with the controlled chemical substances while defendant possessed them with the intent to sell, and there was no requirement that actual sales occurred in the daughter's presence. *Jones v. State*, 257 So. 3d 285, 2018 Miss. App. LEXIS 142 (Miss. Ct. App.), cert. denied, 256 So. 3d 595, 2018 Miss. LEXIS 458 (Miss. 2018).

Evidence permitting a jury to infer that defendant knew a baby was left in the house following the shootings and remained there for two days without necessary food or supervision, including evidence that defendant had been inside the house and that the baby had been crying, was sufficient to support defendant's conviction for felonious child neglect. *Christian v. State*, 207 So. 3d 1207, 2016 Miss. LEXIS 463 (Miss. 2016).

Sufficient evidence supported defendant's felony child neglect conviction because substantial harm to a child was shown, as (1) the child was left alone for almost two days with nothing to eat or drink and without a diaper change, and (2) a medical examiner testified this would

be traumatic. *Carter v. State*, 195 So. 3d 238, 2016 Miss. App. LEXIS 423 (Miss. Ct. App. 2016), cert. denied, 209 So. 3d 431, 2017 Miss. LEXIS 63 (Miss. 2017).

In a prosecution of defendant for felonious child abuse under Miss. Code Ann. § 97-5-39, the State could not have proved its case against defendant without expert testimony, and the trial court's denial of funds for the procurement of expert witnesses denied defendant his due process rights, as well as his right to a fair trial. *Isham v. State*, 161 So. 3d 1076, 2015 Miss. LEXIS 191 (Miss. 2015).

Circuit court thoroughly questioned petitioner during the plea hearing, and the fact that petitioner felt some pressure to plead guilty after discussing the offer with his attorney was insufficient to render his pleas involuntary, plus there was a sufficient factual basis for his pleas to sexual battery and felony child, given the indictment, the statement of the prosecutor, the incorporated witness testimony, and petitioner's admissions; the circuit court did not clearly err in finding that petitioner failed to meet his burden to prove entitlement to post-conviction relief. *Watkins v. State*, 170 So. 3d 582, 2014 Miss. App. LEXIS 631 (Miss. Ct. App. 2014), cert. denied, 163 So. 3d 301, 2015 Miss. LEXIS 301 (Miss. 2015).

Defendant was not entitled to a new trial as the verdict finding him guilty of felonious child abuse was not against the weight of the evidence because the doctor who treated the child stated that the burns were not on her dominant fingers and that they were from a solid, hot surface; and defendant's explanations for the child's burned fingers were numerous, contradictory, and inconsistent with the medical testimony. *Harris v. State*, 123 So. 3d 925, 2013 Miss. App. LEXIS 607 (Miss. Ct. App. 2013).

Evidence supported defendant's child abuse conviction because (1) members of defendant's family testified that defendant was alone in a bathroom with defendant's sixteen-month-old child; (2) the family members heard running bath water and defendant spanking the child with a belt; (3) the child suffered a bruise below one eye; (4) a family member said the bath water was steaming hot; and (5) an emer-

gency-room physician testified that the child suffered severe hot-water burns to the lower body. *Williams v. State*, 122 So. 3d 105, 2013 Miss. App. LEXIS 494 (Miss. Ct. App. 2013).

There was sufficient evidence for the jury to find that defendant inflicted serious bodily harm on a child under Miss. Code Ann. § 97-5-39(2)(a), as the physician who examined the child testified that only multiple blows using great force could have caused the child's injuries. *Baker v. State*, 70 So. 3d 235, 2011 Miss. App. LEXIS 24 (Miss. Ct. App.), cert. denied, 69 So. 3d 767, 2011 Miss. LEXIS 445 (Miss. 2011).

Trial court did not err in denying defendant's motion for a new trial because the jury was properly instructed on circumstantial evidence, and its verdict was supported by the overwhelming weight of the evidence; two doctors testified that the child's injury could have only been caused by a high-energy impact and that defendant's explanations of how the injuries occurred were not plausible, and one of the doctors testified that he saw multiple red flags indicating child abuse. *Rutland v. State*, 60 So. 3d 187, 2010 Miss. App. LEXIS 65 (Miss. Ct. App. 2010), aff'd, 60 So. 3d 137, 2011 Miss. LEXIS 152 (Miss. 2011).

Trial court did not err in failing to grant defendant's motion for a judgment notwithstanding the verdict because any rational juror could have found beyond a reasonable doubt that all of the elements of felonious child abuse were proven by the State when the evidence presented was sufficient to show, to the exclusion of every other reasonable hypothesis, that defendant's actions resulted in the child's injuries; two doctors testified that the possible scenarios defendant gave for the child's injuries were not plausible, and defendant, who maintained that the child was constantly under her supervision, offered no other plausible explanation for the injuries. *Rutland v. State*, 60 So. 3d 187, 2010 Miss. App. LEXIS 65 (Miss. Ct. App. 2010), aff'd, 60 So. 3d 137, 2011 Miss. LEXIS 152 (Miss. 2011).

Defendant's conviction for felony child abuse in violation of Miss. Code Ann. § 97-5-39(2)(a) was appropriate because

the evidence was sufficient. In part, medical testimony at trial unequivocally proved that the victim's severe bruising was a temporary disfigurement of a bodily organ. *Henry v. State*, 40 So. 3d 621, 2010 Miss. App. LEXIS 47 (Miss. Ct. App. 2010).

Evidence was sufficient to support the conviction for felonious child abuse, where there was ample evidence to show that the child suffered serious bodily injury, and the doctors who treated the child testified that he had sustained injuries that were life-threatening which he could not have caused to himself. *Hill v. State*, 40 So. 3d 591, 2009 Miss. App. LEXIS 934 (Miss. Ct. App. 2009).

Defendant's claims of the cause of the child's burns were inconsistent with medical evidence; thus, considering the evidence in light most favorable to the State, there was sufficient evidence from which the jury could have reasonably inferred that defendant intentionally held the child down in scalding water. *Anthony v. State*, 23 So. 3d 611, 2009 Miss. App. LEXIS 930 (Miss. Ct. App. 2009).

Reasonable, fair-minded jurors could have concluded that defendant was guilty of felony child abuse, given that (1) he admitted in a handwritten statement that he had shaken the child, (2) there was testimony from two doctors that the child's injuries could not have been caused by a fall from a bouncy seat, (3) one doctor stated that the child's injuries were exclusively caused by a severe shake with the impact of her head hitting a surface, and (4) defendant admitted that he was the only adult present when the child's seat supposedly overturned. *German v. State*, 30 So. 3d 348, 2009 Miss. App. LEXIS 517 (Miss. Ct. App. 2009), cert. denied, 29 So. 3d 774, 2010 Miss. LEXIS 142 (Miss. 2010).

In defendant's felony child abuse case under Miss. Code Ann. § 97-5-39(2)(a), counsel was attempting to prevent the jury from hearing any more testimony about the lingering effects of the child's injuries by stipulating as to the child's condition; the court could not find this action deficient. *German v. State*, 30 So. 3d 348, 2009 Miss. App. LEXIS 517 (Miss. Ct. App. 2009), cert. denied, 29 So. 3d 774, 2010 Miss. LEXIS 142 (Miss. 2010).

Circumstantial evidence was sufficient to support defendant's conviction of felony child abuse where both doctors who treated defendant's nine-week-old son after he was admitted for emergency medical care testified that the child's injuries could not have been self-inflicted, that the injuries could only have been caused by a significant amount of force or trauma, and that the injuries were very recent, where defendant and his wife testified that defendant was the child's sole caretaker during the day while defendant's wife was working and that there was no evidence anyone else cared for the child, and where defendant's neighbor testified that he heard a male voice, inferably defendant's, shout "shut up," a slapping sound, and the sound of a child crying emanating from defendant's apartment. The combination of this evidence could easily lead a reasonable juror to conclude that defendant abused his nine-week-old son. *Hill v. State*, 17 So. 3d 1092, 2009 Miss. App. LEXIS 82 (Miss. Ct. App.), cert. denied, 17 So. 3d 99, 2009 Miss. LEXIS 458 (Miss. 2009).

Evidence was sufficient to convict defendant of felony child abuse, Miss. Code Ann. § 97-5-39(2), where defendant was in the trailer at all times during which the abuse might have happened, he encountered the victim before her injuries were discovered, and the victim identified defendant as her attacker. *Kazery v. State*, 995 So. 2d 827, 2008 Miss. App. LEXIS 493 (Miss. Ct. App. 2008).

Trial court did not err by denying defendant's motion for a new trial or for a judgment notwithstanding the verdict following his conviction of felony child abuse because several competent expert witnesses, some of whom treated the victim, testified regarding the victim's injuries and several lay witnesses, including defendant's aunt, family members, and a neighbor, testified as to what they observed on the day the victim suffered his injuries, including hearing a baby crying, a loud thump, and no more crying. *Middleton v. State*, 980 So. 2d 351, 2008 Miss. App. LEXIS 254 (Miss. Ct. App. 2008).

Defendant's conviction for felony child abuse based on the State's contention that defendant punished his girlfriend's child

for a potty-training accident by holding her in scalding water until her feet were burned was not against the overwhelming weight of the evidence where, upon asking the child what happened, the child said that "Daddy did this." An expert in the field of emergency medicine and pediatrics, with special training in child abuse, opined that the child was forcibly placed in the water and held there. *Martin v. State*, 970 So. 2d 723, 2007 Miss. LEXIS 706 (Miss. 2007).

Facts supported defendant's conviction for capital murder as a result of felonious abuse of a child under Miss. Code Ann. § 97-3-19(2)(f) because failure to provide medical treatment to a child with severe injuries could be interpreted as intentional; defendant's omission in failing to at least bring the child for whom defendant was caring to a hospital to treat extensive and serious injuries was sufficient to find felonious child abuse. *Berry v. State*, 980 So. 2d 936, 2007 Miss. App. LEXIS 393 (Miss. Ct. App. 2007), cert. denied, 979 So. 2d 691, 2008 Miss. LEXIS 204 (Miss. 2008).

Where the evidence showed that defendant was in charge of two minor children when one suffered a head injury that was determined by a treating physician to be intentional, there was sufficient evidence to support a conviction for felony child abuse. *Wells v. State*, 913 So. 2d 1053, 2005 Miss. App. LEXIS 434 (Miss. Ct. App. 2005).

Where defendant was convicted of felony child abuse, the trial court did not err in denying her motions for JNOV and a new trial because there was ample undisputed evidence that defendant had intentionally burned the child; the child testified that defendant had forced him to take a bath in scalding hot water and he had permanent, visible scars and, while defendant and her sister testified to a different version of events, the conflict between the two versions was a question of fact for the jury. The jury credited the child's version and the child's testimony alone provided sufficient evidence with which a rational juror could have found that the State had proved the elements of felonious child abuse. *Horton v. State*, 919 So. 2d 44, 2005 Miss. LEXIS 395 (Miss. 2005).

Sufficient evidence supported mother's and stepfather's convictions for felonious child abuse under Miss. Code Ann. § 97-5-39(2), where they failed to provide adequate medical treatment to child after witnessing numerous falls and failed to offer adequate explanation for the child's multiple fractures and burns, which had occurred in separate incidents. The parents' failure to provide adequate medical treatment to the child after they witnessed or knew of numerous falls that were severe enough to result in multiple fractures could be interpreted as intentional. *Scarborough v. State*, 2004 Miss. App. LEXIS 910 (Miss. Ct. App. Sept. 14, 2004), op. withdrawn, sub. op., 893 So. 2d 265, 2004 Miss. App. LEXIS 1119 (Miss. Ct. App. 2004).

Mother and stepfather's failure to provide adequate medical treatment to their child after they witnessed or knew of numerous falls that were severe enough to result in multiple fractures could be interpreted as sufficient intentional conduct to support their conviction for felonious child abuse under Miss. Code Ann. § 97-5-39(2) because Miss. Code Ann. § 97-5-39(1) of the child abuse statute clearly included acts of omission that result in the abuse and/or battering of any child as misdemeanor crimes, but it did not contain language that designated all acts of omission to be misdemeanor offenses. Miss. Code Ann. § 97-5-39(2) pertaining to felonious child abuse included a catch-all, "or otherwise abuse," which has been interpreted by the Mississippi Supreme Court to be a clear indicator that the list provided was not exhaustive. *Scarborough v. State*, 2004 Miss. App. LEXIS 910 (Miss. Ct. App. Sept. 14, 2004), op. withdrawn, sub. op., 893 So. 2d 265, 2004 Miss. App. LEXIS 1119 (Miss. Ct. App. 2004).

Defendant's capital murder convictions and death sentence were proper where the killings occurred within a few hours and were all part of the common scheme to rob his ex-father-in-law and eliminate any witnesses, Miss. Code Ann. § 97-3-19(2)(f); further, shooting his child fit the description of felony child abuse in that it was a strike to the child in such a manner as to cause serious bodily harm, Miss. Code Ann. § 97-5-39. *Brawner v. State*,

872 So. 2d 1, 2004 Miss. LEXIS 458 (Miss. 2004).

In a case where defendant father and defendant adopted son were convicted of conspiracy to commit sexual battery, Miss. Code Ann. §§ 97-1-1 and 97-3-95(1)(d), sexual battery, Miss. Code Ann. § 97-3-95(1)(d), and contributing to the delinquency of a minor, Miss. Code Ann. § 97-5-39(1), none of the issues raised by defendant father rose to the level of reversible error either standing alone or when considered together as the evidence supported the finding that defendant father was the ringleader of the abominable enterprise and he failed to demonstrate any procedural or substantive errors that warranted reversal; thus, defendant father's convictions and sentences were affirmed. *King v. State*, 857 So. 2d 702, 2003 Miss. LEXIS 450 (Miss. 2003).

Evidence was sufficient to support a conviction for felonious child abuse because (1) there was no question that the child sustained serious bodily harm or that the blow that caused the injury was intentional because the medical testimony clearly established that the child was not old enough to self-inflict his injuries and could not have sustained his injuries accidentally, and (2) although both the defendant and the child's mother were alone with the child during the time that the child sustained his injuries, it was shown that the defendant lied about various events and the jury determined that he inflicted the injuries. *Wheat v. State*, 758 So. 2d 1072, 2000 Miss. App. LEXIS 161 (Miss. Ct. App. 2000).

5. Serious bodily harm.

Sufficient evidence supported defendant's child abuse conviction under Miss. Code Ann. § 97-5-39(2) as it appeared prior to the 2013 amendments by showing serious bodily harm because the evidence showed defendant's conduct caused severe bruising, abrasions and lacerations. *Byers v. State*, 157 So. 3d 98, 2014 Miss. App. LEXIS 399 (Miss. Ct. App. 2014), cert. denied, 157 So. 3d 835, 2015 Miss. LEXIS 74 (Miss. 2015).

Evidence supported the convictions of defendants, husband and wife, for third-degree felonious child abuse under Miss.

Code Ann. § 97-5-39 because defendants' failure to provide adequate medical treatment for their child after they witnessed his falls, which were severe enough to result in multiple fractures, could be interpreted as intentional. *Scarbough v. State*, 893 So. 2d 265, 2004 Miss. App. LEXIS 1119 (Miss. Ct. App. 2004), cert. denied, 893 So. 2d 1061, 2005 Miss. LEXIS 103 (Miss. 2005).

"Serious bodily harm," as it pertains to Miss. Code Ann. § 97-5-39(2), is any physical injury that amounts to child maltreatment such as death, or permanent or temporary disfigurement, or impairment of any function of any bodily organ or function. *Buffington v. State*, 824 So. 2d 576, 2002 Miss. LEXIS 206 (Miss. 2002).

6. Sentence and punishment.

Inmate's sentence did not violate Miss. Code Ann. § 47-7-34 where: (1) the inmate was sentenced to the maximum sentence for possession-of-cocaine of 16 years' under Miss. Code Ann. § 41-29-139(c)(1)(C); (2) the inmate was sentenced to the maximum sentence for child-endangerment of 10 years' under Miss. Code Ann. § 97-5-39(2)(b)(i); (3) 11 years of the 26-year sentence were suspended, leaving 15 years to serve; and (4) when the 5 years of post-release supervision were added to the 15 years to serve, the total was less than the maximum authorized sentence. *Ivy v. State*, 103 So. 3d 766, 2012 Miss. App. LEXIS 800 (Miss. Ct. App. 2012), cert. dismissed, 119 So. 3d 328, 2013 Miss. LEXIS 397 (Miss. 2013).

Defendant's conviction for felony child abuse was appropriate because he failed to prove that he received the ineffective assistance of counsel. In part, defendant's claims that his attorney incorrectly informed him that the maximum penalty for felony child abuse was 20 years instead of the correct maximum sentence, which was life in prison, was without merit; the statement made to the jury during voir dire did not say that 20 years was the maximum penalty for felony child abuse but instead merely suggested to the jury the possibility that defendant could go to prison for 20 years, which was a valid possibility under Miss. Code Ann. § 97-5-39(2)(a). *Henry v. State*, 40 So. 3d 621,

2010 Miss. App. LEXIS 47 (Miss. Ct. App. 2010).

Defendant who was sentenced to 15 years for felony child abuse did not meet her burden to prove that she was entitled to post-conviction relief because: (1) no reason was presented why the mitigating evidence attached to her motion could not have been discovered previously, and (2) her sentence was within the statutory limits. *Austin v. State*, 971 So. 2d 1286, 2008 Miss. App. LEXIS 9 (Miss. Ct. App. 2008).

Inmate's claim that when reading Miss. Code Ann. § 97-5-39(2)(c) in conjunction with Miss. Code Ann. § 97-3-19(2)(f), the result was an automatic implication of a capital crime regardless of how or in what manner the child suffered death, was procedurally barred under Miss. Code Ann. § 99-39-21(1) because it could have been raised on direct appeal and was not; the claim was also without merit because the Mississippi Supreme Court had previously found that upon reading the statutes in conjunction they were constitutional. *Brawner v. State*, 947 So. 2d 254, 2006 Miss. LEXIS 625 (Miss. 2006).

In a case where defendant father and defendant adopted son were convicted of conspiracy to commit sexual battery, Miss. Code Ann. §§ 97-1-1 and 97-3-95(1)(d), sexual battery, Miss. Code Ann. § 97-3-95(1)(d), and contributing to the delinquency of a minor, Miss. Code Ann. § 97-5-39(1), defendant father was sentenced to five years and a \$ 5,000 fine on the conspiracy count; 30 years and a \$ 10,000 fine on the sexual battery count; and one year and a \$ 1,000 fine on the contributing to the delinquency of a minor charge and the trial court ordered that the prison time be served consecutively; however, nothing in the record or presented by defendant father warranted reversal or reduction of his sentence because his sentence was within the statutory limits and it was a just punishment for the despicable crimes for which he was found guilty by a fair and impartial jury. *King v. State*, 857 So. 2d 702, 2003 Miss. LEXIS 450 (Miss. 2003).

7. Jury instructions.

In a felonious child abuse case, because the child's burns were not caused by a

child exploring her environment, the doctor who treated her unequivocally opined that the burns were nonaccidental, the burns came from a hot, solid object, and no reasonable juror could find the child's second-degree burns on nondominant fingers were not considered serious bodily harm, the trial court did not err in refusing to instruct the jury on the lesser-offense of simple assault. *Harris v. State*, 123 So. 3d 925, 2013 Miss. App. LEXIS 607 (Miss. Ct. App. 2013).

In a felonious child abuse case, because the medical evidence showed that the burns to the child's fingers were second-degree burns, which could not be classified as anything other than serious bodily harm regardless of their cause, no reasonable jury could find defendant guilty of merely misdemeanor child abuse; thus, there was no evidentiary basis for a lesser-included instruction on misdemeanor child abuse. *Harris v. State*, 123 So. 3d 925, 2013 Miss. App. LEXIS 607 (Miss. Ct. App. 2013).

Defendant's convictions for felonious child abuse were appropriate, in part because, while comments made by the trial court might have been improper, the trial court gave a curative instruction stating that the comments had not been intended as commentary on the believability of the victim's testimony and requiring the jury to disregard the comments. *Clark v. State*, 40 So. 3d 531, 2010 Miss. LEXIS 410 (Miss. 2010).

Defendant's convictions for felonious child abuse were appropriate, in part because, while comments made by the trial court might have been improper, the trial court gave a curative instruction stating that the comments had not been intended as commentary on the believability of the victim's testimony and requiring the jury to disregard the comments. *Clark v. State*, 40 So. 3d 531, 2010 Miss. LEXIS 410 (Miss. 2010).

In defendant's trial under Miss. Code Ann. § 97-5-39(2)(a), defendant did admit to shaking the child and his admission to an important element of the crime negated the need for a circumstantial-evidence instruction, such that counsel was not ineffective for failing to proffer such an instruction. *German v. State*, 30 So. 3d

348, 2009 Miss. App. LEXIS 517 (Miss. Ct. App. 2009), cert. denied, 29 So. 3d 774, 2010 Miss. LEXIS 142 (Miss. 2010).

Jury instruction defining child abuse as “intentional torture in such a manner as to cause serious bodily injury or the death of any child” was proper because it tracked the language of Miss. Code Ann. § 97-5-39(2)(a), and the language of the statute was not vague. *Rubenstein v. State*, 941 So. 2d 735, 2006 Miss. LEXIS 411 (Miss. 2006).

Jury instruction on the elements of felonious child abuse was neither vague nor insufficient as it accurately tracked the language of the felonious child abuse statute, Miss. Code Ann. § 97-5-39. *Rubenstein v. State*, 2005 Miss. LEXIS 789 (Miss. Dec. 1, 2005), op. withdrawn, 2006 Miss. LEXIS 424 (Miss. Aug. 10, 2006), sub. op., 941 So. 2d 735, 2006 Miss. LEXIS 411 (Miss. 2006).

8. Capital murder.

Evidence supported defendant’s conviction for capital murder for killing his infant son in the commission of felonious abuse or battery of a child, as defendant’s wife testified that she and defendant had had a disagreement about the child and that defendant was angry when she left to go back to work the day the child died, and the doctor who performed an autopsy testified that the child’s death was consistent with Shaken Baby Syndrome. *Brown v. State*, 152 So. 3d 1146, 2014 Miss. LEXIS 595 (Miss. 2014).

Petitioner state death row inmate’s argument that the charge of murder for each victim was enhanced by underlying offenses that used murder as an element, thus violating the Double Jeopardy Clause of the Fifth Amendment, was rejected because Miss. Code Ann. § 97-3-19(1), described murder to include killing with deliberate design to effect the death of the person killed, and in Miss. Code Ann. § 97-3-19(2)(e) defined capital murder as including such a killing when done without any design to effect death by any person engaged in the commission of the crime of felonious child abuse and/or battery of a child in violation Miss. Code Ann. § 97-5-39(2) and child abuse, as had been alleged in the indictment, was not so

much an “underlying felony” as an element of the offense of capital murder, thus, the merger doctrine did not really apply. *Stevens v. Epps*, 2008 U.S. Dist. LEXIS 69564 (S.D. Miss. Sept. 15, 2008), aff’d, 618 F.3d 489, 2010 U.S. App. LEXIS 18696 (5th Cir. Miss. 2010).

9-10. [Reserved for future use.]

II. UNDER FORMER LAW.

11. In general.

In a prosecution for child abuse [Code 1972, § 43-21-27(b)[Repealed] allegedly caused by the infant’s parents, the trial court did not err in allowing testimony which showed that the child had sustained fractures of its arms and legs, including X-rays of the injuries which showed varying degrees of healing indicating that the injuries had been inflicted at different times where such evidence strongly supported an ongoing, continuing and purposeful course of criminal abuse of the child and tended to negate the theory that the injuries had been the result of a fall or other isolated accident. The evidence, although circumstantial, supported the conviction where there was no fact or circumstance in evidence tending in any way to support any other reasonable explanation of these injuries except that they had been inflicted by the parents and where no other person was shown to have had custody or care of the infant save its parents. *Aldridge v. State*, 398 So. 2d 1308, 1981 Miss. LEXIS 2017 (Miss. 1981).

A father is primarily required by law to support and maintain his children. *King v. King*, 191 So. 2d 409, 1966 Miss. LEXIS 1213 (Miss. 1966).

Failure of the title of the Youth Act to mention the offense of contributing to the neglect of a minor child defined in one of its provisions does not invalidate such provision. *Matthews v. State*, 240 Miss. 189, 126 So. 2d 245, 1961 Miss. LEXIS 448 (Miss. 1961).

The definition of neglected child in Code 1942, § 7185-02(h), is in pari materia with this section [Code 1942, § 7185-13]. *Matthews v. State*, 240 Miss. 189, 126 So. 2d 245, 1961 Miss. LEXIS 448 (Miss. 1961).

12. Jurisdiction.

Jurisdiction of the offense created by this section [Code 1942, § 7185-13] is in the regular criminal courts and not the Youth Court. *Harris v. State*, 241 Miss. 46, 129 So. 2d 372, 1961 Miss. LEXIS 317 (Miss. 1961).

The Youth Court does not supersede the regular criminal courts in prosecutions under this section [Code 1942, § 7185-13]. *Matthews v. State*, 240 Miss. 189, 126 So. 2d 245, 1961 Miss. LEXIS 448 (Miss. 1961).

13. What constitutes offense.

This section [Code 1942, § 7185-13] applies to any person who "willfully" commits any act which contributes to, or tends to contribute to, the delinquency of a child, or who "knowingly" aids any child in being a delinquent as defined in Code 1942, § 7185-02. *Guyot v. State*, 252 Miss. 509, 175 So. 2d 184, 1965 Miss. LEXIS 1127 (Miss. 1965).

A mother who entrusted her 7-months-old daughter to a nursery without informing it of the child's need for regular daily medication for a weak heart may be convicted under this section [Code 1942, § 7185-13]. *Matthews v. State*, 240 Miss. 189, 126 So. 2d 245, 1961 Miss. LEXIS 448 (Miss. 1961).

Where defendant was convicted in justice court under an affidavit charging him with attributing to delinquency of his minor son by permitting and using the son to aid in loading and distributing intoxicating liquors, and defendant appealed to Circuit Court, amendment of affidavit charging defendant contributing to delinquency of son also by knowingly and intentionally permitting son to be present while defendant was loading intoxicating liquors was allowed, since the essential charge was the same in the affidavit and the amendment. *Mays v. State*, 216 Miss. 631, 63 So. 2d 110, 1953 Miss. LEXIS 678 (Miss. 1953).

Under this statute, employment of minor under age of 18 years to commit or aid

in commission of misdemeanor constitutes contributing to his delinquency. *Broadstreet v. State*, 208 Miss. 789, 45 So. 2d 590, 1950 Miss. LEXIS 299 (Miss. 1950).

In prosecution under this section for contributing to delinquency of minor under 18 years of age, where gravamen of offense is employment of minor to sell whiskey for and at place of appellant, and minor was actually paid by appellant, it is immaterial that minor was working at the place of another who furnished money for his salary. *Broadstreet v. State*, 208 Miss. 789, 45 So. 2d 590, 1950 Miss. LEXIS 299 (Miss. 1950).

14. Instructions.

A defendant was entitled to have the jury instructed according to subsection (2) of this section, as it read at the time of the commission of the offense prior to the 1989 amendment. *Butler v. State*, 608 So. 2d 314, 1992 Miss. LEXIS 588 (Miss. 1992).

Instruction in prosecution for contributing to delinquency of minor under age of 18 years which does not follow exact language of indictment but follows statute and defines offense is sufficient. *Broadstreet v. State*, 208 Miss. 789, 45 So. 2d 590, 1950 Miss. LEXIS 299 (Miss. 1950).

15. Sentence and punishment.

In prosecution for contributing to delinquency of minor under 18 years of age, failure to quash jury panel is not error when trial judge in sentencing defendant in case immediately preceding trial of defendant, involving similar circumstances, stated as reason for imposing fine and jail sentence that he was interested in protection of boys and girls, though statement was in presence of prospective jurors, since degree of punishment is matter with which trial jury has no concern. *Broadstreet v. State*, 208 Miss. 789, 45 So. 2d 590, 1950 Miss. LEXIS 299 (Miss. 1950).

OPINIONS OF THE ATTORNEY GENERAL

Under subsection (3) of this section a municipality may enact a "parental responsibility" ordinance with appropriate

criminal penalties without conflicting with state law. Of course, the ordinance must be reasonable in scope and must

pass constitutional scrutiny. Patten, January 10, 1996, A.G. Op. #95-0822.

A person can be charged with the failure to utilize a child restraint device or seat belt and child abuse without violating the double jeopardy clause. Bishop, Feb. 16, 2001, A.G. Op. #2001-0733.

A municipal court has jurisdiction to hear and decide, without a jury, an alleged

violation of Miss. Code Ann. § 97-5-39(1)(a), and to punish offenders as prescribed by law. The penalty for state misdemeanors tried in a municipal court is limited to six months incarceration and/or a \$1,000 fine pursuant to Miss Code Ann. § 21-13-19. Boutwell, March 16, 2007, A.G. Op. #07-00124, 2007 Miss. AG LEXIS 113.

RESEARCH REFERENCES

ALR.

Parents' liability for injury or damage intentionally inflicted by minor child. 54 A.L.R.3d 974.

Sexual child abuser's civil liability to child's parent. 54 A.L.R.4th 93.

Parent's right to recover for loss of consortium in connection with injury to child. 54 A.L.R.4th 112.

Liability of health maintenance organizations (HMOs) for negligence of member physicians. 51 A.L.R.5th 271.

Waiver of evidentiary privilege by inadvertent disclosure – state law. 51 A.L.R.5th 603.

Parents' criminal liability for failure to provide medical attention to their children. 118 A.L.R.5th 253.

Am. Jur.

47 Am. Jur. 2d, Juvenile Courts and Delinquent and Dependent Children §§ 135 et seq.

15 Am. Jur. Pl & Pr Forms (Rev), Juvenile Courts and Delinquent and Dependent Children, Form 102 (judgment or decree adjudging minor a neglected and

dependent child and ordering change of custody).

2 Am. Jur. Proof of Facts 2d, Child Abuse-The Battered Child Syndrome, §§ 35 et seq. (proof of physical abuse in juvenile or family court proceeding).

3 Am. Jur. Proof of Facts 2d, Child Neglect, §§ 25 et seq. (proof of physical neglect – malnutrition and lack of adequate clothing); §§ 44 et seq. (proof of emotional neglect – child's emotional well-being endangered by parent's disturbed condition); §§ 72 et seq. (proof of medical neglect – parent's refusal to consent to blood transfusion during surgery for alleviation of facial disfigurement).

6 Am. Jur. Proof of Facts 2d, Failure to Report Suspected Case of Child Abuse, §§ 10 et seq. (proof of physicians' negligent failure to diagnose and report suspected case of child abuse).

Law Reviews.

Comment: Recent amendments to the Mississippi Rules of Evidence – the rights of the victim v. the rights of the accused in child abuse prosecutions and dependency or neglect proceedings. 61 Miss. L. J. 367 (Fall, 1991).

§ 97-5-40. Condoning child abuse.

(1) Any parent, guardian, custodian, stepparent or any other person who lives in the household with a child, who knowingly condones an incident of felonious child abuse of that child, which consists of one or more violations of (a) subsection (2) of Section 97-5-39 or (b) felonious sexual battery of that child, which consists of one or more violations of Section 97-3-95 shall be guilty of a misdemeanor and, upon conviction thereof, shall be punished by imprisonment for not more than one (1) year or by a fine of not more than One Thousand Dollars (\$1,000.00), or both.

(2) A person shall not be considered to have condoned child abuse merely because such person does not report an act of child abuse.

(3) The provisions of this section shall be in addition to any other criminal law.

HISTORY: Laws, 1989, ch. 566, § 1; Laws, 1992, ch. 557, § 1, eff from and after July 1, 1992.

Cross References — Imposition of standard state assessment in addition to all court imposed fines or other penalties for any misdemeanor violation, see § 99-19-73.

Additional monetary assessment for violation of this section when committed against a minor to be deposited in Mississippi Children's Trust Fund, see § 99-19-75.

RESEARCH REFERENCES

Am. Jur.

25 Am. Jur. Proof of Facts 3d 189, Cor-roboration of a Child's Sexual Abuse Allegations with Behavioral Evidence.

§ 97-5-41. Carnal knowledge of step or adopted child; carnal knowledge of child by cohabitating partner.

(1) Any person who shall have carnal knowledge of his or her unmarried stepchild or adopted child younger than himself or herself and over fourteen (14) and under eighteen (18) years of age, upon conviction, shall be punished by imprisonment in the penitentiary for a term not exceeding ten (10) years.

(2) Any person who shall have carnal knowledge of an unmarried child younger than himself or herself and over fourteen (14) and under eighteen (18) years of age, with whose parent he or she is cohabiting or living together as husband and wife, upon conviction, shall be punished by imprisonment in the penitentiary for a term not exceeding ten (10) years.

HISTORY: Laws, 1984, ch. 390; Laws, 1985, ch. 389, § 5, eff from and after July 1, 1985.

Cross References — Applicability of certain evidentiary rules in criminal prosecutions for child abuse, see § 13-1-401.

Notification of Department of Education that certificated person has been convicted of sex offense, see § 37-3-51.

Prohibition of person convicted of crimes affecting children or other violent crimes from being licensed as foster parent or a foster home, see § 43-15-6.

Other sexually related offenses against children, see §§ 97-3-65, 97-3-95, 97-5-5, 97-5-23, 97-5-27 through 97-5-37.

Rape of female under 12 years of age, see §§ 97-3-65, 97-3-95, and 97-5-23.

Sexual battery, see §§ 97-3-95 through 97-3-103.

Felonious abuse of children, see § 97-5-39.

Mandatory reporting of offense under this section relating to the carnal knowledge of a stepchild, adopted child or child of a cohabitating partner when committed by an adult against a minor under the age of sixteen, see § 97-5-51.

Additional monetary assessment for violation of this section when committed against a minor to be deposited in Mississippi Children's Trust Fund, see § 99-19-75.

Testing for HIV and AIDS of any person convicted under this section, see §§ 99-19-201 and 99-19-203.

RESEARCH REFERENCES

ALR.

Assault with intent to commit unnatural sex act upon minor as affected by latter's consent. 65 A.L.R.2d 748.

Assault and battery: sexual nature of physical contact as aggravating offense. 63 A.L.R.3d 225.

Marital or sexual relationship between parties as affecting right to adopt. 42 A.L.R.4th 776.

Am. Jur.

65 Am. Jur. 2d, Rape §§ 2, 5-10, 15-20, 24.

70C Am. Jur. 2d, Sodomy §§ 1 et seq.

2A Am. Jur. Pl & Pr Forms, Assault and Battery, Forms 191-193 (complaints and instructions as to sex offenses).

Forms 195.1, 196.1 (complaint, petition or declaration, sexual molestation of minor daughter during daughter's childhood, against father).

CJS.

6A C.J.S., Assault and Battery §§ 75, 84-88.

75 C.J.S., Rape §§ 36-50.

Law Reviews.

1979, Mississippi Supreme Court Review: Criminal Law and Procedure. 50 Miss. L. J. 763, December, 1979.

Recent amendments to the Mississippi Rules of Evidence—the rights of the victim v. the rights of the accused in child abuse prosecutions and dependency or neglect proceedings. 61 Miss. L. J. 367 (Fall, 1991).

Practice References.

The Prosecution and Defense of Sex Crimes (Matthew Bender).

Sexual Assault Trials, Second Edition (Michie).

§ 97-5-42. Protection of children from parents convicted of felony child sexual abuse; creation of local registry; penalties; standards for visitation.

(1)(a) For purposes of this section, a conviction of felony parental child sexual abuse shall include any nolo contendere plea, guilty plea or conviction at trial to any offense enumerated in Section 93-15-121(h) or any other statute of the State of Mississippi whereby a parent may be penalized as a felon on account of sexual abuse of his or her own child; and shall include any conviction by plea or trial in any other state of the United States to an offense whereby a parent may be penalized as a felon for sexual abuse of his or her own child under the laws of that state, or which would be so penalized for such conduct had the act or acts been committed in the State of Mississippi.

(b) A certified copy of the court order or judgment evidencing such a conviction shall be accepted by any public office with responsibilities pursuant to this section, and by any court in the State of Mississippi, as conclusive evidence of the conviction.

(2)(a) No person who has been convicted of felony parental child sexual abuse shall contact or attempt to contact the victim child without the prior express written permission of the child's then legal custodian, who may be the other parent, a guardian, person in loco parentis or person with legal or physical custody of a child.

(b) No person who has been convicted of felony parental child sexual abuse shall harass, threaten, intimidate or by any other means menace the victim child or any legal custodian of the child, who may be the other parent,

a guardian, person in loco parentis or person with legal or physical custody of a child.

(c) Any person who believes that a person who has been convicted of felony parental child sexual abuse may violate the provisions of paragraph (a) or (b) of this subsection may register with the sheriff and any municipal law enforcement agency of the child's county and municipality of residence, setting forth the factual basis for that belief which shall include a certified copy of the court order or judgment evidencing the conviction of the child sexual abuse felon. The sheriff's office of each county and all municipal law enforcement agencies shall maintain a separate and distinct register for the purpose of recording the data required herein, and shall advise the reporting party of how emergency contact can be made with that office at any time with respect to a threatened violation of paragraph (a) or (b) of this subsection. Immediate response with police protection shall be provided to any emergency contact made pursuant to this section, which police protection shall be continued in such reasonable manner as to deter future violations and protect the child and any person with legal custody of the child.

(d) Any person who has been convicted of felony parental child sexual abuse who violates paragraph (a) of this subsection shall, upon conviction, be punished by imprisonment in the county jail for not more than one (1) year. Any person who has been convicted of felony parental child sexual abuse who violates paragraph (b) of this subsection shall, upon conviction, be punished by imprisonment in the state penitentiary for not more than five (5) years.

(3) No person who has been convicted of felony parental child sexual abuse shall be entitled to have parental or other visitation rights as to that child who was the victim, unless he or she files a petition in the chancery court of the county in which the child resides, reciting the conviction, and joining as parties defendant any other parent, guardian, person standing in loco parentis or having legal or physical custody of the child. A guardian ad litem shall be appointed to represent the child at petitioner's expense. The court shall appoint a qualified psychologist or psychiatrist to conduct an independent examination of the petitioner to determine whether contact with that person poses a physical or emotional risk to the child, and report to the court. Such examination shall be at petitioner's expense. The court shall require any such petitioner to deposit with the court sufficient funds to pay expenses chargeable to a petitioner hereunder, the amount of such deposit to be within the discretion of the chancellor. Any defendant and the child through his or her guardian ad litem shall be entitled to a full evidentiary hearing on the petition. In no event shall a child be required to testify in court or by deposition, or be subjected to any psychological examination, without the express consent of the child through his or her guardian ad litem. Such guardian ad litem shall consult with the child's legal guardian or custodians before consenting to such testimony or examination. At any hearing there is a rebuttable presumption that contact with the child poses a physical and emotional risk to the child. That presumption may be rebutted and visitation or contact allowed on such terms and conditions that the chancery court shall set only upon specific written findings by the court that:

(a) Contact between the child and the offending parent is appropriate and poses minimal risk to the child;

(b) If the child has received counseling, that the child's counselor believes such contact is in the child's best interest;

(c) The offending parent has successfully engaged in treatment for sex offenders or is engaged in such treatment and making progress; and

(d) The offending parent's treatment provider believes contact with the child is appropriate and poses minimal risk to the child. If the court, in its discretion, allows visitation or contact it may impose such conditions to the visitation or contact which it finds reasonable, including supervision of contact or visitation by a neutral and independent adult with a detailed plan for supervision of any such contact or visitation.

HISTORY: Laws, 2000, ch. 403, § 1, eff from and after July 1, 2000.

Joint Legislative Committee Note — Pursuant to Section 1-1-109, the Joint Legislative Committee on Compilation, Revision and Publication of Legislation corrected an error appearing in (1)(b). The words “this act” were changed to “this section” so that “responsibilities pursuant to this act” now reads as “responsibilities pursuant to this section.” The Joint Committee ratified the correction at its May 16, 2002 meeting.

Pursuant to Section 1-1-109, the Joint Legislative Committee on Compilation, Revision and Publication of Legislation corrected an error in a statutory reference in subsection (1)(a) by substituting “Section 93-15-121(h)” for “Section 93-15-103(3)(g).” The Joint Committee ratified the correction at its August 5, 2016, meeting.

Pursuant to Section 1-1-109, the Joint Legislative Committee on Compilation, Revision and Publication of Legislation corrected errors in internal references in this section by substituting “paragraph (a) or (b) of this subsection” for “subsection (2)(a) or (2)(b) hereof” both times it appears in (2)(c), “paragraph (a) of this subsection” for “subsection (2)(a) hereof” in the first sentence of (2)(d) and “paragraph (b) of this subsection” for “subsection (2)(b) hereof” in the last sentence of (2)(d). The Joint Committee ratified the correction at the August 15, 2017, meeting of the Committee.

Cross References — Child welfare, see §§ 43-15-1 et seq.

Mississippi Sex Offenders Registration Law, see § 45-33-21 et seq.

Grounds for termination of parental rights, see § 93-15-121.

Additional monetary assessment for violation of this section when committed against a minor to be deposited in Mississippi Children's Trust Fund, see § 99-19-75.

§§ 97-5-43 through 97-5-47. Repealed.

Repealed by Laws, 1997, ch. 578, § 16, eff from and after February 1, 1998.

§ 97-5-43. [Laws, 1994, ch. 486, § 5]

§ 97-5-45. [Laws, 1994, ch. 486, § 6]

§ 97-5-47. [Laws, 1994, ch. 486, § 7]

Editor's Notes — Former § 97-5-43 related to posting signs prohibiting the sale of tobacco products to children.

Former § 97-5-45 related to notice to employees and agreements prohibiting the sale of tobacco products to children.

Former § 97-5-47 related to requirements for the sale of tobacco products through vending machines.

§ 97-5-49. Knowingly allowing party where minor obtains, possesses or consumes alcoholic beverage; definitions; applicability of section; penalties.

(1) As used in this section:

(a) “Adult” means a person over the age of twenty-one (21) years.

(b) “Alcoholic beverage” has the meaning as defined in Section 67-1-5.

(c) “Beer” has the meaning as defined in Section 67-3-3.

(d) “Light wine” means wine containing five percent (5%) or less of alcohol by weight.

(e) “Minor” means a person under the age of twenty-one (21) years.

(f) “Party” means a gathering or event at which a group of two (2) or more persons assembles for a social occasion or activity at a private residence or a private premises.

(g) “Private premises” means privately owned land, including any appurtenances or improvements on the land.

(h) “Private residence” means the place where a person actually lives or has his or her home.

(i) “Wine” has the meaning as defined in Section 67-1-5.

(j) “Light spirit product” means a beverage of an alcoholic content of not more than four percent (4%) by weight and containing one or more distilled spirits, as defined in Section 67-1-5.

(2) No adult who owns or leases a private residence or private premises shall knowingly allow a party to take place or continue at the residence or premises if a minor at the party obtains, possesses or consumes any alcoholic beverage, light wine, light spirit product or beer if the adult knows that the minor has obtained, possesses or is consuming alcoholic beverages, light wine, light spirit product or beer.

(3) This section shall not apply to legally protected religious activities or gatherings of family members or to any of the exemptions set forth in Section 67-3-54.

(4) Each incident in violation of subsection (2) of this section or any part of subsection (2) constitutes a separate offense.

(5) Any person who violates subsection (2) of this section shall be guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of One Thousand Dollars (\$1,000.00) or by imprisonment in the county jail for not more than six (6) months, or by both the fine and imprisonment, in the discretion of the court.

HISTORY: Laws, 2011, ch. 435; Laws, 2011, ch. 472, § 1; Laws, 2016, ch. 405, § 1, eff from and after July 1, 2016; Laws, 2020, ch. 314, § 62, eff from and after passage (approved June 18, 2020).

Amendment Notes — The 2020 amendment, effective June 18, 2020, added (1)(j); and in (2), “inserted light spirit product.”

Cross References — Imposition of standard state assessment in addition to all court imposed fines or other penalties for any misdemeanor violation, see § 99-19-73.

§ 97-5-51. Mandatory reporting of sex crimes against minors; definitions; procedure; report contents; forensic samples; penalties.

(1) **Definitions.** For the purposes of this section:

(a) “Sex crime against a minor” means any offense under at least one (1) of the following statutes when committed by an adult against a minor who is under the age of sixteen (16):

- (i) Section 97-3-65 relating to rape;
- (ii) Section 97-3-71 relating to rape and assault with intent to ravish;
- (iii) Section 97-3-95 relating to sexual battery;
- (iv) Section 97-5-23 relating to the touching of a child, mentally defective or incapacitated person or physically helpless person for lustful purposes;
- (v) Section 97-5-41 relating to the carnal knowledge of a stepchild, adopted child or child of a cohabiting partner;
- (vi) Section 97-5-33 relating to exploitation of children;
- (vii) Section 97-3-54.1(1)(c) relating to procuring sexual servitude of a minor;
- (viii) Section 43-47-18 relating to sexual abuse of a vulnerable person;
- (ix) Section 97-1-7 relating to the attempt to commit any of the offenses listed in this subsection;
- (x) Section 97-29-51 relating to procuring sexual services of a minor; and
- (xi) Section 43-47-18 and Section 43-47-19 relating to sexual battery abuse of a vulnerable person who is a minor.

(b) “Mandatory reporter” means any of the following individuals performing their occupational duties: health care practitioner, clergy member, teaching or child care provider, law enforcement officer, or commercial image processor.

(c) “Health care practitioner” means any individual who provides health care services, including a physician, surgeon, physical therapist, psychiatrist, psychologist, medical resident, medical intern, hospital staff member, licensed nurse, midwife and emergency medical technician or paramedic.

(d) “Clergy member” means any priest, rabbi or duly ordained deacon or minister.

(e) “Teaching or child care provider” means anyone who provides training or supervision of a minor under the age of sixteen (16), including a teacher, teacher’s aide, principal or staff member of a public or private school, social worker, probation officer, foster home parent, group home or other child care institutional staff member, personnel of residential home facilities, a licensed or unlicensed day care provider.

(f) “Commercial image processor” means any person who, for compensation: (i) develops exposed photographic film into negatives, slides or prints; (ii) makes prints from negatives or slides; or (iii) processes or stores digital

media or images from any digital process, including, but not limited to, website applications, photography, live streaming of video, posting, creation of power points or any other means of intellectual property communication or media including conversion or manipulation of still shots or video into a digital show stored on a photography site or a media storage site.

(g) “Caretaker” means any person legally obligated to provide or secure adequate care for a minor under the age of sixteen (16), including a parent, guardian, tutor, legal custodian or foster home parent.

(2)(a) **Mandatory reporter requirement.** A mandatory reporter shall make a report if it would be reasonable for the mandatory reporter to suspect that a sex crime against a minor has occurred.

(b) Failure to file a mandatory report shall be punished as provided in this section.

(c) Reports made under this section and the identity of the mandatory reporter are confidential except when the court determines the testimony of the person reporting to be material to a judicial proceeding or when the identity of the reporter is released to law enforcement agencies and the appropriate prosecutor. The identity of the reporting party shall not be disclosed to anyone other than law enforcement or prosecutors except under court order; violation of this requirement is a misdemeanor. Reports made under this section are for the purpose of criminal investigation and prosecution only and information from these reports is not a public record. Disclosure of any information by the prosecutor shall conform to the Mississippi Uniform Rules of Circuit and County Court Procedure.

(d) Any mandatory reporter who makes a required report under this section or participates in a judicial proceeding resulting from a mandatory report shall be presumed to be acting in good faith. Any person or institution reporting in good faith shall be immune from any liability, civil or criminal, that might otherwise be incurred or imposed.

(3)(a) **Mandatory reporting procedure.** A report required under subsection (2) must be made immediately to the law enforcement agency in whose jurisdiction the reporter believes the sex crime against the minor occurred. Except as otherwise provided in this subsection (3), a mandatory reporter may not delegate to any other person the responsibility to report, but shall make the report personally.

(i) The reporting requirement under this subsection (3) is satisfied if a mandatory reporter in good faith reports a suspected sex crime against a minor to the Department of Child Protection Services under Section 43-21-353.

(ii) The reporting requirement under this subsection (3) is satisfied if a mandatory reporter reports a suspected sex crime against a minor by following a reporting procedure that is imposed:

1. By state agency rule as part of licensure of any person or entity holding a state license to provide services that include the treatment or education of abused or neglected children; or

2. By statute.

(b) **Contents of the report.** The report shall identify, to the extent known to the reporter, the following:

- (i) The name and address of the minor victim;
- (ii) The name and address of the minor's caretaker;
- (iii) Any other pertinent information known to the reporter.

(4) A law enforcement officer who receives a mandated report under this section shall file an affidavit against the offender on behalf of the State of Mississippi if there is probable cause to believe that the offender has committed a sex crime against a minor.

(5) **Collection of forensic samples.**

(a)(i) When an abortion is performed on a minor who is less than fourteen (14) years of age at the time of the abortion procedure, fetal tissue extracted during the abortion shall be collected in accordance with rules and regulations adopted pursuant to this section if it would be reasonable to suspect that the pregnancy being terminated is the result of a sex crime against a minor.

(ii) When a minor who is under sixteen (16) years of age gives birth to an infant, umbilical cord blood shall be collected, if possible, in accordance with rules and regulations adopted pursuant to this section if it would be reasonable to suspect that the minor's pregnancy resulted from a sex crime against a minor.

(iii) It shall be reasonable to suspect that a sex crime against a minor has occurred if the mother of an infant was less than sixteen (16) years of age at the time of conception and at least one (1) of the following conditions also applies:

1. The mother of the infant will not identify the father of the infant;
2. The mother of the infant lists the father of the infant as unknown;
3. The person the mother identifies as the father of the infant disputes his fatherhood;
4. The person the mother identifies as the father of the infant is twenty-one (21) years of age or older; or
5. The person the mother identifies as the father is deceased.

(b) The State Medical Examiner shall adopt rules and regulations consistent with Section 99-49-1 that prescribe:

- (i) The amount and type of fetal tissue or umbilical cord blood to be collected pursuant to this section;
- (ii) Procedures for the proper preservation of the tissue or blood for the purpose of DNA testing and examination;
- (iii) Procedures for documenting the chain of custody of such tissue or blood for use as evidence;
- (iv) Procedures for proper disposal of fetal tissue or umbilical cord blood collected pursuant to this section;
- (v) A uniform reporting instrument mandated to be utilized, which shall include the complete residence address and name of the parent or legal guardian of the minor who is the subject of the report required under this subsection (5); and

(vi) Procedures for communication with law enforcement agencies regarding evidence and information obtained pursuant to this section.

(6) Penalties.

(a) A person who is convicted of a first offense under this section shall be guilty of a misdemeanor and fined not more than Five Hundred Dollars (\$500.00).

(b) A person who is convicted of a second offense under this section shall be guilty of a misdemeanor and fined not more than One Thousand Dollars (\$1,000.00), or imprisoned for not more than thirty (30) days, or both.

(c) A person who is convicted of a third or subsequent offense under this section shall be guilty of a misdemeanor and fined not more than Five Thousand Dollars (\$5,000.00), or imprisoned for not more than one (1) year, or both.

(7) A health care practitioner or health care facility shall be immune from any penalty, civil or criminal, for good-faith compliance with any rules and regulations adopted pursuant to this section.

HISTORY: Laws, 2012, ch. 519, § 1; Laws, 2013, ch. 511, § 1, eff from and after July 1, 2013; Laws, 2019, ch. 420, § 7, eff from and after July 1, 2019.

Editor's Notes — Laws of 2012, ch. 519, § 2, provides:

“SECTION 2. **Severability.** Any provision of this act held to be invalid or unenforceable by its terms, or as applied to any person or circumstance, shall be construed so as to give it the maximum effect permitted by law, unless such holding shall be one of utter invalidity or unenforceability, in which event such provision shall be deemed severable herefrom and shall not affect the remainder hereof or the application of such provision to other persons not similarly situated or to other dissimilar circumstances.”

Amendment Notes — The 2019 amendment added (1)(a)(x) and (xi) and made a related change; and substituted “Department of Child Protection Services” for “Department of Human Services” in (3)(a)(i).

Cross References — Imposition of standard state assessment in addition to all court imposed fines or other penalties for any misdemeanor violation, see § 99-19-73.

CHAPTER 7.

CRIMES AGAINST SOVEREIGNTY OR ADMINISTRATION OF GOVERNMENT

Sec.

- 97-7-1. Assessment; failure or refusal to deliver by taxpayer.
- 97-7-3. Assessment; failure to deliver by banker.
- 97-7-5. Assessment; frauds on.
- 97-7-7. Capitol building; not to be used for sleeping-rooms.
- 97-7-9. Capitol building; defacing.
- 97-7-10. Fraudulent statements and representations.
- 97-7-11. Conspiracy to defraud state; obtaining public funds fraudulently.
- 97-7-13. Conspiracy to defraud state; defeating or preventing prosecution of just claim due state.
- 97-7-15. Conspiracy to defraud state; each party guilty of felony when one or more conspirators act.
- 97-7-17. Conspiracy to prevent holding a public office or discharging its duties, etc.; by use of force, etc.
- 97-7-19. Conspiracy to prevent holding public office or discharging its duties, etc.; by use of boycott.
- 97-7-21 through 97-7-27. Repealed.
- 97-7-29. Destroying, injuring, etc. property to hinder war efforts.
- 97-7-31. Destroying, injuring, etc. state or federally licensed communication systems.
- 97-7-33. False statements to federal authorities as to denial of constitutional rights by the state or its agents.
- 97-7-35. False swearing; false sworn statements to federal authorities as to denial of constitutional rights by the state or its agents.
- 97-7-37. False swearing; false sworn statements to federal authorities as to denial of constitutional rights by the state or its agents with intent or purpose to deceive or cause investigation.
- 97-7-39. Flags; desecration of national or state flag prohibited.
- 97-7-41. Food commodity donated by federal or state government; obtaining fraudulently, sale or unauthorized disposition.
- 97-7-42. Fraudulent use of food coupons dispensed by state welfare department.
- 97-7-43. Impersonating state, county or municipal officer or employee.
- 97-7-44. Impersonation of state, county, municipal or other public officer or employee prohibited; penalties.
- 97-7-45. Legislature; preventing or attempting to prevent meetings.
- 97-7-47. Legislature; disturbing proceedings.
- 97-7-49. Legislature; altering bills or resolutions before passage.
- 97-7-51. Legislature; altering bills or resolutions after passage.
- 97-7-53. Legislature; bribing or influencing member.
- 97-7-55. Legislature; member accepting or agreeing to accept bribes.
- 97-7-57. Legislature; influence peddling.
- 97-7-59. Military service; failure to report for active duty.
- 97-7-61. Military service; organizing military body for public drill or parade; license required.
- 97-7-63. Picketing which interferes with access to government buildings, property, streets and sidewalks.
- 97-7-65. Timber; cutting and rafting from state lands.
- 97-7-67. Treason; punishment.
- 97-7-69. Treason; essential proof.

dollars nor more than five hundred dollars, or imprisoned in the county jail not less than one week nor more than three months, or both.

HISTORY: Codes, 1892, § 971; 1906, § 1047; Hemingway's 1917, § 775; 1930, § 791; 1942, § 2015.

Cross References — Tax assessments, see §§ 27-35-23 et seq.

§ 97-7-7. Capitol building; not to be used for sleeping-rooms.

If any person shall occupy any of the offices, apartments, halls, or other portion of the capitol building at Jackson as a lodging or sleeping-room, he shall be guilty of a misdemeanor, and, upon conviction, shall be fined not less than ten dollars nor more than one hundred dollars, and be imprisoned in the county jail not exceeding thirty days.

HISTORY: Codes, Hutchinson's 1848, ch. 4, art. 23 (3); 1857, ch. 6, art. 96; 1871, § 190; 1880, § 272; 1892, § 999; 1906, § 1076; Hemingway's 1917, § 803; 1930, § 822; 1942, § 2048.

Cross References — Restrictions on use of capitol buildings, see §§ 29-5-1 et seq.

Imposition of standard state assessment in addition to all court imposed fines or other penalties for any misdemeanor violation, see § 99-19-73.

§ 97-7-9. Capitol building; defacing.

If any person shall, by any means whatsoever, wilfully injure or destroy any of the works, materials, furniture, or ornaments of the capitol, or any of the buildings or monuments on the grounds belonging thereto, or shall wilfully deface any of the walls thereof, or shall write or make any drawing or characters thereon with pencil-mark, or otherwise, or do any indecent act, either on or to said walls, or within the same, or shall wilfully deface or injure the trees, fences, pavement, or soil on said grounds, such person, on conviction, shall be punished by a fine not exceeding five hundred dollars, or imprisonment in the county jail not more than six months, or both.

HISTORY: Codes, 1857, ch. 6, art. 101; 1871, § 194; 1880, § 273; 1892, § 1000; 1906, § 1077; Hemingway's 1917, § 804; 1930, § 823; 1942, § 2049.

§ 97-7-10. Fraudulent statements and representations.

(1) Whoever, with intent to defraud the state or any department, agency, office, board, commission, county, municipality or other subdivision of state or local government, knowingly and willfully falsifies, conceals or covers up by trick, scheme or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall, upon conviction, be punished by a fine of not more than Ten Thousand Dollars (\$10,000.00) or by imprisonment for not more than five (5) years, or by both such fine and imprisonment.

(2) This section shall not prohibit the prosecution under any other criminal statute of the state.

HISTORY: Laws, 1988, ch. 511, § 2, eff from and after July 1, 1988.

Cross References — White-collar crime investigations, see § 7-5-59.

JUDICIAL DECISIONS

ANALYSIS

1. Evidence.
2. Grand jury.

1. Evidence.

Because the State failed to prove beyond a reasonable doubt that defendant knowingly or willfully made, used, or produced the title application with the intent to defraud the officer and defendant testified that it was an employee of the seller, not defendant, that created the title application, defendant was entitled to reversal of his conviction for making fraudulent statements and representations to defraud the government. *Harris v. State*, — So. 3d —, 2020 Miss. App. LEXIS 499 (Miss. Ct. App. Aug. 25, 2020).

Defendant's convictions for fraud, in violation of Miss. Code Ann. § 97-7-10(1), were supported by the evidence because defendant, a deputy clerk at a county tax collector's office, admitted to a police officer to changing the addresses for taxing districts to reduce the fees customers paid for car tags; defendant also admitted to supplying a made-up repair shop listed on a penalty waiver form to enable customers

to have their late penalties waived. *Gooden v. State*, 54 So. 3d 298, 2010 Miss. App. LEXIS 547 (Miss. Ct. App. 2010).

Evidence was sufficient to support a conviction where testimony showed that the defendant submitted an invoice to a county board of education for, inter alia, grinding 46 tree stumps, but that only seven or eight tree stumps were actually ground. *Pool v. State*, 724 So. 2d 1044, 1998 Miss. App. LEXIS 1040 (Miss. Ct. App. 1998).

2. Grand jury.

Trial court properly denied a public utility's motion to quash a grand jury subpoena because issuance of the subpoena was a lawful exercise of the grand jury's investigative authority, and the evidence was relevant to its investigation and had the potential to result in criminal indictments; if the grand jury was investigating to determine if state laws regarding the tax collection were being followed, it was acting within the scope of its authority and its actions were unquestionable. *Entergy Miss., Inc. v. State*, 132 So. 3d 568, 2014 Miss. LEXIS 120 (Miss. 2014).

§ 97-7-11. Conspiracy to defraud state; obtaining public funds fraudulently.

If any person shall enter into any agreement, combination or conspiracy to defraud the State of Mississippi, or any department or political subdivision thereof, by obtaining or aiding to obtain the payment or allowance from the public funds of the state, or of any department or political subdivision thereof, of any false or fraudulent claim, he shall be subject to indictment therefor, and upon conviction thereof, shall be imprisoned in the state penitentiary for a term not to exceed five years, or shall be punished by a fine not to exceed \$1000.00, or by imprisonment in the county jail for a term of not more than six months, or by both such fine and imprisonment, within the discretion of the court.

HISTORY: Codes, 1930, § 831; 1942, § 2057; Laws, 1930, ch. 97.

Cross References — Suits by the state, see §§ 11-45-1 et seq.

Unfair bidder on public contracts, see § 19-13-113.

Proceedings for execution and enforcement of antitrust laws, see §§ 75-21-19 et seq.

Conspiracy, generally, see § 97-1-1.

Conspiracy and collusion connected with state highway work, see §§ 97-15-5, 97-15-11.

RESEARCH REFERENCES

Am. Jur.

16 Am. Jur. 2d, Conspiracy §§ 1 et seq.

CJS.

15A C.J.S., Conspiracy §§ 257 et seq.

§ 97-7-13. Conspiracy to defraud state; defeating or preventing prosecution of just claim due state.

If any person, with intent to defraud the State of Mississippi, or any department or political subdivision thereof, shall enter into any agreement, combination or conspiracy to defeat, by any unlawful or fraudulent means, the payment of any just claim or penalty due the State of Mississippi, or any department or political subdivision thereof, or to prevent, by any unlawful or fraudulent means, the prosecution of suit for the proper enforcement of any such claim or penalty, or to defraud the State of Mississippi or any department or political subdivision thereof, in any manner, or for any purpose, he shall be guilty of a felony, and upon conviction thereof shall be punished by imprisonment in the state penitentiary for a term not to exceed five years, or by imprisonment in the county jail for not more than six months, or by fine of not more than \$1000.00, or by both such imprisonment and fine, within the discretion of the court.

HISTORY: Codes, 1930, § 832; 1942, § 2058; Laws, 1930, ch. 97.

Cross References — Suits by the state, see §§ 11-45-11 et seq.

Conspiracy, generally, see § 97-1-1.

Imposition of standard state assessment in addition to all court imposed fines or other penalties for any felony violation, see § 99-19-73.

RESEARCH REFERENCES

Am. Jur.

16 Am. Jur. 2d, Conspiracy §§ 1 et seq.

CJS.

15A C.J.S., Conspiracy §§ 279-285.

§ 97-7-15. Conspiracy to defraud state; each party guilty of felony when one or more conspirators act.

If two or more persons, with intent to defraud the State of Mississippi, or any department or political subdivision thereof, shall conspire to defeat by any unlawful or fraudulent means, the payment of any just claim or penalty due the State of Mississippi, or any department or political subdivision thereof, or shall conspire to prevent by any unlawful or fraudulent means, the prosecution

of suit for the proper enforcement of any such claim or penalty, or shall conspire to defraud the State of Mississippi, or any department or political subdivision thereof, in any manner, or for any purpose, and one or more of such parties shall do any act to effect the object of the conspiracy each of the parties to such conspiracy shall be guilty of a felony, and upon conviction thereof shall be punished as provided in section 97-7-13.

HISTORY: Codes, 1930, § 833; 1942, § 2059; Laws, 1930, ch. 97.

Cross References — Suits by the state, see §§ 11-45-11 et seq.
Conspiracy, generally, see § 97-1-1.

RESEARCH REFERENCES

Am. Jur.

16 Am. Jur. 2d, Conspiracy §§ 1 et seq.

CJS.

15A C.J.S., Conspiracy §§ 279-285.

§ 97-7-17. Conspiracy to prevent holding a public office or discharging its duties, etc.; by use of force, etc.

If two (2) or more persons conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the State of Mississippi, or any subdivision thereof, or from discharging any duties thereof, or to induce by like means any officer of the State of Mississippi or subdivision thereof, to leave the place where his duties as an officer are required to be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties, each of such persons shall be fined upon conviction not more than one thousand dollars (\$1,000.00) or imprisoned for not more than five (5) years, or both.

HISTORY: Codes, 1942, § 2059.1; Laws, 1968, ch. 344, § 1, eff from and after passage (approved July 30, 1968).

§ 97-7-19. Conspiracy to prevent holding public office or discharging its duties, etc.; by use of boycott.

If two (2) or more persons conspire to prevent any person from accepting or holding any office, trust, or place of confidence under the State of Mississippi or any subdivision thereof, or to induce any officer of the State of Mississippi or subdivision thereof to leave the place where his duties as an officer are required to be performed and as a means of carrying out the object of such conspiracy, shall cause or attempt to cause, or induce or encourage any individual or individuals to cease doing business with any other person or to cease using, buying, selling, or otherwise dealing in the products of any other person, each of such persons shall be fined upon conviction not more than one thousand dollars (\$1,000.00), or imprisoned for not more than five (5) years, or both.

HISTORY: Codes, 1942, § 2059.2; Laws, 1968, ch. 344, § 2, eff from and after passage (approved July 30, 1968).

§§ 97-7-21 through 97-7-27. Repealed.

Repealed by Laws, 2009, ch. 369, § 1, effective upon passage (March 17, 2009).

§ 97-7-21. [Codes, 1942, § 2066.5-01; Laws, 1964, ch. 323, § 1, eff from and after passage (approved June 11, 1964).]

§ 97-7-23. [Codes, 1942, § 2066.5-02; Laws, 1964, ch. 323, § 2, eff from and after passage (approved June 11, 1964).]

§ 97-7-25. [Codes, 1942, § 2066.5-03; Laws, 1964, ch. 323, § 3, eff from and after passage (approved June 11, 1964).]

§ 97-7-27. [Codes, 1942, § 2066.5-04; Laws, 1964, ch. 323, § 4, eff from and after passage (approved June 11, 1964).]

Editor's Notes — Former § 97-7-21 defined criminal syndicalism.

Former § 97-7-23 provided the penalties for the commission of certain acts of criminal syndicalism.

Former § 97-7-25 made assemblage for the purpose of advocating, encouraging, teaching or suggesting the doctrine of criminal syndicalism unlawful.

Former § 97-7-27 provided a penalty for permitting the use of a place or building for unlawful assemblage.

§ 97-7-29. Destroying, injuring, etc. property to hinder war efforts.

Whoever intentionally destroys, impairs, injures, interferes or tampers with real or personal property with reasonable grounds to believe that such act will hinder, delay or interfere with the preparation of the United States or of any of the states for defense or for war, or with the prosecution of war by the United States, shall be punished by imprisonment for not more than ten years, or by a fine of not more than ten thousand dollars (\$10,000.00), or both.

HISTORY: Codes, 1942, § 2400; Laws, 1942, ch. 183.

Cross References — Treason, see §§ 97-7-67 et seq.

RESEARCH REFERENCES

CJS.

77 C.J.S., Riot; Insurrection §§ 1 et seq.

87 C.J.S., Treason §§ 1 et seq.

§ 97-7-31. Destroying, injuring, etc. state or federally licensed communication systems.

Whoever intentionally destroys, impairs, injures, or tampers or interferes with any real or personal property used or useful in the maintenance, repair or operation of any telephone or telegraph system or radio station which is subject to regulation or licensing by any agency of the United States of America

or of the State of Mississippi, with reasonable grounds to believe that such act will hinder, delay or interfere with the maintenance, repair or operation of such telephone or telegraph system or radio station, on conviction shall be punished as prescribed in Section 97-7-29.

HISTORY: Codes, 1942, § 2401; Laws, 1942, ch. 183.

Cross References — Treason, see §§ 97-7-67 et seq.

RESEARCH REFERENCES

ALR.

Criminal liability for unauthorized interference with or reception of radio or television transmission. 43 A.L.R.4th 991.

CJS.

77 C.J.S., Riot; Insurrection §§ 1 et seq.

87 C.J.S., Treason §§ 1 et seq.

§ 97-7-33. False statements to federal authorities as to denial of constitutional rights by the state or its agents.

It shall be unlawful for any person or persons to wilfully and knowingly, whether orally or in writing, make or cause to be made, to any agency, or board, or commission, or member, or officer or official, or appointee, or employee, or representative thereof, of the executive, or the legislative, or the judicial department, of the United States or any subdivision thereof, which may be now in existence, or who may be now appointed, or hereafter created or appointed, including but not limited to any commissioner, or referee, or voting referee now appointed or who may be hereafter appointed by any court of the United States or any judge thereof, and further including but not limited to any member of the Federal Bureau of Investigation and any agent or representative, or investigator, or member of the Commission on Civil Rights of the United States, or the Advisory Committee or Board of the Commission on Civil Rights of the United States appointed in and for the State of Mississippi, any false or fictitious or fraudulent statement or statements, or to use any false writing or document asserting or claiming, that such person, or persons, or any other person or persons have been, or are about to be denied or deprived of any right, or privilege, or immunity granted or secured to them, or to any of them, by the United States Constitution and laws, or by the Mississippi Constitution and laws, by any officer, or agency, or employee, or representative, or board, or commission, or any member thereof of the State of Mississippi, or of any county or municipality, of the State of Mississippi, or of any other political subdivision of the State of Mississippi, or by the State of Mississippi and any person or persons violating the provisions of this section shall be guilty of the crime of making a false statement, which is created by this section, a felony, and upon conviction thereof shall be punished by imprisonment in the county jail for not less than six (6) months nor more than five (5) years in the penitentiary, or by a fine of not less than one hundred dollars (\$100.00) nor more than one thousand dollars (\$1,000.00) or by both such fine and imprisonment.

HISTORY: Codes, 1942, § 2155.4; Laws, 1960, ch. 263, § 1.

Cross References — False sworn statements to federal authorities, see §§ 97-7-35, 97-7-37.

Perjury, see §§ 97-9-59 et seq.

Imposition of standard state assessment in addition to all court imposed fines or other penalties for any felony violation, see § 99-19-73.

§ 97-7-35. False swearing; false sworn statements to federal authorities as to denial of constitutional rights by the state or its agents.

(1) It shall be unlawful for any person or persons to wilfully and knowingly make any oral or written sworn false statement, or affidavit, or attestation, or complaint, or allegation before any individual or officer authorized to administer oaths, to any agency, or board, or commission, or member, or official, or appointee, or employee, or representative thereof, of the executive, or the legislative, or the judicial department, of the United States, or any subdivision thereof, which may be now in existence, or who may be now appointed, or hereafter created or appointed, including but not limited to any member of the Federal Bureau of Investigation and any agent, or representative, or investigator, or member of the Commission on Civil Rights of the United States, or the Advisory Committee or Board of the Commission on Civil Rights of the United States appointed in and for the State of Mississippi, that such person, or persons, or other persons have been or are about to be deprived of any right, or privilege, or immunity granted or secured by the United States Constitution and Laws or by the Mississippi Constitution and Laws, by any officer, or agency, or employee, or representative, or board, or commission, or any member thereof of the State of Mississippi, or of any county or municipality, of the State of Mississippi, or of any other political subdivision of the State of Mississippi, or by the State of Mississippi, and any person or persons violating the provisions of this section shall be guilty of the crime of false swearing which is created by this section, a felony, and upon conviction thereof, shall be punished by imprisonment in the county jail for not less than six (6) months nor more than five (5) years in the penitentiary, or a fine of not less than one hundred dollars (\$100.00), nor more than one thousand dollars (\$1,000.00), or by both such fine and imprisonment.

(2) Corroboration or proof by more than one witness to establish the falsity of testimony or statements under oath is not required in prosecutions under this section. It shall not be necessary to prove, to sustain or charge under this section, that the oath or matter sworn to was material, or, if before an executive, legislative or judicial tribunal committee or commission that the tribunal committee or commission had jurisdiction.

HISTORY: Codes, 1942, § 2155.5; Laws, 1960, ch. 256, §§ 1, 2.

Cross References — False statements to federal authorities, see §§ 97-7-33, 97-7-37.

Perjury, see §§ 97-9-59 et seq.

Imposition of standard state assessment in addition to all court imposed fines or other penalties for any felony violation, see § 99-19-73.

§ 97-7-37. False swearing; false sworn statements to federal authorities as to denial of constitutional rights by the state or its agents with intent or purpose to deceive or cause investigation.

(1) It shall be unlawful for any person or persons to wilfully make any oral or written sworn false statements or affidavit or attestation or complaint or allegation before any individual or officer authorized to administer oaths, that such person or persons or other persons have been or are about to be deprived of any right or privilege or immunity granted or secured by the United States Constitution and laws, or either, or by the Mississippi Constitution and laws, or either, knowing the same, or any material part thereof to be false, with the intent or purpose to cause or encourage an investigation or which causes or contributes in any way to causing an investigation thereof, or any other action to be taken as a result thereof by any executive or legislative or judicial department, officer or agent, or representative of the United States, including but not limited to any member of the Federal Bureau of Investigation or member or representative or employee of, the Commission on Civil Rights created by an act of the Congress of the United States, or the State Advisory Group or Council, or Committee of the Commission on Civil Rights appointed in or for the State of Mississippi, and any person or persons violating the provisions of this section shall be guilty of the crime of false swearing which is created by this section, a felony, and upon conviction thereof, shall be punished by imprisonment in the county jail for not less than six (6) months nor more than five (5) years in the penitentiary, or a fine of not less than one hundred dollars (\$100.00), nor more than one thousand dollars (\$1,000.00), or by both such fine and imprisonment.

(2) Corroboration or proof by more than one witness to establish the falsity of testimony or statements under oath is not required in prosecutions under this section. It shall not be necessary to prove, to sustain any charge under this section, that the oath or matter sworn to was material, or, if before an executive, legislative or judicial tribunal, committee, or commission that the tribunal, committee, or commission had jurisdiction.

HISTORY: Codes, 1942, § 2155.6; Laws, 1960, ch. 255, §§ 1, 2.

Cross References — False statements to federal authorities, see §§ 97-7-33, 97-7-35.

Perjury, see §§ 97-9-59 et seq.

Imposition of standard state assessment in addition to all court imposed fines or other penalties for any felony violation, see § 99-19-73.

§ 97-7-39. Flags; desecration of national or state flag prohibited.

Any person who, in any manner, for exhibition or display, shall place or cause to be placed any word, figure, mark, picture, design, drawing, or any advertisement of any nature, upon any flag, standard, color or ensign of the

United States or state flag of the State of Mississippi, or ensign or Confederate flag, or shall expose or cause to be exposed to public view any such flag, standard, color or ensign, upon which shall be attached, appended, affixed or annexed any word, figure, mark, picture, design or drawing, or any advertisement of any nature, or who shall expose to public view, manufacture, sell, expose for sale, give away or have in possession for sale or to give away, or for use for any purpose, any article or substance, being an article of merchandise, or a receptacle of merchandise, or article or things for carrying or transporting merchandise upon which, shall have been printed, painted, attached or otherwise placed, a representation of any such flag, standard, color or ensign, to advertise, call attention to, decorate, mark or distinguish the article or substance, on which so placed, or who shall publicly mutilate, deface, defile or defy, trample upon or cast contempt, either by word or act, upon any such flag, standard, color or ensign, with the intent to desecrate or dishonor such, shall be guilty of a misdemeanor and upon conviction shall be punished by a fine of not more than one thousand dollars (\$1,000.00), or by imprisonment for not more than thirty (30) days, or both, in the discretion of the court; shall be deemed guilty of a misdemeanor and shall be punished by a fine not exceeding one hundred dollars (\$100.00) or by imprisonment for not more than thirty (30) days, or both, in the discretion of the court; and shall also forfeit a penalty in the discretion of the court, of not more than fifty dollars (\$50.00) for each such offense, to be recovered with costs in a civil action or suit, in any court having jurisdiction, and such action or suit may be brought by and in the name of any citizen of this state. Such penalty when collected, less the reasonable cost and expense of action or suit, shall be paid into the treasury of this state. Two (2) or more penalties may be sued for and recovered in the same action or suit. The words "flag," "standard," "color," or "ensign," as used in this section, shall include any flag, standard, color, ensign or any picture or representation of either thereof, made of any substance, or represented on any substance, and of any size, evidently purporting to be, either of said flag, standard, color or ensign of the United States of America or a picture or a representation of either thereof, upon which shall be shown the colors, the stars, and the stripes, in any number of either thereof, or by which the person seeing the same, without deliberation, may believe the same to represent the flag, colors, standard or ensign of the United States of America or of the State of Mississippi or Confederate flag.

HISTORY: Codes, Hemingway's 1917, § 903; 1930, § 930; 1942, § 2159; Laws, 1916, ch. 118; Laws, 1971, ch. 311, § 1, eff from and after passage (approved February 8, 1971).

Editor's Notes — Although the retention of the duplicate penalty provision in the section of the Mississippi Code of 1942 from which this section is derived, § 2159, as amended by Chapter 311, Laws of 1971, was probably inadvertent on the legislature's part, the office of the attorney general was of the opinion that the duplicate provision should be brought into the Mississippi Code of 1972, and the matter noted for legislative clarification.

Cross References — Flags of national guard, see § 33-7-29.

Display and study of flags in schools, see § 37-13-5.

Imposition of standard state assessment in addition to all court imposed fines or other penalties for any misdemeanor violation, see § 99-19-73.

JUDICIAL DECISIONS

1. In general.

Prosecution under federal Flag Protection Act (18 USCS § 700) for burning American flag violated Federal Constitution's First Amendment, as defendants' flag burning constituted expressive conduct; Court would not reconsider holding in earlier case that flag burning as mode of expression enjoys full protection of First Amendment; Act improperly suppressed expression out of concern for its likely communicative impact even though it contained no explicit content-based limitation on scope of prohibited conduct, therefore was subject to most exacting scrutiny, Act did not advance government's legitimate interest in preserving flag's function as incident of sovereignty, and even assuming national consensus favoring prohibition against flag burning, suggestion that government's interest in suppressing speech becomes more weighty as popular opposition grows is foreign to First Amendment. *United States v. Eichman*, 496 U.S. 310, 110 S. Ct. 2404, 110 L. Ed. 2d 287, 1990 U.S. LEXIS 3087 (U.S. 1990).

Conviction of protestor for burning American flag as part of political demonstration violated First Amendment, since conduct was sufficiently imbued with elements of communication to implicate First Amendment, state's interest in preventing breaches of peace was not implicated on record in particular case, and state's asserted interest in preserving flag as symbol of nationhood and national unity does not justify conviction. *Texas v. Johnson*, 491 U.S. 397, 109 S. Ct. 2533, 105 L. Ed. 2d 342, 1989 U.S. LEXIS 3115 (U.S. 1989).

A state statute (in this instance, N.Y. former Penal Law § 1425(16)(d), now N.Y. Gen Bus § 136) making it a misdemeanor publicly to mutilate, deface, defile, trample upon, or cast contempt upon an American flag either by words or acts, is unconstitutionally applied insofar as it permits a person to be punished merely for speaking defiant or contemptuous words about the American flag. *Street v. New York*, 394 U.S. 576, 89 S. Ct. 1354, 22 L. Ed. 2d 572, 1969 U.S. LEXIS 3189 (U.S. 1969).

RESEARCH REFERENCES

ALR.

What constitutes violation of flag desecration statutes. 41 A.L.R.3d 502.

Propriety of Prohibition of Display or Wearing of Confederate Flag. 66 A.L.R.6th 493.

Am. Jur.

3 Am. Jur. 2d, Advertising § 5.

35A Am. Jur. 2d, Flag §§ 3, 4.

Lawyers' Edition.

Constitutionality of statutes, ordinances, or administrative provisions prohibiting defiance, disrespect, mutilation, or misuse of American Flag. 22 L. Ed. 2d 972.

Supreme Court's views as to constitutionality of laws prohibiting, or of criminal convictions for, desecration, defiance, disrespect, or misuse of American flag. 105 L. Ed. 2d 809.

§ 97-7-41. Food commodity donated by federal or state government; obtaining fraudulently, sale or unauthorized disposition.

(1) Whoever obtains, or attempts to obtain, or aids or abets any person to obtain by means of a willfully false statement or representation or by

impersonation, or other fraudulent device, any food commodity donated under any program of the federal or state government: (a) to which he is not entitled; or (b) being an employee of the state, makes any unauthorized disposition of such food commodity; or (c) not being an authorized recipient thereof converts to his own use or benefit any such donated food commodities; or (d) being an authorized recipient, sells, exchanges or makes an unauthorized disposition of such donated food commodity in any other way than as prescribed or directed by lawful rules and regulations, shall be guilty of a misdemeanor and upon conviction thereof shall be fined not more than five hundred dollars (\$500.00), or be imprisoned for not more than six (6) months, or be both so fined and imprisoned in the discretion of the court. In assessing the penalty the court shall take into consideration the value of the commodities.

(2) Any person who purchases, barter, exchanges or otherwise obtains any donated food commodities from any authorized recipient knowing it to have been furnished said recipient by the state or federal government, or places the same in a channel of trade shall be guilty of a misdemeanor and upon conviction thereof shall be fined not more than five hundred dollars (\$500.00), or be imprisoned for not more than six (6) months, or be both so fined and imprisoned in the discretion of the court.

HISTORY: Codes, 1942, § 2159.5; Laws, 1964, ch. 339, §§ 1, 2, eff from and after passage (approved June 11, 1964).

Cross References — Representing or personating another to obtain money or property, see § 97-19-35.

Imposition of standard state assessment in addition to all court imposed fines or other penalties for any misdemeanor violation, see § 99-19-73.

§ 97-7-42. Fraudulent use of food coupons dispensed by state welfare department.

Whoever knowingly obtains or attempts to obtain, or aids or abets any person to obtain food coupons, by means of a willfully false statement or representation or by impersonation or in any manner not authorized by law or regulations issued by the state department of welfare, or presents or causes to be presented any food coupons to which he is not entitled or food coupons of a greater value than that to which he is justly entitled shall be guilty of a misdemeanor and upon conviction thereof be fined not less than one hundred dollars (\$100.00) nor more than one thousand dollars (\$1,000.00) or imprisoned in the county jail not more than one (1) year, or both in the discretion of the court; provided further, that any person who sells or gives coupons which he legally possesses to another person, and any person not legally entitled to coupons who accepts or purchases same, shall be guilty of a misdemeanor and upon conviction thereof be fined not less than one hundred dollars (\$100.00) nor more than one thousand dollars (\$1,000.00) or imprisoned in the county jail not more than one (1) year, or both in the discretion of the court. Each violation shall be a separate and distinct offense; and any person committing a third offense shall be guilty of a felony and upon conviction thereof be fined

not less than one thousand dollars (\$1,000.00) nor more than ten thousand dollars (\$10,000.00) or imprisoned in the penitentiary not less than one (1) nor more than five (5) years, or both in the discretion of the court.

HISTORY: Laws, 1973, ch. 420, § 1, eff from and after passage (approved March 29, 1973).

Cross References — Imposition of standard state assessment in addition to all court imposed fines or other penalties for any felony violation, see § 99-19-73.

OPINIONS OF THE ATTORNEY GENERAL

Since Justice Court cannot order restitution over \$1,000.00, each misappropriation of food stamp is separate charge. Phillips Sept. 9, 1993, A.G. Op. #93-0565.

A prosecution for fraud in connection with state or federally funded assistance programs under Miss. Code Section 97-19-71 must be commenced within two

years from the commission of such offense, but a prosecution under this section for the fraudulent use of food coupons dispensed by the state welfare department may begin at any time without a time limitation. Taylor, July 18, 1997, A.G. Op. #97-0407.

§ 97-7-43. Impersonating state, county or municipal officer or employee.

Whoever falsely and willfully assumes or pretends to be an officer or employee acting under the authority of the State of Mississippi or any department, agency or officer thereof; or of any county, municipality or any other subdivision of the State of Mississippi, or of any department, agency or officer of such county, municipality or subdivision, shall be guilty of a misdemeanor and punished for each separate such offense by a fine of not more than five hundred dollars (\$500.00) or by imprisonment of not more than six (6) months in jail, or by both such fine and imprisonment.

HISTORY: Codes, 1942, § 2144.5; Laws, 1956, ch. 245.

Cross References — Impersonation of weights and measures officer, see § 75-27-57.

Imposition of standard state assessment in addition to all court imposed fines or other penalties for any misdemeanor violation, see § 99-19-73.

RESEARCH REFERENCES

ALR.

"Acts as such" element of 18 USCS § 912, making it a crime to pretend to be an officer or employee of the United States. 55 A.L.R. Fed. 494.

Am. Jur.

32 Am. Jur. 2d, False Personation § 4.

CJS.

35 C.J.S., False Personation §§ 1 et seq.

§ 97-7-44. Impersonation of state, county, municipal or other public officer or employee prohibited; penalties.

Any person who falsely and willfully assumes or pretends to be an officer

or employee acting under the authority of the State of Mississippi or any department, agency or officer thereof; or of any county, municipality or any other subdivision of the State of Mississippi, or of any department agency or officer of such county, municipality or subdivision, shall be guilty of a misdemeanor and punished for each separate such offense by a fine of not more than Five Hundred Dollars (\$500.00) or by imprisonment of not more than six (6) months in jail, or by both such fine and imprisonment.

HISTORY: Laws, 2001, ch. 322, § 1, eff from and after July 1, 2001.

Joint Legislative Committee Note — Pursuant to Section 1-1-109, the Joint Legislative Committee on Compilation, Revision and Publication of Legislation corrected a typographical error. The subsection (1) was deleted, there are no other subsections. The Joint Committee ratified the correction at its June 3, 2003 meeting.

§ 97-7-45. Legislature; preventing or attempting to prevent meetings.

Every person who wilfully, and by force or fraud, prevents, or attempts to prevent, the legislature, or either of the houses composing it, or any of the members thereof, from meeting or organizing, shall be guilty of a felony, and, upon conviction, shall be punished by imprisonment in the penitentiary, not exceeding ten years.

HISTORY: Codes, 1892, § 1189; 1906, § 1267; Hemingway's 1917, § 997; 1930, § 1026; 1942, § 2258.

Cross References — Meeting and organization of legislature, see §§ 5-1-7 et seq. Compelling witness to testify in crimes against legislative power, see § 99-17-31.

RESEARCH REFERENCES

Am. Jur.

2 Am. Jur. Trials, Investigating Particular Crimes §§ 37 et seq.

§ 97-7-47. Legislature; disturbing proceedings.

Every person who wilfully disturbs the legislature, or either of the houses composing it, while in session; or who commits any disorderly conduct in the view and presence of either house, tending to interrupt its proceedings, or impair the respect due to its authority, shall be guilty of a misdemeanor, and, upon conviction, shall be punished by fine, not less than twenty dollars nor more than two hundred dollars, and by imprisonment in the county jail not more than three months.

HISTORY: Codes, 1892, § 1190; 1906, § 1268; Hemingway's 1917, § 998; 1930, § 1027; 1942, § 2259.

Cross References — Disorderly and contemptuous behavior when legislature is in session, see Miss Const Art. 4, § 58.

Duty of sergeant-at-arms of senate, see § 5-1-35.

Imposition of standard state assessment in addition to all court imposed fines or other penalties for any misdemeanor violation, see § 99-19-73.

§ 97-7-49. Legislature; altering bills or resolutions before passage.

Every person who fraudulently alters, destroys, or mutilates the draft of any bill or resolution which has been presented to either house composing the legislature, or the engrossed copy thereof, to be passed or adopted, with intent to procure it to be passed or adopted by either house, or signed or certified by the presiding officer of either house, in language different than that intended by such house, shall be guilty of a felony, and, on conviction, shall be imprisoned in the penitentiary not exceeding ten years.

HISTORY: Codes, 1892, § 1191; 1906, § 1269; Hemingway's 1917, § 999; 1930, § 1028; 1942, § 2260.

Cross References — Duty of secretary and clerk of house of representatives, see § 5-1-31.

§ 97-7-51. Legislature; altering bills or resolutions after passage.

Every person who fraudulently alters, destroys, or mutilates the enrolled copy of any bill or resolution which has been passed or adopted by the legislature of this state, with intent to procure it to be approved by the governor, or certified by the secretary of state, or printed or published as a statute or law, in language different from that in which it was passed or adopted by the legislature, shall be guilty of a felony, and, upon conviction, shall be punished by imprisonment in the penitentiary not exceeding ten years.

HISTORY: Codes, 1892, § 1192; 1906, § 1270; Hemingway's 1917, § 1000; 1930, § 1029; 1942, § 2261.

§ 97-7-53. Legislature; bribing or influencing member.

Every person who gives or offers to give a bribe to any member of the legislature, or to another person for him, or attempts by menace, deceit, suppression of truth, or any corrupt means to influence a member in giving or withholding his vote, or in not attending the house or any committee of which he is a member, shall be guilty of a felony, and, upon conviction, shall be imprisoned in the penitentiary not exceeding ten years.

HISTORY: Codes, 1892, § 1193; 1906, § 1271; Hemingway's 1917, § 1001; 1930, § 1030; 1942, § 2262.

Cross References — Lobbying, generally, see §§ 5-8-1 et seq.
Bribery, generally, see §§ 97-11-11, 97-11-13.

RESEARCH REFERENCES

ALR.

Entrapment to commit bribery or offer to bribe. 69 A.L.R.2d 1397.

Criminal liability of corporation for bribery or conspiracy to bribe public official. 52 A.L.R.3d 1274.

Am. Jur.

12 Am. Jur. 2d, Bribery §§ 15 et seq.

CJS.

11 C.J.S., Bribery §§ 1 et seq.

§ 97-7-55. Legislature; member accepting or agreeing to accept bribes.

Every member of either house composing the legislature who asks, receives, or agrees to receive any bribe, upon any understanding, express or implied, that his official vote, opinion, judgment, or action shall be influenced thereby, or shall be given in any particular manner or upon any particular side of any question or matter upon which he may be required to act in his official capacity, or gives or offers or promises to give any official vote in consideration that another member of the legislature shall give any such vote, either upon the same or another question, shall be guilty of a felony, and, upon conviction, shall be imprisoned in the penitentiary not less than one year nor more than ten years.

HISTORY: Codes, 1892, § 1194; 1906, § 1272; Hemingway's 1917, § 1002; 1930, § 1031; 1942, § 2263.

Cross References — Prohibition against legislative member being counsel or taking fee or reward, see Miss Const Art. 4, § 47.

Bribery, generally, see §§ 97-11-11, 97-11-13.

RESEARCH REFERENCES

Am. Jur.

12 Am. Jur. 2d, Bribery §§ 15 et seq.

CJS.

11 C.J.S., Bribery §§ 1 et seq.

§ 97-7-57. Legislature; influence peddling.

Every person who obtains, or seeks to obtain, money or other thing of value from another person upon a pretense, claim or representation that he can or will improperly influence, in any manner, the action of any member of the legislature or officer thereof, in regard to any vote or legislative matter, shall be guilty of felony, and, upon conviction, shall be imprisoned in the penitentiary not exceeding ten years.

HISTORY: Codes, 1892, § 1195; 1906, § 1273; Hemingway's 1917, § 1003; 1930, § 1032; 1942, § 2264.

Cross References — Bribery, generally, see §§ 97-11-11, 97-11-13.

§ 97-7-59. Military service; failure to report for active duty.

Any officer or enlisted man of the Mississippi national guard called out or

notified for active duty, who shall fail to report at the time and place appointed, shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not exceeding five hundred dollars or by imprisonment in the county jail not to exceed six months, or by both such fine and imprisonment, at the discretion of the court, and if the conviction be by a military court in addition thereto, may be dismissed or dishonorably discharged from the military service of the state.

HISTORY: Codes, 1892, § 1211; 1906, § 1289; Hemingway's 1917, § 1021; 1930, § 1052; 1942, § 2284; Laws, 1916, ch. 245.

Cross References — Calling out militia for active duty, see §§ 33-5-9, 33-5-11.

Refusal of militia officer to obey order, see § 97-11-39.

Imposition of standard state assessment in addition to all court imposed fines or other penalties for any misdemeanor violation, see § 99-19-73.

RESEARCH REFERENCES

Am. Jur.

53 Am. Jur. 2d, Military and Civil Defense §§ 47 et seq.

§ 97-7-61. Military service; organizing military body for public drill or parade; license required.

It shall be unlawful for any body of men whatsoever, other than the regularly organized land and naval militia of this state, the land and naval forces of the United States, and the students of public or of regularly chartered educational institutions where military science is a prescribed part of the course of instruction, to associate themselves together as a military organization for drill or parade in public with firearms in this state, without special license from the governor for each occasion, and application for such license must be approved by the mayor and board of aldermen or commissioners of the town or city where such organization may propose to parade, and any person or persons participating in such unlawful association shall be guilty of a misdemeanor and on conviction of same shall be punished by imprisonment in the county jail for a term not to exceed six months or by a fine not to exceed five hundred dollars, or both fine and imprisonment, at the discretion of the court. Provided that the governor may permit the passage through or the attendance in the state of the organized militia of other states for the purpose of attending joint maneuvers, rifle competitions, or for such other purposes as he may deem proper.

HISTORY: Codes, 1892, § 1212; 1906, § 1290; Hemingway's 1917, § 1022; 1930, § 1053; 1942, § 2285; Laws, 1916, ch. 245.

Cross References — Enrollment of militia, see § 33-5-3.

Imposition of standard state assessment in addition to all court imposed fines or other penalties for any misdemeanor violation, see § 99-19-73.

RESEARCH REFERENCES

Am. Jur.

53 Am. Jur. 2d, Military, and Civil Defense §§ 47 et seq.

§ 97-7-63. Picketing which interferes with access to government buildings, property, streets and sidewalks.

(1) It shall be unlawful for any person, singly or in concert with others, to engage in picketing or mass demonstrations in such a manner as to obstruct or unreasonably interfere with free ingress or egress to and from any public premises, state property, county or municipal courthouses, city halls, office buildings, jails, or other public buildings or property owned by the State of Mississippi, or any county or municipal government located therein, or with the transaction of public business or administration of justice therein or thereon conducted or so as to obstruct or unreasonably interfere with free use of public streets, sidewalks, or other public ways adjacent or contiguous thereto.

(2) Any person guilty of violating this section shall be deemed guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than five hundred dollars (\$500.00), or imprisoned in jail not more than six (6) months, or both such fine and imprisonment.

(3) This section shall not be construed to affect any suit or prosecution pending on July 9, 1964 in any court.

HISTORY: Codes, 1942, § 2318.5; Laws, 1964, ch. 343, §§ 1-3; Laws, 1964, 1st Ex Sess ch. 23.

Cross References — Power of courts to punish for contempt, see § 9-1-17.

Picketing or demonstrating in or near courthouse or residence of judge, etc., see § 97-9-67.

Intentional or wilful obstruction of public streets, etc., see §§ 97-35-23, 97-35-25.

Imposition of standard state assessment in addition to all court imposed fines or other penalties for any misdemeanor violation, see § 99-19-73.

JUDICIAL DECISIONS

1. In general.

A state criminal statute prohibiting, among other things, picketing in such a manner as to obstruct or unreasonably interfere with free ingress or egress to and from any courthouses or other public buildings is not so broad, vague, indefinite, and lacking in definitely ascertainable standard as to be unconstitutional on its face, is not void for overbreadth, but is a valid law dealing with conduct subject to regulation so as to vindicate important interests of society. *Cameron v. Johnson*,

390 U.S. 611, 88 S. Ct. 1335, 20 L. Ed. 2d 182, 1968 U.S. LEXIS 1879 (U.S. 1968).

This section [Code 1942, § 2318.5] does not prohibit picketing or mass demonstrations on courthouse grounds, for the prohibited factor is the obstruction or unreasonable interference with free ingress or egress to and from the courthouse. *Cameron v. Johnson*, 262 F. Supp. 873, 1966 U.S. Dist. LEXIS 9596 (S.D. Miss. 1966), *aff'd*, 390 U.S. 611, 88 S. Ct. 1335, 20 L. Ed. 2d 182, 1968 U.S. LEXIS 1879 (U.S. 1968).

Federal courts are prohibited by 28 USC § 2283 from enjoining the prosecution in state courts of defendants charged with violating the provisions of this section [Code 1942, § 2318.5]. *Cameron v.*

Johnson, 262 F. Supp. 873, 1966 U.S. Dist. LEXIS 9596 (S.D. Miss. 1966), *aff'd*, 390 U.S. 611, 88 S. Ct. 1335, 20 L. Ed. 2d 182, 1968 U.S. LEXIS 1879 (U.S. 1968).

RESEARCH REFERENCES

ALR.

Nonlabor picketing or boycott. 93 A.L.R.2d 1284.

Am. Jur.

48A Am. Jur. 2d, Labor and Labor Relations §§ 2644 et seq.

Lawyers' Edition.

Governmental regulation of nonlabor picketing as violating freedom of speech or press under Federal Constitution's First Amendment – Supreme Court cases. 101 L. Ed. 2d 1052.

§ 97-7-65. Timber; cutting and rafting from state lands.

If any person shall be guilty of cutting or rafting any cypress, pine, oak, persimmon, gum, hickory, pecan, walnut, mulberry, poplar, cottonwood, sassafras, or ash trees, or other merchantable timber upon any lands belonging to this state or held in trust by this state, such person shall be guilty of crime, and on conviction, if the value of the trees or timber so cut or rafted shall be twenty-five dollars or more, such person shall be imprisoned in the penitentiary for a term not exceeding five years; and if the value of the said trees or timber so cut or rafted shall be under twenty-five dollars, such person shall be imprisoned in the county jail not exceeding six months or fined in a sum not less than one hundred dollars nor more than one thousand dollars, or both.

HISTORY: Codes, 1857, ch. 64, art. 230; 1871, § 2684; 1880, § 2955; 1892, § 1304; 1906, § 1378; Hemingway's 1917, § 1118; 1930, § 1148; 1942, § 2385; Laws, 1930, ch. 152.

Cross References — Cutting of merchantable timber, etc., before land is redeemed for tax sale, see § 27-41-83.

Protection of public lands from trespass and damages for trespass, see §§ 29-1-17, 29-1-19.

Prohibition on removal of pecans falling from private orchards onto public rights-of-way during harvesting season, see §§ 69-33-1 et seq.

Theft of timber, generally, see § 97-17-59.

Cutting or rafting of timber on lands of another, see § 97-17-81.

RESEARCH REFERENCES

ALR.

Revocation of license to cut and remove timber as affecting rights in respect of

timber cut but not removed. 26 A.L.R.2d 1194.

§ 97-7-67. Treason; punishment.

If any person shall levy war against this state, or adhere to its enemies,

giving them aid and comfort, he shall be guilty of treason, and, shall, upon conviction, suffer death or imprisonment for life in the state penitentiary.

HISTORY: Codes, Hutchinsons's 1848, ch. 64, art. 12, Title 2 (2); 1857, ch. 64, art. 236; 1871, § 2688; 1880, § 2965; 1892, § 1313; 1906, § 1387; Hemingway's 1917, § 1130; 1930, § 1160; 1942, § 2397; Laws, 1977, ch. 458, § 8, eff from and after passage (approved April 13, 1977).

Cross References — Destroying, injuring, etc., property to hinder war effort, see § 97-7-29.

Interference with government licensed communications systems, see § 97-7-31.

Separate sentencing procedure to determine punishment in capital cases, see §§ 99-19-101 et seq.

JUDICIAL DECISIONS

1. In general.

A capital case is any case where the permissible punishment prescribed by the legislature is death, even though such penalty may not be inflicted since the decision of the United States Supreme

Court in *Furman v. Georgia*, 408 U.S. 238, 33 L. Ed. 2d 346, 92 S. Ct. 2726, reh den 409 U.S. 902, 34 L. Ed. 2d 163, 93 S. Ct. 89 and on remand 229 Ga 731, 194 SE2d 410. *Hudson v. McAdory*, 268 So. 2d 916, 1972 Miss. LEXIS 1216 (Miss. 1972).

RESEARCH REFERENCES

CJS.

77 C.J.S., Riot; Insurrection §§ 1 et seq.

87 C.J.S., Treason § 14.

§ 97-7-69. Treason; essential proof.

A person shall not be convicted of treason unless upon the testimony of two witnesses to the same overt act, or on his own confession in open court.

HISTORY: Codes, 1857, ch. 64, art. 237; 1871, § 2689; 1880, § 2966; 1892, § 1314; 1906, § 1388; Hemingway's 1917, § 1131; 1930, § 1161; 1942, § 2398.

RESEARCH REFERENCES

ALR.

Sufficiency of corroboration of confession for purpose of establishing corpus delicti as question of law or fact. 33 A.L.R.5th 571.

CJS.

77 C.J.S., Riot; Insurrection §§ 1 et seq.

87 C.J.S., Treason §§ 1 et seq.

§ 97-7-71. Advocacy of violent overthrow of constitution or government; punishment.

Any person who advocates in writing or in print or verbally, or otherwise, the overthrow of the constitution or government of the United States or the constitution or the government of the State of Mississippi, by violence, shall be

deemed guilty of a felony and on conviction be imprisoned in the state penitentiary not less than three and not more than twenty years.

HISTORY: Codes, Hemingway's 1921 Supp. § 1142f; 1930, § 1162; 1942, § 2399; Laws, 1920, ch. 216.

Cross References — Requirement that educational personnel of public schools and of universities and colleges file affidavits as to membership in organizations, see § 37-29-211.

RESEARCH REFERENCES

Am. Jur.

70 Am. Jur. 2d, Sedition, Subversive Activities, and Treason §§ 52 et seq.

CJS.

77 C.J.S., Riot; Insurrection §§ 1 et seq.
87 C.J.S., Treason §§ 1 et seq.

§ 97-7-73. Offering a false instrument for recording against a public servant; penalties.

(1) A person commits the crime of offering a false instrument for recording against a law enforcement officer, public official or public employee if the person offers, for recording, a lien or encumbrance that relates to or affects the real or personal property, or an interest therein, or a contractual relationship of a law enforcement officer, public official or public employee, knowing that the lien or encumbrance contains a materially false statement or materially false information, with the intent to defraud, intimidate, or harass the law enforcement officer, public official or public employee, or to impede the law enforcement officer, public official or public employee in the performance of his or her duties.

(2) Any person who violates this section, upon conviction, shall be punished as follows:

(a) For a first offense, by imprisonment for not more than six (6) months or a fine not to exceed One Thousand Dollars (\$1,000.00), or both.

(b) For a subsequent offense, by imprisonment for not more than five (5) years or a fine of not more than Five Thousand Dollars (\$5,000.00), or both.

HISTORY: Laws, 2013, ch. 530, § 1, eff from and after July 1, 2013.

§ 97-7-75. Mississippi Terroristic Threats Law; offense of making a terroristic threat; requisite intent; defense; penalties.

(1) This section shall be known and may be cited as the “Mississippi Terroristic Threats Law.”

(2)(a) A person commits the offense of making a terroristic threat when the person makes a threat to commit a crime of violence or a threat to cause bodily injury to another person if the threat does in fact cause a reasonable expectation or reasonable fear of the imminent commission of an offense and if, in making the threat, the person has the intent to:

(i) Intimidate or coerce a civilian population or segment of a civilian population to cede to the person's demands;

(ii) Influence or affect, by intimidation or coercion, the policy or conduct of a unit of government, educational institution, business or segment of the civilian population to cede to the person's demands.

(b) It is not a defense to a prosecution under this section that, at the time the defendant made the terroristic threat, the defendant did not have the intent or capability to actually commit the specified offense, nor is it a defense that the threat was not made to a person who was a subject or intended victim of the threatened act.

(3) A person convicted of the offense of making a terroristic threat is guilty of a felony punishable by imprisonment in the custody of the Mississippi Department of Corrections for not more than ten (10) years.

HISTORY: Laws, 2019, ch. 361, § 1, eff from and after July 1, 2019.

Cross References— Imposition of standard state assessment in addition to all court imposed fines or other penalties for any felony violation, see § 99-19-73.

CHAPTER 9.

OFFENSES AFFECTING ADMINISTRATION OF JUSTICE

Article 1.	In General.	97-9-1
Article 3.	Obstruction of Justice.	97-9-101

ARTICLE 1.

IN GENERAL.

Sec.	
97-9-1.	Court forms and legal process; printing, selling or distributing simulated legal documents prohibited.
97-9-3.	Court records and public papers; stealing, concealing, destroying, etc.
97-9-5.	Bribery; jurors, arbitrators, and referees accepting, and person promising them, punished.
97-9-7.	Bribery; taking reward for compounding or concealing, etc. crime punishable by death or life imprisonment.
97-9-9.	Bribery; taking reward for compounding or concealing crime punishable by less than life imprisonment.
97-9-10.	Bribery; commercial bribery.
97-9-11.	Champerty and maintenance; solicitation and stirring up of litigation prohibited.
97-9-13.	Champerty and maintenance; penalty.
97-9-15.	Champerty and maintenance; affidavit of party.
97-9-17.	Champerty and maintenance; affidavit of attorney representing party.
97-9-19.	Champerty and maintenance; penalty for false affidavit.
97-9-21.	Champerty and maintenance; immunity granted witnesses compelled to testify concerning violations; penalty for failure to testify.
97-9-23.	Champerty and maintenance; exceptions; legislative intent.
97-9-25.	Escape of inmates of state institutions; aiding, abetting, etc.
97-9-27.	Escape of prisoners; conveying articles useful for escape to felons.
97-9-29.	Escape of prisoners; aiding escape of felons generally; rescuing prisoners from custody.
97-9-31.	Escape of prisoners; aiding prisoners other than felons generally; conveying article useful for escape.
97-9-33.	Escape of prisoners; aiding escapes from officers.
97-9-35.	Escape of prisoners; permitting escape.
97-9-37.	Escape of prisoners; private persons having custody of prisoner arrested on suspicion.
97-9-39.	Escape of prisoners; refusal of officer, jailer, etc., to arrest or confine; refusal to receive prisoners at jail; suffering an escape; accepting bribe to permit escape.
97-9-41.	Escape of prisoners; concealing or harboring escaped prisoner.
97-9-43.	Escape of prisoners; escapee may be retaken after term expires and imprisoned until tried.
97-9-45.	Escape of prisoners; penalty; willful failure to return to jail after being entrusted to leave.
97-9-47.	Escape of prisoners; penalty for penitentiary convicts serving less than life term; attempt by force or violence.
97-9-49.	Escape of prisoners; penalties for convicts in jail and persons under arrest or custody; willful failure to return to jail after being entrusted to leave.

Sec.

97-9-51.	Repealed.
97-9-53.	Indictments; penalty for disclosing facts relating to indictment.
97-9-55.	Intimidating judge, juror, witness, attorney, etc., or otherwise obstructing justice.
97-9-57.	Officer not to converse with juror; penalty.
97-9-59.	Perjury; definition.
97-9-61.	Perjury; penalty.
97-9-63.	Perjury; subornation of.
97-9-65.	Perjury; bribery to procure.
97-9-67.	Picketing or demonstrating in or near courthouse or residence of judge, juror, witness, or court officer.
97-9-69.	Property levied on; removing without authority.
97-9-71.	Property subject to seizure; refusing or failing to point out to officers.
97-9-72.	Fleeing or eluding a law enforcement officer in a motor vehicle; felonies; sanctions; defenses.
97-9-73.	Resisting or obstructing arrest; fleeing or eluding law enforcement officer in motor vehicle.
97-9-75.	Resisting service of process.
97-9-77.	Wills; alteration, destruction or secretion.
97-9-79.	Misdemeanor; false information.

§ 97-9-1. Court forms and legal process; printing, selling or distributing simulated legal documents prohibited.

(1) It shall be unlawful for any person, firm or corporation to print for the purpose of sale or distribution, to circulate or offer for sale, to send or deliver, to cause to be sent or delivered, any letter, paper, document, notice of intent to bring suit, or other notice or demand which simulates a form of court or legal process, the intention of which document is to lead the recipient or addressee to believe the same to be a genuine court or legal process, for the purpose of obtaining anything of value.

(2) The printing, circulating, selling, sending or delivery of such simulating document shall be prima facie evidence of such intent, and it shall be no defense to show that the document bears any statement to the contrary, nor shall it be a defense to show that the thing of value sought to be obtained was to apply as payment on a valid obligation.

(3) In prosecutions for violation of this section, the prosecution may show that the simulating document was deposited in the post office for mailing or was delivered to any person with intent to be forwarded, and such showing shall be sufficient proof to the sending or delivery.

(4) Nothing in this section shall prevent the printing, publication, sale or distribution of genuine legal forms for the use of attorneys, clerks of court or justices of the peace.

(5) Any person, firm or corporation violating subsection (1) of this section shall be fined, for the first offense, not less than ten dollars (\$10.00) nor more than one hundred dollars (\$100.00), or be imprisoned in the county jail not to exceed thirty (30) days, or by both such a fine and imprisonment; for subsequent offenses, not less than one hundred dollars (\$100.00) nor more than five hundred dollars (\$500.00), or by imprisonment in the county jail not to exceed ninety (90) days, or by both such a fine and imprisonment.

HISTORY: Codes, 1942, § 2150.5; Laws, 1966, ch. 386, §§ 1-5, eff from and after passage (approved February 17, 1966).

Cross References — Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see § 97-43-1 et seq.

§ 97-9-3. Court records and public papers; stealing, concealing, destroying, etc.

The stealing and carrying away, or fraudulently withdrawing, concealing, or destroying or taking away any record, paper, or proceeding of a court of justice, or any paper or proceeding filed or deposited with any officer or in any public office, shall be larceny without reference to the value of the record, paper, or proceeding so stolen, taken away, or destroyed, and shall be punished by imprisonment in the penitentiary not more than five years, or in the county jail not more than one year, and by fine not exceeding five hundred dollars, or both.

HISTORY: Codes, Hutchinson's 1848, ch. 64, art. 12, Title 4(70); 1857, ch. 64, art. 195; 1871, § 2656; 1880, § 2906; 1892, § 1179; 1906, § 1257; Hemingway's 1917, § 987; 1930, § 1015; 1942, § 2247.

Cross References — Custody and withdrawal of court exhibits, see §§ 9-13-27, 9-13-29.

Clerk of chancery court as custodian of records and papers, see § 9-5-163.

Filing together all papers related to a cause, see § 11-1-5.

Malicious mischief, see § 97-17-67.

Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see § 97-43-1 et seq.

JUDICIAL DECISIONS

1. In general.

To sustain conviction for secretion of paper of public office, state must prove secretion of effective paper belonging to or kept in such office for public purpose;

concealment of blank teacher's certificates will not sustain conviction for concealing paper from public office. *Tally v. State*, 147 Miss. 226, 113 So. 547, 1927 Miss. LEXIS 357 (Miss. 1927).

RESEARCH REFERENCES

Am. Jur.

50 Am. Jur. 2d, Larceny § 68.

CJS.

52B C.J.S., Larceny §§ 8, 11, 12, 13, 79, 80, 82.

§ 97-9-5. Bribery; jurors, arbitrators, and referees accepting, and person promising them, punished.

If any person drawn, summoned, chosen, or appointed as a juror, arbitrator, or referee shall, corruptly take or receive any gratuity, gift, or reward

whatever, or any promise thereof, or if the wife of such person, with his knowledge and consent, shall so take or receive, to influence any verdict, award, or report of such juror, arbitrator, or referee, he shall, on conviction, be imprisoned in the penitentiary not more than five years, or in the county jail not more than one year, or fined one thousand dollars, or both, and any person who shall make or offer any such gratuity, reward, or any promise thereof, shall, on conviction, suffer the same penalty.

HISTORY: Codes, Hutchinson's 1848, ch. 64, art. 12, Title 5(11); 1857, ch. 64, art. 36; 1871, § 2513; 1880, § 2729; 1892, § 983; 1906, § 1059; Hemingway's 1917, § 787; 1930, § 803; 1942, § 2029.

Cross References — White-collar crime investigation, see § 7-5-59.

Grounds for vacation of arbitration award, see § 11-15-23.

Arbitration of controversies arising out of construction contracts and related agreements, see §§ 11-15-101 et seq.

Challenge to array and quashing special venire facias, see § 13-5-81.

Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see § 97-43-1 et seq.

JUDICIAL DECISIONS

1. In general.

A defendant's acquittal of a drug charge at his second trial was irrelevant in a prosecution stemming from attempts to influence jurors in the defendant's first drug trial. *King v. State*, 580 So. 2d 1182, 1991 Miss. LEXIS 319 (Miss. 1991).

The evidence was sufficient to support convictions of conspiracy and bribery stemming from attempts to influence jurors, where the secretary for one of the defendant's attorneys testified that the defendant did some of the talking when he and his father asked her to type up a list containing the jurors' names and that the

defendant took the list from her and made photocopies of it, a witness testified that the defendant drove his father to the witness' home where the father discussed the scheme to bribe a juror while the defendant listened, a juror testified that during the trial the defendant and his father entered the store where she worked, though they left without speaking to her, and an investigator testified that he discovered the photocopies of the jury list under the seat of the defendant's truck. *King v. State*, 580 So. 2d 1182, 1991 Miss. LEXIS 319 (Miss. 1991).

RESEARCH REFERENCES

Am. Jur.

12 Am. Jur. 2d, Bribery §§ 1 et seq.

37 Am. Jur. Trials 273, Handling the Defense in a Bribery Prosecution.

24 Am. Jur. Proof of Facts 2d 633, Jury Misconduct Warranting New Trial.

CJS.

11 C.J.S., Bribery §§ 1 et seq.

§ 97-9-7. Bribery; taking reward for compounding or concealing, etc. crime punishable by death or life imprisonment.

Every person having a knowledge of the actual commission of any offense

punishable by death or by imprisonment in the penitentiary for life, who shall take any money or property of another, or any gratuity or reward, or any engagement or promise therefor, upon any agreement or understanding, express or implied, to compound or conceal any such crime, or to abstain from any prosecution thereof, or to withhold any evidence thereof, shall, upon conviction, be punished by imprisonment in the penitentiary not exceeding five years, or in the county jail not exceeding one year.

HISTORY: Codes, Hutchinson's 1848, ch. 64, art. 12, Title 7(17); 1857, ch. 64, art. 40; 1871, § 2517; 1880, § 2733; 1892, § 987; 1906, § 1063; Hemingway's 1917, § 791; 1930, § 807; 1942, § 2033.

Cross References — Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see § 97-43-1 et seq.

RESEARCH REFERENCES

Am. Jur.

12 Am. Jur. 2d, Bribery §§ 1 et seq.
37 Am. Jur. Trials 273, Handling the
Defense in a Bribery Prosecution.

CJS.

11 C.J.S., Bribery §§ 8 et seq.

§ 97-9-9. Bribery; taking reward for compounding or concealing crime punishable by less than life imprisonment.

Every person having a knowledge of the actual commission of any offense punishable by imprisonment in the penitentiary for any other term than for life, who shall take any money or property of another, or any gratuity or reward, or any engagement or promise therefor, upon any agreement or understanding, expressed or implied, to compound or conceal any such crime, or to abstain from any prosecution therefor, or to withhold any evidence thereof shall, upon conviction, be punished by imprisonment in the penitentiary not exceeding three years, or in the county jail not exceeding six months.

HISTORY: Codes, Hutchinson's 1848, ch. 64, art. 12, Title 7(18); 1857, ch. 64, art. 41; 1871, § 2518; 1880, § 2732; 1892, § 988; 1906, § 1064; Hemingway's 1917, § 792; 1930, § 808; 1942, § 2034.

Cross References — Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see § 97-43-1 et seq.

RESEARCH REFERENCES

Am. Jur.

12 Am. Jur. 2d, Bribery §§ 1 et seq.
37 Am. Jur. Trials 273, Handling the
Defense in a Bribery Prosecution.

CJS.

11 C.J.S., Bribery §§ 1 et seq.

§ 97-9-10. Bribery; commercial bribery.

(1) Commercial bribery is the giving or offering to give, directly or

indirectly, anything of apparent present or prospective value to any private agent, employee or fiduciary, without the knowledge and consent of the principal or employer, with the intent to influence such agent's, employee's or fiduciary's action in relation to the principal's or employer's affairs.

(2) The agent's, employee's or fiduciary's acceptance of or offer to accept, directly or indirectly, anything of apparent present or prospective value under the circumstances set forth in subsection (1) of this section shall also constitute commercial bribery.

(3) The offender under this section who states the facts, under oath, to the district attorney charged with prosecution of the offense, who gives evidence tending to convict any other offender under this section and who testifies in support of the evidence he gives when requested by the district attorney, may, in the discretion of the district attorney, be granted full immunity from prosecution for commercial bribery, in respect to the particular offense reported.

(4) Any person violating the provisions of this section shall be guilty of a misdemeanor, and upon conviction shall be punished by a fine of not more than five hundred dollars (\$500.00) or by imprisonment for not more than six (6) months, or by both such fine or imprisonment.

HISTORY: Laws, 1983, ch. 515, eff from and after July 1, 1983.

Cross References — White-collar crime investigations, see § 7-5-59.

Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see § 97-43-1 et seq.

Imposition of standard state assessment in addition to all court imposed fines or other penalties for any misdemeanor violation, see § 99-19-73.

RESEARCH REFERENCES

Am. Jur.

12 Am. Jur. 2d, Bribery §§ 1 et seq.

37 Am. Jur. Trials 273, Handling the Defense in a Bribery Prosecution.

CJS.

11 C.J.S., Bribery §§ 1 et seq.

§ 97-9-11. Champerty and maintenance; solicitation and stirring up of litigation prohibited.

It shall be unlawful for any person, firm, partnership, corporation, group, organization, or association, either incorporated or unincorporated from this state or any other state, either before or after proceedings commenced: (a) to promise, give, or offer, or to conspire or agree to promise, give, or offer, (b) to receive or accept, or to agree or conspire to receive or accept, (c) to solicit, request, or donate, any money, bank note, bank check, chose in action, personal services, or any other personal or real property, or any other thing of value, or any other assistance as an inducement to any person to commence or to prosecute further, or for the purpose of assisting such person to commence or prosecute further, any proceeding in any court or before any administrative board or other agency, regardless of jurisdiction; provided, however, this

section shall not be construed to prohibit the constitutional right of regular employment of any attorney at law or solicitor in chancery, for either a fixed fee or upon a contingent basis, to represent such person, firm, partnership, corporation, group, organization, or association before any court or administrative agency.

HISTORY: Codes, 1942, § 2049-01; Laws, 1956, ch. 253, § 1; Laws, 1976, ch. 359; Laws, 2013, ch. 556, § 3, eff from and after July 1, 2013.

Cross References — Unlawfulness of encouraging litigation, see § 73-3-57.

Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see § 97-43-1 et seq.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Attorney advancing "living expenses."

1. In general.

A settlement agreement in which insurers paid their liability limit of \$5 million and the plaintiffs agreed to sue the defendant automobile manufacturer was not a champertous contract; it was a valid assignment of a chose in action and, therefore, the plaintiffs, the insurers, and their attorneys were not required to execute the statutory champerty affidavits. *Sneed v. Ford Motor Co.*, 735 So. 2d 306, 1999 Miss. LEXIS 132 (Miss. 1999).

Mortgagee's assignment of rights under fire and extended care policy on real estate was not champertous, where insureds were not strangers to litigation and had asserted interest in action separate and distinct from interest of mortgagee. *Stephen R. Ward, Inc. v. United States Fidelity & Guaranty Co.*, 681 F. Supp. 389, 1988 U.S. Dist. LEXIS 1902 (S.D. Miss. 1988).

Holder of mortgage on property destroyed by fire could properly assign its interest in any claims and/or causes of action against insurance company arising out of loss to the property owner, with property owner remaining fully liable to mortgagee for amount still owed on mortgage, and such assignment is not champertous, as property owners who obtain assignment from mortgage company are not strangers to litigation against insurance company and have asserted interest

separate and distinct from interest of mortgagee; in issues of propriety of assignment and claims of champerty, analysis is not focused on relationship between assignee and assignor but rather relationships between assignor and insurance company and assignees and insurance company. *Stephen R. Ward, Inc. v. United States Fidelity & Guaranty Co.*, 681 F. Supp. 389, 1988 U.S. Dist. LEXIS 1902 (S.D. Miss. 1988).

Failure to file affidavit as to absence of receipt of valuable consideration as an inducement to the prosecution of a citizen's suit to abate an alleged liquor nuisance, held to require its dismissal. *State ex rel. Carr v. Cabana Terrace, Inc.*, 247 Miss. 26, 153 So. 2d 257, 1963 Miss. LEXIS 279 (Miss. 1963).

Where the evidence wholly failed to sustain the charge that the state attorney general had threatened to enforce as against the plaintiffs and their attorneys the provisions of the champerty and maintenance statutes and that, as a result of such threats, plaintiffs and their attorneys suffered irreparable injury, there being no controversy between the parties with respect to these statutes, plaintiffs could not maintain portion of their action attacking the constitutionality thereof. *Darby v. Daniel*, 168 F. Supp. 170, 1958 U.S. Dist. LEXIS 3312 (D. Miss. 1958).

2. Attorney advancing "living expenses."

Chancery court erred in granting summary judgment to a Louisiana attorney in a Mississippi client's legal malpractice ac-

tion because there was a genuine issue of material fact as to whether the attorney's conduct in advancing over \$100,000 to the client for "living expenses" violated Miss. R. Prof. Conduct 1.8(e), Miss. Code Ann. §§ 97-9-11 and 73-3-57, and voided the

parties' contingency-fee contract. *Forbes v. Louis St. Martin*, 145 So. 3d 1184, 2013 Miss. App. LEXIS 124 (Miss. Ct. App. 2013), rev'd, 145 So. 3d 1124, 2014 Miss. LEXIS 258 (Miss. 2014).

RESEARCH REFERENCES

ALR.

Court rules limiting amount of contingent fees or otherwise imposing conditions on contingent fee contracts. 77 A.L.R.2d 411.

Construction of contingent fee contract as regards compensation for services after judgment or on appeal. 13 A.L.R.3d 673.

Validity and effect of contract for attorney's compensation made after inception of attorney-client relationship. 13 A.L.R.3d 701.

Modern status of law regarding solicitation of business by or for attorney. 5 A.L.R.4th 866.

Validity, construction, and effect of contract providing for contingent fee to defendant's attorney. 9 A.L.R.4th 191.

Contracts by organizations in business of providing evidence, witness, or research

assistance to legal counsel in specific litigation. 15 A.L.R.4th 1255.

Validity and construction of contracts by organizations in business of providing expert witnesses, research assistance, and consultation services to attorneys in specific litigation. 70 A.L.R.5th 513.

Am. Jur.

14 Am. Jur. 2d, Champerty, Maintenance and Barratry, § 18.

5A Am. Jur. Pl & Pr Forms (Rev), Champerty and Maintenance, Forms 1 et seq. (actions to recover for champerty or maintenance).

CJS.

14 C.J.S., Champerty and Maintenance Barratry and Related Matters §§ 30, 31.

§ 97-9-13. Champerty and maintenance; penalty.

Any person violating any of the provisions of Section 97-9-11 shall be guilty of maintenance and, upon conviction thereof, shall be punished by imprisonment for one year in the state penitentiary.

HISTORY: Codes, 1942, § 2049-02; Laws, 1956, ch. 253, § 2.

Cross References — Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see § 97-43-1 et seq.

§ 97-9-15. Champerty and maintenance; affidavit of party.

Every person who commences or prosecutes or assists in the commencement or prosecution of any proceeding in any court or before any administrative agency in the State of Mississippi, or who may take an appeal from any such rule, order, or judgment thereof, shall, on motion made by any of the parties of such proceedings, or by the court or agency in which such proceeding is pending, file with such court or agency, as a condition precedent to the further prosecution of such proceeding, the following affidavit:

I, (_____), petitioner (or complainant, plaintiff, appellant or whatever party he may be) in this matter, do hereby swear (or affirm) that I have neither

received, nor conspired to receive, any valuable consideration or assistance whatever as an inducement to the commencement or further prosecution of the proceedings in this matter.

(Signature of Affiant)

Affiant

Sworn to and subscribed before me on this, the (_____) day of (_____), 2(____).

(Signature of Official)

(Title of Official)

In the case of any firm, corporation, group, organization, or association required to make the above affidavit, such affidavit shall be made by the person having custody and control of the books and records of such firm, corporation, group, organization, or association.

HISTORY: Codes, 1942, § 2049-03; Laws, 1956, ch. 253, § 3.

Cross References — Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see § 97-43-1 et seq.

JUDICIAL DECISIONS

1. In general.

A settlement agreement in which insurers paid their liability limit of \$5 million and the plaintiffs agreed to sue the defendant automobile manufacturer was not a champertous contract; it was a valid assignment of a chose in action and, therefore, the plaintiffs, the insurers, and their attorneys were not required to execute the statutory champerty affidavits. *Sneed v.*

Ford Motor Co., 735 So. 2d 306, 1999 Miss. LEXIS 132 (Miss. 1999).

Failure to file affidavit as to absence of receipt of valuable consideration as an inducement to the prosecution of a citizen's suit to abate an alleged liquor nuisance, held to require its dismissal. *State ex rel. Carr v. Cabana Terrace, Inc.*, 247 Miss. 26, 153 So. 2d 257, 1963 Miss. LEXIS 279 (Miss. 1963).

§ 97-9-17. Champerty and maintenance; affidavit of attorney representing party.

Every attorney representing any person, firm, partnership, corporation, group, organization, or association in any proceeding in any court or before any administrative agency in the State of Mississippi, or who may take an appeal from any rule, order, or judgment thereof, shall, on motion made by any of the parties to such proceeding, or by the court or agency in which such proceeding is pending, file, as a condition precedent to the further prosecution of such proceeding, the following affidavit:

I, (_____), attorney representing (_____), petitioner (or complainant, plaintiff, appellant or whatever party he may be) in this matter, do hereby swear (or affirm) that neither I nor, to the best of my knowledge and belief, any

other person, firm, partnership, corporation, group, organization, or association has promised, given, or offered, or conspired to promise, give, or offer, or solicited, received, or accepted any valuable consideration or any assistance whatever to said (_____) as an inducement to said (_____) to the commencement or further prosecution of the proceedings herein.

(Signature of Affiant)

Affiant

Sworn to and subscribed before me on this, the (_____) day of (_____), 2(____).

(Signature of Official)

(Title of Official)

Provided, however, that if, on motion made, such affidavits are promptly filed, the failure in the first instance to have filed same shall not constitute grounds for a continuance of such proceedings.

HISTORY: Codes, 1942, § 2049-04; Laws, 1956, ch. 253, § 4.

Cross References — Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see § 97-43-1 et seq.

§ 97-9-19. Champerty and maintenance; penalty for false affidavit.

Every person or attorney who shall file a false affidavit shall be guilty of perjury and shall be punished as provided by law. Every attorney who shall file a false affidavit, or who shall violate any other provision of Sections 97-9-11 through 97-9-23, upon final conviction thereof shall also be disbarred, by order of the court in which convicted. Any attorney who shall file a false affidavit, or violate any other provision of Sections 97-9-11 through 97-9-23, and who is not a member of the Mississippi Bar shall, in addition to the other penalties provided by Sections 97-9-11 through 97-9-23, be forever barred from practicing before any court or administrative agency of this state.

HISTORY: Codes, 1942, § 2049-05; Laws, 1956, ch. 253, § 5.

Cross References — Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see § 97-43-1 et seq.

§ 97-9-21. Champerty and maintenance; immunity granted witnesses compelled to testify concerning violations; penalty for failure to testify.

No person shall be excused from attending or testifying or producing evidence of any kind before a grand jury, or before any court, or in any cause

or proceeding, criminal or otherwise, based upon or growing out of any alleged violation of the provisions of Sections 97-9-11 through 97-9-23 on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to criminate him or subject him to a penalty or forfeiture. But no person shall be prosecuted or subject to any penalty or forfeiture for, or on account of, any transaction, matter, or thing, concerning which he may be required to testify or produce evidence, documentary or otherwise, before the grand jury or court or in any cause or proceeding; provided, that no person so testifying shall be exempt from prosecution or punishment for perjury in so testifying. Any person who shall neglect or refuse to so attend or testify, or to answer any lawful inquiry, or to produce books or other documentary evidence, if in his power to do so, shall be guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not less than one hundred dollars (\$100.00) nor more than one thousand dollars (\$1,000.00), or by imprisonment for not more than one hundred eighty (180) days, or by both such fine and imprisonment.

HISTORY: Codes, 1942, § 2049-06; Laws, 1956, ch. 253, § 6.

Cross References — Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see § 97-43-1 et seq.

Imposition of standard state assessment in addition to all court imposed fines or other penalties for any misdemeanor violation, see § 99-19-73.

RESEARCH REFERENCES

Lawyers' Edition.	against self-incrimination. 32 L. Ed. 2d
Adequacy, under Federal Constitution,	869.
of immunity granted in lieu of privilege	

§ 97-9-23. Champerty and maintenance; exceptions; legislative intent.

The provisions of Sections 97-9-11 through 97-9-23 shall not be applicable to attorneys who are parties to contingent fee contracts with their clients where the attorney does not pay or protect the client from payment of the costs and expenses of litigation, nor shall said sections apply to suits pertaining to or affecting possession of or title to real or personal property, nor shall said sections apply to suits involving the legality of assessment or collection of taxes, nor shall said sections apply to suits involving rates or charges by common carriers or public utilities, nor shall said sections apply to criminal prosecutions, nor to the payment of attorneys by legal aid societies approved by the Mississippi State Bar.

Nothing in Sections 97-9-11 through 97-9-23 is intended to be in derogation of the constitutional right of real parties in interest to employ counsel or to prosecute any available legal remedy. The intent, as herein set out, is to prohibit and punish, more clearly and definitely, champerty, maintenance, barratry, and the solicitation or stirring up of litigation, whether the same be

committed by licensed attorneys or by others who are not real parties in interest to the subject matter of such litigation.

HISTORY: Codes, 1942, § 2049-07; Laws, 1956, ch. 253, § 7.

Cross References — Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see § 97-43-1 et seq.

JUDICIAL DECISIONS

1. In general.

A settlement agreement in which insurers paid their liability limit of \$5 million and the plaintiffs agreed to sue the defendant automobile manufacturer was not a champertous contract; it was a valid assignment of a chose in action and, therefore, the plaintiffs, the insurers, and their attorneys were not required to execute the statutory champerty affidavits. *Sneed v.*

Ford Motor Co., 735 So. 2d 306, 1999 Miss. LEXIS 132 (Miss. 1999).

Failure to file affidavit as to absence of receipt of valuable consideration as an inducement to the prosecution of a citizen's suit to abate an alleged liquor nuisance, held to require its dismissal. *State ex rel. Carr v. Cabana Terrace, Inc.*, 247 Miss. 26, 153 So. 2d 257, 1963 Miss. LEXIS 279 (Miss. 1963).

RESEARCH REFERENCES

ALR.

Limitation to quantum meruit recovery, where attorney employed under contin-

gent fee contract is discharged without cause. 92 A.L.R.3d 690.

§ 97-9-25. Escape of inmates of state institutions; aiding, abetting, etc.

It shall be unlawful for any person, firm, copartnership, corporation or association to knowingly entice, harbor, employ, or aid, assist or abet in the escape, enticing, harboring or employment of any delinquent, person with mental illness, person with an intellectual disability or incorrigible person committed to, or confined in any institution maintained by the state for the treatment, education or welfare of delinquent persons, persons with mental illness, persons with an intellectual disability or incorrigible persons. Any person violating the provisions of this section, upon conviction, shall be punished by a fine of not less than Twenty-five Dollars (\$25.00) nor more than Five Hundred Dollars (\$500.00), or imprisonment in the county jail for not less than thirty (30) days, nor more than ninety (90) days, or both.

HISTORY: Codes, 1930, § 901; 1942, § 2130; Laws, 1930, ch. 25; Laws, 2008, ch. 442, § 33; Laws, 2010, ch. 476, § 80, eff from and after passage (approved Apr. 1, 2010).

Cross References — Escape from private correctional facilities, penalties, see § 47-4-7.

Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see § 97-43-1 et seq.

JUDICIAL DECISIONS

1. Application.

In a case where a patient in a mental health facility was injured during an attempted escape, liability was not precluded under Miss. Code Ann. § 97-9-25

and Miss. Code Ann. § 11-46-9(1)(f) because an attempted escape by a mental patient was not a criminal act. *Miss. Dep't of Mental Health v. Hall*, 936 So. 2d 917, 2006 Miss. LEXIS 462 (Miss. 2006).

RESEARCH REFERENCES

ALR.

What justifies escape or attempt to escape, or assistance in that regard. 70 A.L.R.2d 1430.

Escape from public employee or institution other than correctional or law enforcement employee or institution as criminal offense. 69 A.L.R.3d 625.

Duress, necessity, or conditions of confinement as justification for escape from prison. 69 A.L.R.3d 678.

Am. Jur.

27A Am. Jur. 2d, Escape §§ 1 et seq.

CJS.

30A C.J.S., Escape and Related Offenses

Rescue §§ 24 et seq.

§ 97-9-27. Escape of prisoners; conveying articles useful for escape to felons.

Every person who shall convey into the penitentiary, jail, or other place of confinement any disguise, instrument, arms, or other things useful to any prisoner in his escape, with the intent thereby to facilitate the escape of any prisoner lawfully committed to or detained in such prison, jail, or place for any felony whatever, whether such escape be effected or attempted or not, shall, upon conviction, be punished by imprisonment in the penitentiary not exceeding ten years.

HISTORY: Codes, Hutchinson's 1848, ch. 64, art. 12, Title 5(13); 1857, ch. 64, art. 86; 1871, § 2551; 1880, § 2791; 1892, § 1069; 1906, § 1149; Hemingway's 1917, § 876; 1930, § 902; 1942, § 2131.

Cross References — Convicts not being credited with wages during time of escape, see § 47-1-17.

Use of prisoners as servants, see § 47-5-137.

Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see § 97-43-1 et seq.

Arrest procedure, see §§ 99-3-13 et seq.

Arrest of fugitives from justice from other states, see §§ 99-21-1 et seq.

JUDICIAL DECISIONS

1. In general.

Defendants' conspiracy convictions were proper where the trial court did not err in admitting a letter to the first defendant, pursuant to Miss. R. Evid. 401 and

402, because the critical fact at issue was whether the first defendant was engaged in a conspiracy to escape, and that letter was evidence that tended to make that fact more probable or less probable than

without the evidence. *Farris v. State*, 906 So. 2d 113, 2004 Miss. App. LEXIS 1126 (Miss. Ct. App. 2004).

A defendant, indicted for violation of this section [Code 1942, § 2131], could not be convicted where the proof showed that the prisoner he was alleged to be aiding had been released from jail six days prior to the date on which the offense was charged, and there was no evidence that there was at the time any other prisoner in the jail who had been committed for a felony. *Vickers v. State*, 215 So. 2d 432, 1968 Miss. LEXIS 1364 (Miss. 1968).

Although the proof may have been sufficient to sustain a verdict of guilty of aiding the escape of a nonfelon under Code 1942, § 2133, a defendant indicted

for violating Code 1942, § 2131 and charged with aiding the escape of a felon should not have been convicted for violating Code 1942, § 2133 where the trial judge failed to order the indictment, record, and proceedings amended to conform with the proof. *Vickers v. State*, 215 So. 2d 432, 1968 Miss. LEXIS 1364 (Miss. 1968).

This section [Code 1942, § 2131] does not require that the prisoner whose escape is intended to be aided must be guilty of felony, or that the person who extends the aid must know or believe him to be; it makes guilt consist of the effort to aid an escape by one lawfully in prison on a charge of felony. *Holland v. State*, 60 Miss. 939, 1883 Miss. LEXIS 41 (Miss. 1883).

RESEARCH REFERENCES

ALR.

What justifies escape or attempt to escape, or assistance in that regard. 70 A.L.R.2d 1430.

Escape or prison breach as affected by means employed. 96 A.L.R.2d 520.

Duress, necessity, or conditions of confinement as justification for escape from prison. 69 A.L.R.3d 678.

Duress, necessity, or conditions of confinement as justification for escape from prison. 54 A.L.R.5th 141.

Sufficiency of evidence of instigating or assisting escape from federal custody, under 18 USCS § 752(a). 74 A.L.R. Fed. 816.

Am. Jur.

27A Am. Jur. 2d, Escape §§ 1 et seq.

CJS.

30A C.J.S., Escape and Related Offenses

Rescue §§ 24 et seq.

§ 97-9-29. Escape of prisoners; aiding escape of felons generally; rescuing prisoners from custody.

Every person who shall, by any means whatever, aid or assist any prisoner lawfully detained in the penitentiary, or in any jail or place of confinement for any felony, in an attempt to escape therefrom, whether such escape be effective or not, or who shall forcibly rescue any prisoner held in legal custody upon any criminal charge, shall, upon conviction, be punished by imprisonment in the penitentiary not exceeding ten years.

HISTORY: Codes, *Hutchinson's* 1848, ch. 64, art. 12, Title 5(14); 1857, ch. 64, art. 87; 1871, § 2552; 1880, § 2792; 1892, § 1070; 1906, § 1150; *Hemingway's* 1917, § 877; 1930, § 903; 1942, § 2132.

Cross References — Escaped convict not being credited with wages, see § 47-1-17.

Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see § 97-43-1 et seq.

JUDICIAL DECISIONS

1. In general.

Evidence was sufficient to convict defendant of crime of aiding escape of felon where prosecution proved that defendant drove get-a-way car, despite contention that there was no evidence that she had assisted escapee in scaling prison walls, nor that she smuggled into escapee's place of confinement any weapon or instrumentality of escape. *Suan v. State*, 511 So. 2d 144, 1987 Miss. LEXIS 2675 (Miss. 1987).

In a prosecution on charges of aiding the attempted escape of a person confined for a felony offense, testimony that an affidavit was sworn out charging such person with burglary of a dwelling, that such person was bound over to await grand jury action on that charge, and that such person was present in jail at the time of the attempted escape, constituted sufficient evidence from which a jury could reasonably conclude that such person was confined for a felony within the meaning of this section. *Pryor v. State*, 349 So. 2d 1063, 1977 Miss. LEXIS 2202 (Miss. 1977).

Constitution secures to one charged with violation of this section [Code 1942, § 2132] only right to be advised of nature of charge against him, and not right to have set forth facts relied on to sustain charge. *State v. Needham*, 182 Miss. 663, 180 So. 786, 1938 Miss. LEXIS 154 (Miss. 1938).

Indictment held sufficient to charge crime of accessory after the fact to crime of murder, although it did not allege specific acts committed by defendant. *State v. Needham*, 182 Miss. 663, 180 So. 786, 1938 Miss. LEXIS 154 (Miss. 1938).

A verdict rendered on an indictment under this section [Code 1942, § 2132] in these words, "We, the jury, on our oaths do find defendant guilty of negligently permitting the escape of the convict named in the indictment, but not guilty of feloniously aiding or assisting him to escape," amounts to an acquittal. The indictment did not charge that the accused was jailer. *Westbrook v. State*, 52 Miss. 777, 1876 Miss. LEXIS 290 (Miss. 1876).

RESEARCH REFERENCES

ALR.

What justifies escape or attempt to escape, or assistance in that regard. 70 A.L.R.2d 1430.

Duress, necessity, or conditions of confinement as justification for escape from prison. 69 A.L.R.3d 678.

Sufficiency of evidence of instigating or assisting escape from federal custody, under 18 USCS § 752(a). 74 A.L.R. Fed. 816.

Am. Jur.

27A Am. Jur. 2d, Escape §§ 1 et seq.

CJS.

30A C.J.S., Escape and Related Offenses

Rescue §§ 24 et seq.

§ 97-9-31. Escape of prisoners; aiding prisoners other than felons generally; conveying article useful for escape.

Every person who, by any means whatever, shall aid or assist any prisoner lawfully committed to any jail or place of confinement, in execution of any conviction for any criminal offense other than felony, to escape, whether such escape be effective or not, or who shall convey into such jail or place of confinement any disguise, instrument, arm, or other things useful to facilitate the escape of any prisoner so committed, whether such escape be effective or attempted or not, shall be punished by imprisonment in the county jail not exceeding one year, or by fine not exceeding five hundred dollars, or both.

HISTORY: Codes, Hutchinson's 1848, ch. 64, art. 12, Title 5(15); 1857, ch. 64, art. 88; 1871, § 2553; 1880, § 2793; 1892, § 1071; 1906, § 1151; Hemingway's 1917, § 878; 1930, § 904; 1942, § 2133.

Cross References — When a convict is not credited with wages, see § 47-1-17.
Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see § 97-43-1 et seq.

JUDICIAL DECISIONS

1. In general.

Although the proof may have been sufficient to sustain a verdict of guilty of aiding the escape of a nonfelon under Code 1942, § 2133, a defendant indicted for violating Code 1942, § 2131 and charged with aiding the escape of a felon

should not have been convicted for violating Code 1942, § 2133 where the trial judge failed to order the indictment, record, and proceedings amended to conform with the proof. *Vickers v. State*, 215 So. 2d 432, 1968 Miss. LEXIS 1364 (Miss. 1968).

RESEARCH REFERENCES

ALR.

What justifies escape or attempt to escape, or assistance in that regard. 70 A.L.R.2d 1430.

Duress, necessity, or conditions of confinement as justification for escape from prison. 69 A.L.R.3d 678.

Am. Jur.

27A Am. Jur. 2d, Escape §§ 1 et seq.

CJS.

30A C.J.S., Escape and Related Offenses

Rescue §§ 24 et seq.

§ 97-9-33. Escape of prisoners; aiding escapes from officers.

Every person who shall aid or assist any prisoner in escaping or attempting to escape from the custody of any sheriff, marshal, constable, or other officer or person who shall have the lawful charge of such prisoner upon any criminal charge, shall, upon conviction, be punished by imprisonment in the county jail not exceeding one (1) year, or by fine not exceeding Five Hundred Dollars (\$500.00), or both.

HISTORY: Codes, Hutchinson's 1848, ch. 64, art. 12, Title 5(17); 1857, ch. 64, art. 90; 1871, § 2555; 1880, § 2795; 1892, § 1072; 1906, § 1152; Hemingway's 1917, § 879; 1930, § 905; 1942, § 2134; Laws, 1986, ch. 459, § 38, eff from and after July 1, 1986.

Cross References — Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see § 97-43-1 et seq.

RESEARCH REFERENCES

ALR.

What justifies escape or attempt to escape, or assistance in that regard. 70 A.L.R.2d 1430.

Duress, necessity, or conditions of con-

finement as justification for escape from prison. 69 A.L.R.3d 678.

Am. Jur.

27A Am. Jur. 2d, Escape §§ 1 et seq.

CJS.

30A C.J.S., Escape and Related Offenses
Rescue §§ 24 et seq.

§ 97-9-35. Escape of prisoners; permitting escape.

If any officer, or guard of the penitentiary, or any other person, shall, while any convict is under his keeping or charge, wilfully or negligently permit such convict to escape from custody, the person so offending shall be subject to indictment therefor, and, on conviction, shall be fined not more than one thousand dollars and be imprisoned in the penitentiary not less than one year nor more than two years, or in the county jail not less than six months, or shall be punished by both such fine and imprisonment.

HISTORY: Codes, 1857, ch. 64, art. 98; 1871, § 2563; 1880, § 2803; 1892, § 1080; 1906, § 1160; Hemingway's 1917, § 887; 1930, § 913; 1942, § 2142.

Cross References — Use of prisoners as servants, see § 47-5-137.

Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see § 97-43-1 et seq.

RESEARCH REFERENCES**ALR.**

What justifies escape or attempt to escape, or assistance in that regard. 70 A.L.R.2d 1430.

Liability of public officer or body for harm done by prisoner permitted to escape. 44 A.L.R.3d 899.

Duress, necessity, or conditions of confinement as justification for escape from prison. 69 A.L.R.3d 678.

Am. Jur.

27A Am. Jur. 2d, Escape § 9.

CJS.

30A C.J.S., Escape and Related Offenses

Rescue §§ 1 et seq.

§ 97-9-37. Escape of prisoners; private persons having custody of prisoner arrested on suspicion.

If any private person having a prisoner in his keeping, arrested on suspicion of felony or other offense, and the prisoner who is so arrested escape by the wilful act or negligence of the person having him in custody, then the person from whom such prisoner so escaped shall, upon conviction, be fined not more than one thousand dollars or imprisoned in the county jail not longer than one year, or both.

HISTORY: Codes, 1857, ch. 64, art. 91; 1871, § 2556; 1880, § 2796; 1892, § 1073; 1906, § 1153; Hemingway's 1917, § 880; 1930, § 906; 1942, § 2135.

Cross References — Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see § 97-43-1 et seq.

RESEARCH REFERENCES

ALR.

What justifies escape or attempt to escape, or assistance in that regard. 70 A.L.R.2d 1430.

Escape from custody of private person as criminal offense. 69 A.L.R.3d 664.

Duress, necessity, or conditions of confinement as justification for escape from prison. 69 A.L.R.3d 678.

Am. Jur.

27A Am. Jur. 2d, Escape §§ 1 et seq.

CJS.

30A C.J.S., Escape and Related Offenses

Rescue §§ 24 et seq.

§ 97-9-39. Escape of prisoners; refusal of officer, jailer, etc., to arrest or confine; refusal to receive prisoners at jail; suffering an escape; accepting bribe to permit escape.

If any sheriff, jailer, constable, marshal, or other officer, shall wilfully and corruptly refuse to execute any lawful process directed to him or any of them, requiring the apprehension or confinement of any person charged with a criminal offense; or shall corruptly and wilfully omit to execute such process, by which such person shall escape; or shall wilfully refuse to receive in any jail under his charge any offender lawfully committed to such jail and ordered to be confined therein on any criminal charge or conviction, or any lawful process whatever; or shall suffer any person lawfully committed to his custody to escape and go at large, either wilfully or negligently; or shall receive any gratuity or reward, or any security or engagement for the same, to procure, assist, or connive at, or permit any prisoner in his custody on any criminal charge or conviction to escape, whether such escape be attempted or effected or not, he shall, upon conviction, be punished by imprisonment in the county jail not exceeding one (1) year, or by fine not exceeding One Thousand Dollars (\$1,000.00), or both.

HISTORY: Codes, Hutchinson's 1848, ch. 64, art. 12, Title 5(18); 1857, ch. 64, art. 92; 1871, § 2557; 1880, § 2797; 1892, § 1074; 1906, § 1154; Hemingway's 1917, § 881; 1930, § 907; 1942, § 2136; Laws, 1986, ch. 459, § 39, eff from and after July 1, 1986.

Cross References — Remedy against officer in reference to fines, see § 11-7-219.

Penalty for constable's neglect of duty, see § 19-19-15.

Liability for failure to return execution, see § 19-25-41.

Failure of officers to return offenders, see § 97-11-35.

Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see § 97-43-1 et seq.

JUDICIAL DECISIONS

1. In general.

A sheriff's duties with respect to operating a jail and keeping prisoners confined were discretionary in nature and, there-

fore, the sheriff was entitled to the protection of qualified immunity in a suit to recover for the wrongful death of a victim who was murdered by escaped inmates.

McQueen v. Williams, 587 So. 2d 918, 1991 Miss. LEXIS 715 (Miss. 1991), overruled, Little v. Miss. DOT, 129 So. 3d 132, 2013 Miss. LEXIS 551 (Miss. 2013).

Whenever an escape is shown, the law implies negligence on the part of the sheriff into whose custody the prisoner has been placed, and it is not necessary for the

state to prove negligence to procure conviction. If the escape be shown, such officer must show, to avoid conviction, that it was caused by the act of God, or other irresistible force. The insecurity of the jail does not constitute a defense. Shattuck v. State, 51 Miss. 575, 1875 Miss. LEXIS 81 (Miss. 1875).

OPINIONS OF THE ATTORNEY GENERAL

A sheriff is not lawfully obligated to receive municipal prisoners unless the city has a contract with the county to do

so. Sanders, Dec. 9, 2005, A.G. Op. 05-0587.

RESEARCH REFERENCES

Am. Jur.

27A Am. Jur. 2d, Escape §§ 1 et seq.

fenses

Rescue §§ 1 et seq.

CJS.

30A C.J.S., Escape and Related Of-

§ 97-9-41. Escape of prisoners; concealing or harboring escaped prisoner.

Every person who shall knowingly conceal or harbor any prisoner or convict who has escaped from the lawful custody of any officer, jail, prison, or the penitentiary, within this state shall be guilty of a felony and upon conviction shall be fined not less than one hundred dollars (\$100.00) nor more than five hundred dollars (\$500.00) or by imprisonment in the penitentiary for a term not to exceed five (5) years.

HISTORY: Codes, 1942, § 2142.5; Laws, 1952, ch. 258.

Cross References — Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see § 97-43-1 et seq.

Imposition of standard state assessment in addition to all court imposed fines or other penalties for any felony violation, see § 99-19-73.

JUDICIAL DECISIONS

1. In general.

The statute [Code 1942, § 2142.5] is a felony statute notwithstanding its provision for a fine as an alternative to imprisonment in the penitentiary. Bellew v. Dedeaux, 240 Miss. 79, 126 So. 2d 249, 1961 Miss. LEXIS 433 (Miss. 1961).

This statute [Code 1942, § 2142.5] is not unconstitutional as containing two subject matters in that the punishment

prescribed may be either imprisonment in the penitentiary or fine and commitment to the county jail. Bellew v. State, 238 Miss. 734, 106 So. 2d 146, 1958 Miss. LEXIS 347 (Miss. 1958), cert. denied, 360 U.S. 473, 79 S. Ct. 1430, 3 L. Ed. 2d 1531, 1959 U.S. LEXIS 758 (U.S. 1959).

Indictment under this provision need not set forth means by which escaped prisoner was harbored. Bellew v. State,

238 Miss. 734, 106 So. 2d 146, 1958 Miss. U.S. 473, 79 S. Ct. 1430, 3 L. Ed. 2d 1531, LEXIS 347 (Miss. 1958), cert. denied, 360 1959 U.S. LEXIS 758 (U.S. 1959).

RESEARCH REFERENCES

ALR.

What justifies escape or attempt to escape, or assistance in that regard. 70 A.L.R.2d 1430.

Duress, necessity, or conditions of confinement as justification for escape from prison. 69 A.L.R.3d 678.

Duress, necessity, or conditions of confinement as justification for escape from prison. 54 A.L.R.5th 141.

Harboring or concealing federal prisoner after his escape, under 18 USCS § 1072. 49 A.L.R. Fed. 814.

Sufficiency of evidence of instigating or assisting escape from federal custody, under 18 USCS § 752(a). 74 A.L.R. Fed. 816.

Am. Jur.

27A Am. Jur. 2d, Escape § 10.

§ 97-9-43. Escape of prisoners; escapee may be retaken after term expires and imprisoned until tried.

If any convict, confined in any jail or in the penitentiary for a criminal offense, shall escape therefrom he may be pursued, retaken and imprisoned again, notwithstanding the term for which he was sentenced to be imprisoned may have expired at the time he shall be retaken, and shall remain so imprisoned until he shall have served as a convict the entire length of time which he would have been required to so serve had he not escaped, and until tried for such escape, or until discharged on a failure to prosecute therefor.

HISTORY: Codes, Hutchinson's 1848, ch. 64, art. 12, Title 5(20); 1857, ch. 64, art. 93; 1871, § 2558; 1880, § 2798; 1892, § 1075; 1906, § 1155; Hemingway's 1917, § 882; 1930, § 908; 1942, § 2137; Laws, 1978, ch. 414, § 1, eff from and after July 1, 1978.

Cross References — Governor's duties in delivering fugitives from justice, see §§ 7-1-25 et seq.

When convict is not credited with wages, see § 47-1-17.

Escape of state or county inmate participating in joint state-county public service work program, see § 47-5-409.

Escape of inmate participating in joint state-county work program, see § 47-5-457.

Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see § 97-43-1 et seq.

Officer pursuing offender into other counties, see § 99-3-13.

Retaking escaped offenders anywhere, see § 99-3-15.

JUDICIAL DECISIONS

1. In general.

A prisoner who was convicted of unlawful possession of liquors and who was released by the sheriff to allow the prisoner to seek private hospital care, was an

escapee and he was not entitled to credit upon his sentence or fine and costs for the time spent away from the jail. *Hegwood v. State*, 213 Miss. 693, 57 So. 2d 500, 1952 Miss. LEXIS 413 (Miss. 1952).

RESEARCH REFERENCES

ALR.

Duress, necessity, or conditions of confinement as justification for escape from prison. 69 A.L.R.3d 678.

Am. Jur.

27A Am. Jur. 2d, Escape § 19.

§ 97-9-45. Escape of prisoners; penalty; willful failure to return to jail after being entrusted to leave.

If any person sentenced to the Mississippi Department of Corrections for any term shall escape or attempt to escape from his particular unit or camp of confinement or the boundaries of the penitentiary as a whole, or shall escape or attempt to escape from custody before confinement therein, he shall, upon conviction, be punished by imprisonment in such prison for a term not exceeding five (5) years, to commence from and after the expiration of the original term of his imprisonment as extended in consequence of such escape or attempted escape.

Any convict who is entrusted to leave the boundaries of confinement by authorities of the Mississippi Department of Corrections or by the Governor, and who willfully fails to return within the stipulated time, or after the accomplishment of the purpose for which he was entrusted to leave, shall be an escapee and, upon conviction, shall be subject to the penalties provided under this section.

HISTORY: Codes, Hutchinson's 1848, ch. 64, art. 12, Title 5(21); 1857, ch. 64, art. 94; 1871, § 2559; 1880, § 2799; 1892, § 1076; 1906, § 1156; Hemingway's 1917, § 883; 1930, § 909; 1942, § 2138; Laws, 1966, ch. 357, § 1; Laws, 1972, ch. 312, § 1; Laws, 1984, ch. 428; Laws, 2002, ch. 328, § 1, eff from and after July 1, 2002.

Cross References — Use of prisoners as servants, see § 47-5-137.

Forfeiture of meritorious earned time as penalty for escape, see § 47-5-142.

Escape of state of county inmate participating in joint state-county public service work program, see § 47-5-409.

Escape of inmate participating in joint state-county work program, see § 47-5-457.

Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see § 97-43-1 et seq.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Indictment.

1. In general.

Defendant was properly convicted of escape because the Legislature made clear that an escape from house arrest was a felony escape and defendant was on "house arrest" under the jurisdiction of the Mississippi Department of Correc-

tions in the Intensive Supervision Program when he cut his monitoring device off his ankle and fled. *Smith v. State*, 270 So. 3d 1052, 2018 Miss. App. LEXIS 502 (Miss. Ct. App. 2018).

Without waiving the procedural bar to the inmate's claim that the inmate's sentence was unconstitutional, the court held that the inmate was properly charged under Miss. Code Ann. § 97-9-45 and entered a plea of guilty to the escape, and the sentence of three years was well

within the maximum prescribed by the statute, which referred to prisoners sentenced to the Mississippi Department of Corrections and allowed a maximum sentence of five years, and thus the inmate was not entitled to post-conviction relief; although the inmate was in custody and on a work program for a county at the time of the escape, the inmate was considered under the Department's jurisdiction for purposes of § 97-9-45 because (1) the inmate's original burglary sentence required imprisonment in the "penitentiary" under Miss. Code Ann. § 97-17-23, which term meant any facility under the jurisdiction of the Department pursuant to Miss. Code Ann. § 47-5-3, (2) commitment to any institution within the jurisdiction of the Department was to the Department, not a particular institution pursuant to Miss. Code Ann. § 47-5-110, and (3) under Miss. Code Ann. § 47-5-541, the Department recommended rules concerning the participation of inmates in work programs. *Gardner v. State*, 848 So. 2d 900, 2003 Miss. App. LEXIS 570 (Miss. Ct. App. 2003).

A defendant's conviction for escape under this section constituted a "felony" and, therefore, he was properly sentenced as a habitual offender under § 99-19-83. *Beckham v. State*, 556 So. 2d 342, 1990 Miss. LEXIS 11 (Miss. 1990).

While the State is not required to prosecute a criminal defendant under the statute with a lesser penalty when the facts which constitute a criminal offense may fall under either of 2 statutes, if the indictment is ambiguous, the accused can only be punished under the statute with the lesser penalty. Thus, a defendant who was indicted for escape was required to be prosecuted under this section, which simply takes away earned time towards parole, rather than § 97-9-49, which provides for a possible sentence of up to 2 years, where the indictment was silent as to the applicable statute. *Beckham v. State*, 556 So. 2d 342, 1990 Miss. LEXIS 11 (Miss. 1990).

Public policy supports the requirement that a prisoner use legal methods, rather than escape, to vindicate his or her rights. Thus, where a defendant was imprisoned under color of law but alleged that he had

not been afforded a hearing since his incarceration and had not been given the opportunity to post bond or to be represented by counsel, any attempt at redress should have been and should always be through regular legal channels and not via a self-help escape process. *Brown v. State*, 552 So. 2d 109, 1989 Miss. LEXIS 468 (Miss. 1989).

Where it is the threats of prison or jail officials which precipitate a prisoner's escape, the prisoner is not required to return to the custody of the official making the threats in order to preserve the defense of necessity. However, there are numerous law enforcement or other governmental agencies to whom a prisoner might safely report and from whom he could receive assistance in resolving his dangerous situation. Thus, an escaped prisoner who made no effort whatsoever to communicate with anyone in authority about his alleged predicament, even though he had ample opportunity to do so, waived the defense of necessity. *Corley v. State*, 536 So. 2d 1314, 1988 Miss. LEXIS 613 (Miss. 1988).

Prisoner convicted of escape from county jail, where prisoner is being held pending results of appeal of conviction for which prisoner has been sentenced to life imprisonment in state penitentiary, may be sentenced under this section, but not under § 97-9-49, where indictment for jail escape does not specify which statute has been violated. *Cunningham v. State*, 478 So. 2d 308, 1985 Miss. LEXIS 2287 (Miss. 1985).

Where a prisoner escaped from the county jail, the trial court erred in sentencing him under this section instead of § 97-9-49, which governs escape from a county jail). *Moore v. State*, 461 So. 2d 768, 1984 Miss. LEXIS 2064 (Miss. 1984).

In a prosecution for attempted escape, the trial court erred in sentencing defendant, who was under a sentence of life imprisonment for a murder conviction, to a term of two years under § 97-9-49, where the correct sentence for defendant under this section, which specifically covers persons convicted of escape from custody after being sentenced to the penitentiary for life, would be forfeiture of all earned time toward a parole. *Carleton v.*

State, 438 So. 2d 278, 1983 Miss. LEXIS 2845 (Miss. 1983).

Generally, when facts constituting a criminal offense may fall within either of two or more statutes or there is substantial doubt as to which applies, the statute imposing the lesser punishment must be applied. Accordingly, where a prisoner who was entrusted to leave the jail for designated purposes, including errands, and was entrusted to do this alone, wilfully failed to return to the jail, § 97-9-49 providing for an additional sentence not exceeding 6 months of the original sentence for wilfully failing to return to the jail within the stipulated time applied rather than this section providing for a maximum sentence of 5 years for a prisoner escaped from the Department of Corrections. *Bourdeaux v. State*, 412 So. 2d 241, 1982 Miss. LEXIS 1919 (Miss. 1982).

Defendant should be required to serve term for offense of escaping from jail independent of original sentence. *Jones v. State*, 158 Miss. 366, 130 So. 506, 1930 Miss. LEXIS 67 (Miss. 1930).

That robbery case was afterward re-

versed on appeal could not affect or diminish defendant's crime of escaping from jail while under penitentiary sentence. *Jones v. State*, 158 Miss. 366, 130 So. 506, 1930 Miss. LEXIS 67 (Miss. 1930).

Penalty for attempt to escape from county jail limited to a year's imprisonment. *Floyd v. State*, 140 Miss. 884, 105 So. 765, 1925 Miss. LEXIS 319 (Miss. 1925).

2. Indictment.

Defendant was adequately informed by the indictment of the nature of the escape charge against him and the supporting facts, where the State offered proof that defendant had been convicted of vehicular homicide and sentenced to the custody of the Mississippi Department of Corrections, that pending transportation, he was housed at the county jail, and that he escaped from the jail. *Jenkins v. State*, 881 So. 2d 870, 2003 Miss. App. LEXIS 1133 (Miss. Ct. App. 2003), *aff'd* in part and *rev'd* in part, 888 So. 2d 1171, 2004 Miss. LEXIS 1268 (Miss. 2004).

RESEARCH REFERENCES

ALR.

Duress, necessity, or conditions of confinement as justification for escape from prison. 69 A.L.R.3d 678.

Failure of prisoner to return at expiration of work furlough or other permissive release period as crime of escape. 76 A.L.R.3d 658.

Temporary unauthorized absence of prisoner as escape or attempted escape. 76 A.L.R.3d 695.

Conviction for escape where prisoner fails to leave confines of prison or institution. 79 A.L.R.4th 1060.

Duress, necessity, or conditions of confinement as justification for escape from prison. 54 A.L.R.5th 141.

Am. Jur.

27A Am. Jur. 2d, Escape § 23.

4 Am. Jur. Proof of Facts 2d, Criminal Acts Committed under Duress, §§ 17 et seq. (proof of duress excusing defendant's escape from prison).

CJS.

30A C.J.S., Escape and Related Offenses

Rescue §§ 17 et seq.

§ 97-9-47. Escape of prisoners; penalty for penitentiary convicts serving less than life term; attempt by force or violence.

Every person lawfully imprisoned in the penitentiary for any term less than life, who shall attempt, by force or violence to any person, to escape from such prison, whether such escape be effected or not, shall, upon conviction, be adjudged to imprisonment in the penitentiary for a term not less than five

years, to commence after the termination of the imprisonment to which such person shall have been sentenced at the time of such attempt.

HISTORY: Codes, Hutchinson's 1848, ch. 64, art. 12, Title 5(23); 1857, ch. 64, art. 96; 1871, § 2561; 1880, § 2801; 1892, § 1078; 1906, § 1158; Hemingway's 1917, § 885; 1930, § 911; 1942, § 2140.

Cross References — Escape of state or county inmate participating in joint state-county public service work program, see § 47-5-409.

Escape of inmate participating in joint state-county work program, see § 47-5-457.

Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see § 97-43-1 et seq.

JUDICIAL DECISIONS

1. In general.

Indictment contained in defendant's "pen pack" was relevant and admissible during penalty phase of capital murder case to show that defendant's previous escape was crime of violence for purposes of statutory aggravating factor. *Russell v. State*, 670 So. 2d 816, 1995 Miss. LEXIS 617 (Miss. 1995), cert. denied, 519 U.S. 982, 117 S. Ct. 436, 136 L. Ed. 2d 333, 1996 U.S. LEXIS 6884 (U.S. 1996), cert. dismissed, 520 U.S. 1249, 117 S. Ct. 2406, 137 L. Ed. 2d 1064, 1997 U.S. LEXIS 3537 (U.S. 1997).

Public policy supports the requirement that a prisoner use legal methods, rather than escape, to vindicate his or her rights. Thus, where a defendant was imprisoned under color of law but alleged that he had not been afforded a hearing since his incarceration and had not been given the opportunity to post bond or to be represented by counsel, any attempt at redress should have been and should always be through regular legal channels and not via a self-help escape process. *Brown v. State*, 552 So. 2d 109, 1989 Miss. LEXIS 468 (Miss. 1989).

Where it is the threats of prison or jail officials which precipitate a prisoner's es-

cape, the prisoner is not required to return to the custody of the official making the threats in order to preserve the defense of necessity. However, there are numerous law enforcement or other governmental agencies to whom a prisoner might safely report and from whom he could receive assistance in resolving his dangerous situation. Thus, an escaped prisoner who made no effort whatsoever to communicate with anyone in authority about his alleged predicament, even though he had ample opportunity to do so, waived the defense of necessity. *Corley v. State*, 536 So. 2d 1314, 1988 Miss. LEXIS 613 (Miss. 1988).

Defendant's demurrer to an indictment charging him with attempt to escape from the Mississippi Department of Corrections should have been sustained, since the indictment did not state a violation of § 97-9-47, making it unlawful for convicts imprisoned in a penitentiary to attempt to escape from such prison, nor did it state a violation of § 97-9-51[Repealed], which covers those persons attempting escape from the county jail. *Stinson v. State*, 443 So. 2d 869, 1983 Miss. LEXIS 3061 (Miss. 1983), but see *McCarty v. State*, 554 So. 2d 909, 1989 Miss. LEXIS 499 (Miss. 1989).

RESEARCH REFERENCES

ALR.

What justifies escape or attempt to escape, or assistance in that regard. 70 A.L.R.2d 1430.

Escape or prison breach as affected by means employed. 96 A.L.R.2d 520.

Duress, necessity, or conditions of confinement as justification for escape from prison. 69 A.L.R.3d 678.

Conviction for escape where prisoner fails to leave confines of prison or institution. 79 A.L.R.4th 1060.

Duress, necessity, or conditions of confinement as justification for escape from prison. 54 A.L.R.5th 141.

Am. Jur.

27A Am. Jur. 2d, Escape § 23.

CJS.

30A C.J.S., Escape and Related Offenses

Rescue §§ 17 et seq.

§ 97-9-49. Escape of prisoners; penalties for convicts in jail and persons under arrest or custody; willful failure to return to jail after being entrusted to leave.

(1)(a) Whoever escapes or attempts by force or violence to escape from any jail in which he is confined, or from any custody under or by virtue of any process issued under the laws of the State of Mississippi by any court or judge, or from the custody of a sheriff or other peace officer pursuant to lawful arrest, shall, upon conviction, if the confinement or custody is by virtue of an arrest on a charge of felony, or conviction of a felony, be punished by imprisonment in the penitentiary not exceeding five (5) years to commence at the expiration of his former sentence, or, if the confinement or custody is by virtue of an arrest of or charge for or conviction of a misdemeanor, be punished by imprisonment in the county jail not exceeding one (1) year to commence at the expiration of the sentence which the court has imposed or which may be imposed for the crime for which he is charged.

(b) Whoever escapes or attempts by force or violence to escape from any confinement for contempt of court, shall, upon conviction, be found guilty of a misdemeanor and sentenced to imprisonment not to exceed six (6) months in the county jail.

(2) Anyone confined in any jail who is entrusted by any authorized person to leave the jail for any purpose and who willfully fails to return to the jail within the stipulated time, or after the accomplishment of the purpose for which he was entrusted to leave, shall be an escapee and shall be subject to the penalties provided in subsection (1).

HISTORY: Codes, Hutchinson's 1848, ch. 64, art. 12, Title 5(22); 1857, ch. 64, art. 95; 1871, § 2560; 1880, § 2800; 1892, § 1077; 1906, § 1157; Hemingway's 1917, § 884; 1930, § 910; 1942, § 2139; Laws, 1972, ch. 323, § 1; Laws, 1978, ch. 414, § 2; Laws, 1983, ch. 387, § 1; Laws, 2002, ch. 328, § 2; Laws, 2006, ch. 358, § 1, eff from and after July 1, 2006.

Cross References — Escape of state or county inmate participating in joint state-county public service work program, see § 47-5-409.

Escape of inmate participating in joint state-county work program, see § 47-5-457.

Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see § 97-43-1 et seq.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Indictment sufficient.
3. "Force or violence."
4. Defense of necessity.
5. Failure to specify statute.
6. Authority to release from jail.
7. Evidence.

1. In general.

Trial court erred in admitting evidence of defendant's escape into defendant's trial for murder; however, this error was harmless because the evidence of flight paled in comparison to more direct evidence of guilt. *Shaw v. State*, 915 So. 2d 442, 2005 Miss. LEXIS 465 (Miss. 2005).

Trial court did not commit error when it imposed upon defendant a two-year sentence for escape under Miss. Code Ann. § 97-9-49(1) where defendant was in jail awaiting trial for armed robbery when defendant escaped, force or violence was not required for the section to apply to an escape, as opposed to an "attempted escape", and it was within the discretion of the trial judge to impose consecutive sentences when defendant pled guilty to both crimes. *Smith v. State*, 868 So. 2d 1041, 2004 Miss. App. LEXIS 235 (Miss. Ct. App. 2004).

Defendant stated in his petition to enter a plea that he knew the sentence for escape, Miss. Code Ann. § 97-9-49(1), would be consecutive to the sentences for aggravated assault and kidnapping; the statute also provided that if a prisoner was being held on felony charges, whether he had been convicted or not, then an escape could be punished by a term not to exceed five years in the penitentiary. *Coffey v. State*, 856 So. 2d 635, 2003 Miss. App. LEXIS 589 (Miss. Ct. App.), cert. denied, 859 So. 2d 1017, 2003 Miss. LEXIS 596 (Miss. 2003).

Trial judge sentenced defendant within the boundaries of Miss. Code Ann. § 97-9-49(1); the sentence of five years did not exceed the maximum allowed by law and was not contrary to public policy. *Coffey v. State*, 856 So. 2d 635, 2003 Miss. App. LEXIS 589 (Miss. Ct. App.), cert. denied,

859 So. 2d 1017, 2003 Miss. LEXIS 596 (Miss. 2003).

State was required to prove that defendant was held due to his arrest on felony charges, which made his leaving the jail an escape; lawful custody was required to sustain a conviction for escape. *Smith v. State*, 800 So. 2d 535, 2001 Miss. App. LEXIS 464 (Miss. Ct. App. 2001).

Miss. Code Ann. § 97-9-49(1) is applicable to escapees who have not yet been convicted and sentenced. *Edget v. State*, 791 So. 2d 311, 2001 Miss. App. LEXIS 281 (Miss. Ct. App. 2001).

The defendant committed felony escape, rather than misdemeanor escape where, at the time of his escape, he was being held on pending felony charges. *Cressionnie v. State*, 797 So. 2d 289, 2001 Miss. App. LEXIS 113 (Miss. Ct. App. 2001).

Public policy supports the requirement that a prisoner use legal methods, rather than escape, to vindicate his or her rights. Thus, where a defendant was imprisoned under color of law but alleged that he had not been afforded a hearing since his incarceration and had not been given the opportunity to post bond or to be represented by counsel, any attempt at redress should have been and should always be through regular legal channels and not via a self-help escape process. *Brown v. State*, 552 So. 2d 109, 1989 Miss. LEXIS 468 (Miss. 1989).

A deputy sheriff who was in charge of a jail based on orders given by the sheriff was an "authorized person" within the meaning of subsection (2) of this section. *Brown v. State*, 552 So. 2d 109, 1989 Miss. LEXIS 468 (Miss. 1989).

Subsection (1) of this section covers 2 separate and distinct offenses; escape and attempted escape. *Miller v. State*, 492 So. 2d 978, 1986 Miss. LEXIS 2550 (Miss. 1986).

In a prosecution for murder the defendant was improperly sentenced under this section, where defendant escaped prior to his sentencing, and where inasmuch as the defendant was not subject to any "former sentence" at the time he escaped his escape was not within the purview of this section providing that a sentence upon

conviction would “commence from the expiration of his former sentence.” *Williams v. State*, 420 So. 2d 562, 1982 Miss. LEXIS 2231 (Miss. 1982).

Penalty for attempt to escape from county jail limited to a year’s imprisonment. *Floyd v. State*, 140 Miss. 884, 105 So. 765, 1925 Miss. LEXIS 319 (Miss. 1925).

2. Indictment sufficient.

Defendant was adequately informed by the indictment of the nature of the felony escape charge against defendant and the supporting facts because the indictment stated that defendant willfully, unlawfully, and feloniously escaped by force from the custody of a county sheriff’s department, pursuant to lawful process or arrest, in violation of Miss. Code Ann. § 97-9-49. *Jackson v. State*, 121 So. 3d 313, 2013 Miss. App. LEXIS 571 (Miss. Ct. App. 2013), cert. denied, 139 So. 3d 74, 2014 Miss. LEXIS 260 (Miss. 2014).

3. “Force or violence.”

Circuit court properly denied defendant’s post-trial motion for a judgment notwithstanding the verdict because the State was not required to prove defendant used “force or violence” to escape where he was not charged with attempted escape, there was no evidence to support a jury instruction for misdemeanor escape, and his speedy trial claim had no merit since only 108 days elapsed between his arraignment and trial. *Walker v. State*, 238 So. 3d 1186, 2017 Miss. App. LEXIS 663 (Miss. Ct. App. 2017).

Although defendant argued there was no evidence of “force” to support his conviction for attempted escape by force, Miss. Code Ann. § 97-9-49(1)(a), the verdict was not against the manifest weight of evidence because someone had tampered with the air conditioning unit on the jail roof above where defendant’s cell was located, a door was off the air conditioning unit, the filter and insulation from the pipes had been ripped and torn, the pipe chase door and the unit were not intended for access or exit, two inmates were spotted through video surveillance on the jail roof, two inmates were seen climbing the fence located around the jail, and defen-

dant was apprehended at the fence. *Stewart v. State*, 69 So. 3d 768, 2011 Miss. App. LEXIS 154 (Miss. Ct. App. 2011).

Hole used by defendant, a two-foot wide opening in a chain-link roof over the recreational yard, was not intended as an exit. The photographs of the hole established that the chain link roof was pulled, pried, or twisted from the wire which held it in place; thus, the record clearly proved the use of force as to defendant’s conviction for attempted felony escape. *Herrington v. State*, 911 So. 2d 545, 2005 Miss. App. LEXIS 92 (Miss. Ct. App.), cert. denied, 920 So. 2d 1008, 2005 Miss. LEXIS 601 (Miss. 2005).

The “force or violence” wording of subsection (1) of this section refers only to attempted escape and not to the separate and distinct offense of escape. *Miller v. State*, 492 So. 2d 978, 1986 Miss. LEXIS 2550 (Miss. 1986).

Evidence that accused used force or violence is not necessary to prove the offense of escape which consists of (a) the knowing and voluntary departure of a person (b) from lawful custody and (c) with intent to evade the due course of justice. *Miller v. State*, 492 So. 2d 978, 1986 Miss. LEXIS 2550 (Miss. 1986).

4. Defense of necessity.

Where it is the threats of prison or jail officials which precipitate a prisoner’s escape, the prisoner is not required to return to the custody of the official making the threats in order to preserve the defense of necessity. However, there are numerous law enforcement or other governmental agencies to whom a prisoner might safely report and from whom he could receive assistance in resolving his dangerous situation. Thus, an escaped prisoner who made no effort whatsoever to communicate with anyone in authority about his alleged predicament, even though he had ample opportunity to do so, waived the defense of necessity. *Corley v. State*, 536 So. 2d 1314, 1988 Miss. LEXIS 613 (Miss. 1988).

5. Failure to specify statute.

Defendant’s counsel had stipulated that defendant was in custody on a felony charge. Thus, there was not due process

violation because the indictment failed to distinguish between a felony and a misdemeanor charge of attempted escape. *Herrington v. State*, 911 So. 2d 545, 2005 Miss. App. LEXIS 92 (Miss. Ct. App.), cert. denied, 920 So. 2d 1008, 2005 Miss. LEXIS 601 (Miss. 2005).

Defendant's conviction for escape was affirmed but his sentence of five years in the custody of the Mississippi Department of Corrections was reversed and remanded for resentencing where, because defendant's indictment specified no particular statute to have been violated, he should have been sentenced to no more than six months for escape. *Jenkins v. State*, 888 So. 2d 1171, 2004 Miss. LEXIS 1268 (Miss. 2004).

While the State is not required to prosecute a criminal defendant under the statute with a lesser penalty when the facts which constitute a criminal offense may fall under either of 2 statutes, if the indictment is ambiguous, the accused can only be punished under the statute with the lesser penalty. Thus, a defendant who was indicted for escape was required to be prosecuted under § 97-9-45, which simply takes away earned time towards parole, rather than this section, which provides for a possible sentence of up to 2 years, where the indictment was silent as to the applicable statute. *Beckham v. State*, 556 So. 2d 342, 1990 Miss. LEXIS 11 (Miss. 1990).

An inmate's failure to return to jail from an authorized departure to work at the sheriff's office gas station constituted an escape pursuant to subsection (2) of this section and, therefore, the inmate was properly sentenced under subsection (2) of this section, which provides for a maximum sentence of 6 months for failure to return from an authorized leave, as opposed to subsection (1) of this section, which provides for a maximum sentence of 5 years for escape from jail. *State v. Bradford*, 522 So. 2d 227, 1988 Miss. LEXIS 64 (Miss. 1988).

Prisoner convicted of escape from county jail, where prisoner is being held pending results of appeal of conviction for which prisoner has been sentenced to life imprisonment in state penitentiary, may be sentenced under § 97-9-45, but not

under this section, where indictment for jail escape does not specify which statute has been violated. *Cunningham v. State*, 478 So. 2d 308, 1985 Miss. LEXIS 2287 (Miss. 1985).

Where a prisoner escaped from the county jail, the trial court erred in sentencing him under § 97-9-45 instead of this section, which governs escape from a county jail). *Moore v. State*, 461 So. 2d 768, 1984 Miss. LEXIS 2064 (Miss. 1984).

In a prosecution for attempted escape, the trial court erred in sentencing defendant, who was under a sentence of life imprisonment for a murder conviction, to a term of two years under this section, where the correct sentence for defendant under § 97-9-45, which specifically covers persons convicted of escape from custody after being sentenced to the penitentiary for life, would be forfeiture of all earned time toward a parole. *Carleton v. State*, 438 So. 2d 278, 1983 Miss. LEXIS 2845 (Miss. 1983).

Generally, when facts constituting a criminal offense may fall within either of two or more statutes or there is substantial doubt as to which applies, the statute imposing the lesser punishment must be applied. Accordingly, where a prisoner who was entrusted to leave the jail for designated purposes, including errands, and was entrusted to do this alone, willfully failed to return to the jail, this section providing for an additional sentence not exceeding 6 months of the original sentence for wilfully failing to return to the jail within the stipulated time applied rather than § 97-9-45 providing for a maximum sentence of 5 years for a prisoner escaped from the Department of Corrections. *Bourdeaux v. State*, 412 So. 2d 241, 1982 Miss. LEXIS 1919 (Miss. 1982).

6. Authority to release from jail.

Where the record evidence clearly indicated that the defendant was pleading guilty to escape from an officially arranged jail release, rather than forcible or violent escape, the maximum sentence was 6 months; thus, it was error for the court to impose a five year sentence. *Ward v. State*, 708 So. 2d 11, 1998 Miss. LEXIS 4 (Miss. 1998).

Sheriff has no authority to release from jail prisoner who has been placed in cus-

tody of sheriff by court order without procuring court order allowing release; sheriff who releases prisoner, without court order, on basis of alleged mental and physical problems requiring hospitalization of prisoner, may be held in contempt of court. *Coleman v. State*, 482 So. 2d 221, 1986 Miss. LEXIS 2355 (Miss. 1986).

Sheriff who has previously obeyed court orders in releasing prisoners and recording ordered releases on jail docket but who subsequently allows convicted murderer and person convicted of possession with intent to sell controlled substances to leave jail on weekends, without court order and without making jail docket entry to document absence of prisoners, has overstepped bounds of authority and is guilty of criminal contempt. *Coleman v. State*, 482 So. 2d 219, 1986 Miss. LEXIS 2356 (Miss. 1986).

7. Evidence.

Defendant's conviction for attempted felony escape in violation of Miss. Code Ann. § 97-9-49(1) was proper in part because several witnesses testified regarding the attempted escape, including an eyewitness sergeant who testified that defendant scaled the fence and pried apart

adjoining sections of the fence. *Jones v. State*, 974 So. 2d 250, 2007 Miss. App. LEXIS 424 (Miss. Ct. App. 2007).

Because defendant violated the conditions of his felony appearance bond on the underlying felony charges of conspiring to smuggle drugs into a county jail, his bond was revoked, and he was arrested. Defendant escaped from custody while being held on felony charges; thus, the evidence showed that he committed felony escape and was subject to the punishment provisions of Miss. Code Ann. § 97-9-49(1). *Sessom v. State*, 942 So. 2d 234, 2006 Miss. App. LEXIS 392 (Miss. Ct. App.), cert. denied, 942 So. 2d 164, 2006 Miss. LEXIS 716 (Miss. 2006).

The evidence supported a conviction under subsection (2) of this section, but not under subsection (1) of this section, where (1) at the time of the defendant's escape, he was a trustee at the county jail and was authorized by an officer to refuel a patrol car located on some adjacent property 100 to 200 feet away from the sheriff's department, but (2) it was not established whether the defendant's assignment did or did not necessitate the removal of his person from the jail's premises. *King v. State*, 739 So. 2d 1055, 1999 Miss. App. LEXIS 202 (Miss. Ct. App. 1999).

RESEARCH REFERENCES

ALR.

What justifies escape or attempt to escape, or assistance in that regard. 70 A.L.R.2d 1430.

Duress, necessity, or conditions of confinement as justification for escape from prison. 69 A.L.R.3d 678.

Failure of prisoner to return at expiration of work furlough or other permissive release period as crime of escape. 76 A.L.R.3d 658.

Temporary unauthorized absence of prisoner as escape or attempted escape. 76 A.L.R.3d 695.

Conviction for escape where prisoner fails to leave confines of prison or institution. 79 A.L.R.4th 1060.

Am. Jur.

27A Am. Jur. 2d, Escape § 23.

4 Am. Jur. Proof of Facts 2d, Criminal Acts Committed under Duress, §§ 17 et seq. (proof of duress excusing defendant's escape from prison).

CJS.

30A C.J.S., Escape and Related Offenses

Rescue §§ 17 et seq.

Law Reviews.

1989 Mississippi Supreme Court Review: Criminal law; statutes. 59 Miss. L. J. 876, Winter, 1989.

§ 97-9-51. Repealed.

Repealed by Laws, 1983, ch. 387, § 2, eff from and after July 1, 1983.

§ 97-9-51. [Codes, Hutchinson's 1848, ch. 64, art. 12, Title 5(24); 1857, ch. 64, art. 97; 1871, § 2562; 1880, § 2802; 1892, § 1079; 1906, § 1159; Hemingway's 1917, § 886; 1930, § 912; 1942, § 2141; Laws, 1978, ch. 414, § 3]

Editor's Notes — Former § 97-9-51 was entitled: Escape of prisoners; penalties for prisoners in county jail; attempt by force or violence.

§ 97-9-53. Indictments; penalty for disclosing facts relating to indictment.

If a grand juror, witness, district attorney, clerk, sheriff, or any other officer of the court, disclose the fact of an indictment being found or returned into court against a defendant, or disclose any action or proceeding had in relation thereto, before the finding of the indictment, or in six months thereafter, or until after the defendant shall have been arrested or given bail or recognizance to answer thereto, he shall be fined not more than two hundred dollars.

HISTORY: Codes, 1857, ch. 64, art. 260; 1871, § 2797; 1880, § 3008; 1892, § 1349; 1906, § 1421; Hemingway's 1917, § 1177; 1930, § 1201; 1942, § 2444.

Cross References — Prohibition against grand juror disclosing secrets of jury room, see § 13-5-61.

Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see § 97-43-1 et seq.

Indictments, generally, see §§ 99-7-1 et seq.

JUDICIAL DECISIONS

1. In general.

The general rules of grand jury secrecy have no application to testimony given by witnesses who are to be used by the State at a pretrial hearing or at trial with respect to charges lodged by an indictment rendered and served as a result of such testimony. *Addikson v. State*, 608 So. 2d 304, 1992 Miss. LEXIS 452 (Miss. 1992).

This section, which prohibits any grand jury witness from disclosing "any action or proceeding had" before the grand jury, does not allow a witness to reveal what he

or she said before the grand jury but does not prevent a witness from being questioned in a separate proceeding and being required to answer where the questions overlap or even duplicate what the witness was asked before the grand jury. *In re Knapp*, 536 So. 2d 1330, 1988 Miss. LEXIS 606 (Miss. 1988).

It is not permissible to inquire on the trial of the defendant what evidence the grand jury had when it indicted him. *Baldwyn v. State*, 125 Miss. 561, 88 So. 162, 1921 Miss. LEXIS 142 (Miss. 1921).

OPINIONS OF THE ATTORNEY GENERAL

A district attorney (as a "person in charge of a law enforcement agency") or circuit court clerk (as an officer of the court) may comply with Section 45-27-9 by providing to the Mississippi Justice Information Center the information on a capias that either cannot or has not been served

within a reasonable time period; if for some reason the sheriff cannot serve the capias on the defendant and returns the capias unserved, the information on the capias may be provided to the Mississippi Justice Information Center without violation of Sections 97-9-53 or 99-7-15. *Kitch-*

ens, Jr., April 17, 2000, A.G. Op. #2000-0192.

The fact of an indictment being found or returned into court against a Defendant may only be disclosed to the Judge, Clerk,

District Attorney, and Sheriff until the Defendant has been arrested or given bail or recognizance for the offense. Lawrence, February 23, 2007, A.G. Op. #07-00070, 2007 Miss. AG LEXIS 27.

RESEARCH REFERENCES

ALR.

Relief, remedy, or sanction for violation of Rule 6(e) of Federal Rules of Criminal

Procedure, prohibiting disclosure of matters occurring before grand jury. 73 A.L.R. Fed. 112.

§ 97-9-55. Intimidating judge, juror, witness, attorney, etc., or otherwise obstructing justice.

If any person or persons by threats, force or abuse, attempt to intimidate or otherwise influence a judge, justice of the peace, juror, or one whose name has been drawn for jury service, witness, prosecuting or defense attorney or any other officer in the discharge of his duties, or by such force, abuse or reprisals or threats thereof after the performance of such duties, or to obstruct or impede the administration of justice in any court, he shall, upon conviction, be punished by imprisonment not less than one (1) month in the county jail nor more than two (2) years in the state penitentiary or by a fine not exceeding five hundred dollars (\$500.00), or both such fine and imprisonment.

HISTORY: Codes, 1880, § 2976; 1892, § 1222; 1906, § 1298; Hemingway's 1917, § 1031; 1930, § 1062; 1942, § 2294; Laws, 1926, ch. 149; Laws, 1964, ch. 352, eff from and after passage (approved March 12, 1964).

Editor's Notes — Pursuant to Miss. Const., § 171, all reference in the Mississippi Code to justice of the peace shall mean justice court judge.

Cross References — Power of courts to punish for contempt, see § 9-1-17.

Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see § 97-43-1 et seq.

Examination of witnesses, see Miss. Rules of Evidence, Rule 611.

Conduct of attorneys, see Miss. Uniform Rules of Circuit and County Court Practice, Rule 3.02.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Particular applications.

1. In general.

Defendant did not show an indictment alleging attempt to intimidate an identified witness in a criminal case after the performance of the witness's duties was defective because, read as a whole, (1) the nature and cause of the charge were clear,

(2) the statute's necessary elements were stated, and (3) defendant did not show defendant was unaware of the crime charged or unable to prepare an adequate defense. *Bryant v. State*, 238 So. 3d 1213, 2018 Miss. App. LEXIS 97 (Miss. Ct. App. 2018).

The phrase "or otherwise" refers to acts or stratagem of the same general nature as the preceding "threats, force or otherwise" within the section, and indicates acts common to or characteristic of the

preceding group of words or an approximation thereof. *Wilbourn v. State*, 249 Miss. 835, 164 So. 2d 424, 1964 Miss. LEXIS 438 (Miss. 1964).

The offense defined in this section [Code 1942, § 2294], requires the state to show an attempt to intimidate or impede an officer in the discharge of his duties by threats, force, abuse, or otherwise. *Wilbourn v. State*, 249 Miss. 835, 164 So. 2d 424, 1964 Miss. LEXIS 438 (Miss. 1964).

That state's witnesses refused to talk to counsel for accused before being placed on the stand is not ground for reversal; the remedy is by full cross-examination. *Mattox v. State*, 240 Miss. 544, 128 So. 2d 368, 1961 Miss. LEXIS 484 (Miss. 1961).

The phrase "or otherwise" in this section [Code 1942, § 2294] refers to acts or stratagems of the same general nature as the preceding "threats, force or abuse". *Gaston v. State*, 239 Miss. 420, 123 So. 2d 546, 1960 Miss. LEXIS 302 (Miss. 1960).

Constructive contempt, or any act calculated to impede, embarrass, obstruct, defeat, or corrupt the administration of courts of justice, when the act is done beyond the presence of the court, is indictable under this section [Code 1942, § 2294]. *Sullens v. State*, 191 Miss. 856, 4 So. 2d 356, 1941 Miss. LEXIS 195 (Miss. 1941).

Before court can punish for constructive contempt the offense must be judicially stated; proper course taken by citing accused and having his answer charged by information of attempted bribery, and investigating it by taking testimony thereon. *Durham v. State*, 97 Miss. 549, 52 So. 627, 1910 Miss. LEXIS 252 (Miss. 1910).

Under this section [Code 1942, § 2294] it is not necessary to aver in what case the defendant was a witness. *Wilson v. State*, 80 Miss. 388, 31 So. 787, 1902 Miss. LEXIS 250 (Miss. 1902).

Example of proper averments in an indictment under this section [Code 1942, § 2294]. *Wilson v. State*, 80 Miss. 388, 31 So. 787, 1902 Miss. LEXIS 250 (Miss. 1902).

2. Particular applications.

Jury's verdict finding defendant guilty of intimidating a witness was not against

the overwhelming weight of the evidence because defendant's argument that her silence beforehand and her participation in the assault on the victim only after her aunt was pushed by the store manager did not somehow obviate the evidence presented that she accompanied her aunt to the victim's place of employment with the specific intention to talk to the victim about testifying in the case against her brother; and it was the store manager, not the victim, who pushed the aunt, and, thus, it did not follow that defendant would attack the victim when she was not the person who pushed the aunt. *Washington v. State*, 220 So. 3d 972, 2017 Miss. LEXIS 265 (Miss. 2017).

Miss. Code Ann. § 97-9-55, which makes it a criminal offense to intimidate a judge, was not unconstitutional where defendant was charged with a violation for making threats against two judges while speaking with a psychologist who treated inmates because U.S. Const. Amend. I permitted states to ban true threats and because the protected status of threatening speech was not based upon the subjective intent of the speaker; rather, the speaker must have knowingly and intentionally communicated a potential threat that an objectively reasonable person would interpret as a serious expression of an intent to cause a present or future harm. Defendant's words posed a true threat because he was diagnosed as having the capacity to distinguish right from wrong, he intentionally communicated the threats to his psychologist and to members of the parole board, and an objectively reasonable person would interpret statements such as intending to "take care of the judges" or "take out the judges" as intending to inflict physical harm upon the judges. *Hearn v. State*, 3 So. 3d 722, 2008 Miss. LEXIS 607 (Miss. 2008).

The evidence was insufficient to support a conviction for attempting to intimidate a witness at the defendant's second burglary trial, where the evidence did not support a finding that the defendant knew that the witness was a witness at the first trial, which ended in a mistrial, or that the witness would be a witness at the second trial; although it was possible that the defendant could have seen the witness

at the courthouse during the defendant's first trial, this was insufficient to show that the defendant could thereby have concluded that the witness would testify against him at his second trial. *Corley v. State*, 584 So. 2d 769, 1991 Miss. LEXIS 480 (Miss. 1991).

A defendant's acquittal of a drug charge at his second trial was irrelevant in a prosecution stemming from attempts to influence jurors in the defendant's first drug trial. *King v. State*, 580 So. 2d 1182, 1991 Miss. LEXIS 319 (Miss. 1991).

There was no violation of this section [Code 1942, § 2294] where the accused gave to the sheriff investigating a crime a false statement which was calculated to mislead the officer, but which was not accompanied by force, threats, or abuse.

Wilbourn v. State, 249 Miss. 835, 164 So. 2d 424, 1964 Miss. LEXIS 438 (Miss. 1964).

No violation of this statute [Code 1942, § 2294] is committed by ordering off premises officers in pursuit of one not shown to have committed a felony, or an offense in the presence of the officers and for whom they had no warrant of arrest. *King v. State*, 246 Miss. 86, 149 So. 2d 482, 1963 Miss. LEXIS 422 (Miss. 1963).

Merely protesting to the arresting officer that another should not be arrested as he had done nothing, without threats, show of force, or abuse, does not violate this section [Code 1942, § 2294]. *Gaston v. State*, 239 Miss. 420, 123 So. 2d 546, 1960 Miss. LEXIS 302 (Miss. 1960).

RESEARCH REFERENCES

ALR.

Assaulting, threatening, or intimidating witness as contempt of court. 52 A.L.R.2d 1297.

What constitutes obstructing or resisting an officer, in the absence of actual force. 44 A.L.R.3d 1018.

Admissibility in criminal case, on issue of defendant's guilt, of evidence that third person has attempted to influence a witness not to testify or to testify falsely. 79 A.L.R.3d 1156.

Admissibility and effect, on issue of party's credibility or merits of his case, of evidence of attempts to intimidate or influence witness in civil action. 4 A.L.R.4th 829.

Validity, construction, and application of state statutes imposing criminal penalties for influencing, intimidating, or tampering with witness. 8 A.L.R.4th 769.

Impeachment of verdict by juror's evidence that he was coerced or intimidated by fellow juror. 39 A.L.R.4th 800.

Criminal liability of attorney for tampering with evidence. 49 A.L.R.5th 619.

Defenses to State Obstruction of Justice

Charge Relating to Interfering with Criminal Investigation or Judicial Proceeding. 87 A.L.R.5th 597.

Venue of prosecution for unlawfully influencing, intimidating, or impeding a federal officer, witness, or juror, under 18 USCS § 1503. 64 A.L.R. Fed. 678.

Validity, construction, and application of federal witness tampering statute, 18 U.S.C.S. § 1512(b). 183 A.L.R. Fed. 611.

Construction and application of federal witness tampering statute, § 18 U.S.C.S. 1512(b). 185 A.L.R. Fed. 1.

Am. Jur.

58 Am. Jur. 2d, Obstructing Justice § 7.

24 Am. Jur. Proof of Facts 2d 633, Jury Misconduct Warranting New Trial.

CJS.

67 C.J.S., Obstructing Justice or Governmental Administration §§ 1-5.

Law Reviews.

1982 Mississippi Supreme Court Review: Criminal Law and Procedure: No Right to Hold Public Office After Conviction. 53 Miss. L. J. 155, March 1983.

§ 97-9-57. Officer not to converse with juror; penalty.

The sheriff, bailiff, or other officer, shall not be in the room or converse with a juror after the jury has retired from the bar, save by order of the court.

A violation of this section shall subject the offender to a fine of fifty dollars and one week's imprisonment for a contempt.

HISTORY: Codes, *Hutchinson's* 1848, ch. 61, art. 1(137); 1857, ch. 61, art. 156; 1871, § 638; 1880, § 1711; 1892, § 729; 1906, § 790; *Hemingway's* 1917, § 574; 1930, § 583; 1942, § 1527.

Cross References — Another section derived from same 1942 code section, see § 11-7-149.

Control of court over jury, see § 13-5-83.

View by jury, see § 13-5-91.

Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see § 97-43-1 et seq.

JUDICIAL DECISIONS

1. In general.

Although this section makes it a misdemeanor for a bailiff to go into the jury room after the jury has retired, defendant's motion for a mistrial was properly denied, where the bailiff merely walked into the jury room to see how warm it was, after the jury complained of discomfort due to heat, and where there was no evidence of any impropriety occurring in the jury room. *Leflore v. State*, 439 So. 2d 675, 1983 Miss. LEXIS 2883 (Miss. 1983).

No new trial was warranted on grounds that a deputy sheriff without court authorization drove a bus and ate in the same room with the jurors where the deputy did not testify as a witness in the case on its merits, he did not even appear in the courtroom at any time in the course of the trial, his function was to assist in the process of making it possible for the jurors to eat, his only activity was to respond to the sheriff's direction that he drive the

members of the jury, together with the two bailiffs, to the restaurant in the bus, and at all times complained of the jurors were in the protective custody of the bailiff; however, it would have been better policy for the bus driver to receive in open court detailed instructions from the trial judge in the presence of jurors, bailiffs, counsel, and the defendant. *Bickcom v. State*, 286 So. 2d 823, 1973 Miss. LEXIS 1324 (Miss. 1973).

In prosecution for manslaughter when jury during deliberations asked the bailiff what the penalty was for manslaughter and the bailiff replied that penalty was from one month to ten years, and the jury subsequently found defendant guilty of manslaughter and recommended that accused be given mercy of the court, such communication affected the integrity of the verdict and required reversal of conviction. *Horn v. State*, 216 Miss. 439, 62 So. 2d 560, 1953 Miss. LEXIS 654 (Miss. 1953).

RESEARCH REFERENCES

ALR.

Propriety and prejudicial effect, in criminal case, of placing jury in charge of officer who is a witness in the case. 30 A.L.R.3d 1012.

Am. Jur.

75A Am. Jur. 2d, Trial § 852.

24 Am. Jur. Proof of Facts 2d 633, Jury Misconduct Warranting New Trial.

CJS.

89 C.J.S., Trial §§ 941, 943, 945-948.

§ 97-9-59. Perjury; definition.

Every person who shall wilfully and corruptly swear, testify, or affirm

falsely to any material matter under any oath, affirmation, or declaration legally administered in any matter, cause, or proceeding pending in any court of law or equity, or before any officer thereof, or in any case where an oath or affirmation is required by law or is necessary for the prosecution or defense of any private right or for the ends of public justice, or in any matter or proceeding before any tribunal or officer created by the Constitution or by law, or where any oath may be lawfully required by any judicial, executive, or administrative officer, shall be guilty of perjury, and shall not thereafter be received as a witness to be sworn in any matter or cause whatever, until the judgment against him be reversed.

HISTORY: Codes, Hutchinson's 1848, ch. 64, art. 12, Title 5(1); 1857, ch. 64, art. 204; 1871, § 2660; 1880, § 2921; 1892, § 1243; 1906, § 1318; Hemingway's 1917, § 1051; 1930, § 1082; 1942, § 2315.

Cross References — False testimony in legislature as perjury, see § 5-1-27.

Conviction of perjury or subornation of perjury as disqualification of witness, see § 13-1-11.

False income tax returns and reports, see § 27-7-87.

False oath in application for homestead exemption as perjury, see § 27-33-57.

Perjury on application for tax credit where motor vehicle is destroyed, see § 27-51-27.

False swearing before railroad commission as perjury, see § 77-1-35.

False testimony under oath in hearing on license for legal expense insurance as constituting perjury, see § 83-49-11.

False declaration of identity of a father, see § 93-9-37.

Crime of false statements as to denial of constitutional rights, see §§ 97-7-33 et seq.

Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see § 97-43-1 et seq.

Procedure when witness commits perjury, see §§ 99-3-29 et seq.

Requisites of indictment for perjury, see § 99-7-39.

No variance between "sworn" and "affirmed" in perjury prosecutions, see § 99-17-33.

JUDICIAL DECISIONS

ANALYSIS

1. Formal complaint needed.
2. Essentials of offense.
3. How committed.
4. Materiality of testimony.
5. Defenses.
6. Indictment.
7. Proof, generally.
8. —Sufficiency.
9. Need for record or transcript.
10. —Of conflicting statements.
11. Materiality.
12. Variance.
13. Instructions.
14. Perjurer as witness in subsequent cause.

1. Formal complaint needed.

Commission on Judicial Performance

(Commission) contended that the judge committed perjury; however, the Commission never formally charged the judge with perjury and therefore, in the absence of a formal complaint and a hearing on the merits, the supreme court lacked the authority to accept the finding of the Commission on the perjury count. *Miss. Comm'n on Judicial Performance v. Osborne*, 11 So. 3d 107, 2009 Miss. LEXIS 278 (Miss. 2009).

Mississippi Commission on Judicial Performance (Commission) contended to the Mississippi Supreme Court that the judge committed perjury pursuant to Miss. Code Ann. § 97-9-59; however, the Commission never formally charged the judge with perjury, and thus, in the absence of a formal complaint and a hearing

on the merits, the supreme court lacked the authority to accept the finding of the Commission on the perjury count. *Miss. Comm'n on Judicial Performance v. Osborne*, 2009 Miss. LEXIS 9 (Miss. Feb. 5, 2009), op. withdrawn, sub. op., 11 So. 3d 107, 2009 Miss. LEXIS 278 (Miss. 2009).

2. Essentials of offense.

In order to show that a person has corruptly sworn to a material fact, it is necessary that the person charged with the offense knows the fact to be untrue and corruptly and intentionally, and in a manner that is morally and wilfully false, makes the affidavit or commits the perjury, and it is not sufficient to show that he was merely mistaken. *Russell v. Bailey*, 197 So. 2d 469, 1967 Miss. LEXIS 1525 (Miss. 1967).

Conviction of perjury, though creating a general disqualification to testify at common law and in Mississippi, goes only to the convict's credit in the federal court, at least when the conviction was under the federal perjury statute. *Firemen's Mut. Ins. Co. v. Aponaug Mfg. Co.*, 149 F.2d 359, 1945 U.S. App. LEXIS 2597 (5th Cir. Miss. 1945).

To constitute perjury, the false swearing must be not only wilful but corrupt or intentionally false. *Cothran v. State*, 39 Miss. 541, 1860 Miss. LEXIS 86 (Miss. 1860).

3. How committed.

Affidavit submitted by convicted burglar, recanting earlier testimony for prosecution leading to burglary conviction of alleged accomplice, was proof of perjury and lower court should hear accomplice's petition for error coram nobis and hold evidentiary hearing. *Tobias v. State*, 505 So. 2d 1014, 1987 Miss. LEXIS 2450 (Miss. 1987).

Where a person knowingly swears to a false statement in order to obtain money to which he is not legally entitled and such oath is necessary to the obtaining of the money, he is guilty of perjury. Whether intentional false swearing to a legal claim for money is perjury, *quaere*. *Vance v. State*, 62 Miss. 137, 1884 Miss. LEXIS 34 (Miss. 1884).

4. Materiality of testimony.

A defendant's allegedly false statement

in front of the grand jury that he had not returned to his apartment after the discovery of the death of an infant who was at the apartment, was material to the grand jury's investigation of the death of the infant, and could therefore constitute perjury, since the grant jury's deliberations could conceivably have been affected, especially concerning the credibility of the defendant, had it known of the defendant's visit to the apartment and his request that his presence there not be revealed to the authorities. *Smallwood v. State*, 584 So. 2d 733, 1991 Miss. LEXIS 405 (Miss. 1991).

Where on a prosecution for an unlawful sale of liquor, defendant pleaded guilty, testimony of the alleged purchaser that he did not purchase the liquor was not material and no predicate for perjury. *Long v. State*, 100 Miss. 7, 56 So. 185, 1911 Miss. LEXIS 8 (Miss. 1911); *McNeice v. State*, 101 Miss. 366, 58 So. 3, 1912 Miss. LEXIS 4 (Miss. 1912).

Where the record of the cause in which the false swearing is committed is produced before the court trying the perjury, the materiality of the falsehood to the issue in that cause is a question of law. *Cothran v. State*, 39 Miss. 541, 1860 Miss. LEXIS 86 (Miss. 1860).

5. Defenses.

It is no defense to an indictment for perjury to show that the accused testified under fear engendered by the threats of others, the threatened danger not being imminent, impending and unavoidable. *Bain v. State*, 67 Miss. 557, 7 So. 408, 1890 Miss. LEXIS 95 (Miss. 1890).

6. Indictment.

An indictment for perjury must specifically allege the true facts; thus, an indictment for perjury was fatally defective and should have been quashed where it did not attempt to set out the truth as to the allegation that the defendant had "testified falsely that he had not been court-martialed in the military and that he had an honorable discharge and a general discharge under honorable conditions from the United States Army." *Ford v. State*, 610 So. 2d 370, 1992 Miss. LEXIS 747 (Miss. 1992).

An indictment charging the defendant with the crimes of perjury and conspiracy to commit perjury would not be quashed based upon the fact that the same grand jurors who heard the defendant testify, and were therefore witnesses to his alleged perjury, were the same grand jurors who returned the indictment against him, even though it would have been the better practice not to have sought the perjury and conspiracy indictments from the same grand jury who heard the alleged perjury, where there was no evidence of any fraud or wrongdoing on the part of the grand jurors. *Smallwood v. State*, 584 So. 2d 733, 1991 Miss. LEXIS 405 (Miss. 1991).

The rule requiring that the guilt of a defendant indicted for the crime of perjury be proved by the testimony of two witnesses, or the testimony of one witness in corroborating circumstances, applies to the false swearing charge in the indictments. *Clanton v. State*, 210 Miss. 700, 50 So. 2d 567, 1951 Miss. LEXIS 308 (Miss. 1951).

Indictment charging defendant swore falsely in making report to auditor of public accounts, is sufficient to charge that report was made to auditor. *State v. Kelly*, 113 Miss. 461, 74 So. 325, 1917 Miss. LEXIS 123 (Miss. 1917).

Indictment stating perjury committed on wrong day may be amended to conform to proof. *Saucier v. State*, 95 Miss. 226, 48 So. 840, 1909 Miss. LEXIS 245 (Miss. 1909).

Indictment must charge perjury committed as to material matter and set out facts. *Moore v. State*, 91 Miss. 250, 44 So. 817, 1907 Miss. LEXIS 148 (Miss. 1907).

It is sufficient for the indictment to charge generally that the matter sworn to in the false oath was material to the issue or point of inquiry, without showing how. *Lea v. State*, 64 Miss. 278, 1 So. 235, 1886 Miss. LEXIS 56 (Miss. 1886).

An averment in an indictment that the accused knew that his statement was false is necessary only when the oath is as to the witness' belief, and if the swearing were absolute, the averment is surplusage. *Brown v. State*, 57 Miss. 424, 1879 Miss. LEXIS 96 (Miss. 1879).

7. Proof, generally.

Defendant failed to prove the State knowingly used perjured testimony be-

cause the victim's statement to police was not entered into evidence, and the details of the statement were not known; there was no evidence to indicate the victim's statement was contradictory or under oath. *Scott v. State*, 231 So. 3d 1024, 2016 Miss. App. LEXIS 404 (Miss. Ct. App. 2016), *aff'd*, 231 So. 3d 995, 2017 Miss. LEXIS 440 (Miss. 2017).

In perjury case, corpus delicti must be established by State and in ordinary case where accused has made only single statement under oath, in order to prove that he lied, it is incumbent upon State to first prove actual truth. *Hogan v. State*, 516 So. 2d 474, 1987 Miss. LEXIS 2889 (Miss. 1987).

To convict person of perjury alleged to have been committed on trial of case in court of record, evidence must show beyond reasonable doubt that defendant was duly sworn in the formal proceeding. *Polk v. State*, 204 Miss. 538, 37 So. 2d 761, 1948 Miss. LEXIS 387 (Miss. 1948).

Sufficiency of proof of falsity of oath stated. *Johnson v. State*, 122 Miss. 16, 84 So. 140, 1920 Miss. LEXIS 414 (Miss. 1920).

Conviction of perjury not sustained by uncorroborated evidence of single witness. *Lee v. State*, 105 Miss. 539, 62 So. 360, 1913 Miss. LEXIS 215 (Miss. 1913).

8. —Sufficiency.

Evidence was sufficient and not against the overwhelming weight of the evidence to convict defendant of perjury during his probation revocation hearing because, *inter alia*: (1) the state provided the testimony of a district attorney and a federal district court clerk, and introduced into evidence the federal documents that proved that defendant was not under court order to be in the county (in violation of his probation) on October, 13, 2003; thus, because defendant was not required to be in the county on that day, he lied about it at his probation revocation hearing, and therefore under Miss. Code Ann. § 97-9-59 his perjury conviction was proper. *Ford v. State*, 956 So. 2d 301, 2006 Miss. App. LEXIS 817 (Miss. Ct. App. 2006).

The prosecution failed to prove the falsity of the defendant's statement that he

had consumed a pint of gin over the lunch recess by a minimum of two witnesses or by one witness and corroborating circumstances where the state showed that an intoxilyzer test and a blood test showed no trace of alcohol in the defendant's system; the tests together satisfied only the requirement of corroboration, and there was no state witness who was with or otherwise saw the defendant during the relevant lunch break, or a witness who stated that the defendant admitted that what he said was false. *Hammett v. State*, 2000 Miss. App. LEXIS 403 (Miss. Ct. App. Sept. 5, 2000), op. withdrawn, sub. op., 797 So. 2d 258, 2001 Miss. App. LEXIS 37 (Miss. Ct. App. 2001).

Evidence was insufficient to establish perjury based on the defendant's statements relating to his having consumed gin and marijuana during a lunch recess in his trial for domestic violence where both an intoxilyzer test and a blood test showed no discernable alcohol in the defendant's system, but no proof that he had not ingested marijuana was offered, and the state failed to present any witness who was with the defendant throughout the lunch recess. *Hammett v. State*, 797 So. 2d 258, 2001 Miss. App. LEXIS 37 (Miss. Ct. App. 2001).

Evidence was insufficient to establish that the defendant committed perjury in a murder trial when she gave alibi testimony for the defendant in that trial, who was her significant other, where not one witness gave evidence to support the assertion that the defendant committed perjury and the only direct evidence in support of that contention was found in her daily and weekly employment records, which were inconsistent at best. *Hall v. State*, 751 So. 2d 1161, 1999 Miss. App. LEXIS 560 (Miss. Ct. App. 1999).

The evidence was insufficient to support a conviction of perjury, which allegedly occurred before the grand jury, where the testimony was tentative and uncertain, it concerned an incident which occurred more than one year earlier, and it was contradictory as to whether the defendant may have told the literal truth to the grand jury. *Smallwood v. State*, 584 So. 2d 733, 1991 Miss. LEXIS 405 (Miss. 1991).

Conviction of defendant for perjury was upheld over objection that alleged perjury

was not proved by testimony of 2 witnesses or by one witness and corroborating circumstances; common-law rule requiring one witness and corroborating circumstances to sustain perjury conviction refers only to proof of falsity of accused's statement, but does not extend to proof of other elements of crime; testimony of defendant's mother satisfied requirement that one witness testify to falsity of defendant's testimony at trial where perjury was allegedly committed, and her testimony was consistent with defendant's 2 prior sworn statements; to sustain conviction, both of contradictory statements must be under oath. *McFee v. State*, 510 So. 2d 790, 1987 Miss. LEXIS 2631 (Miss. 1987).

The testimony of a handwriting expert that a list of items, admittedly made by the defendant, was written by the same person who wrote a questioned document which the defendant had claimed in a previous trial that he had never seen, and the transcript of the evidence of all of the witnesses in the previous trial, including evidence given by the defendant's wife in his defense, were sufficient to meet the requirement of two witnesses, or one witness and corroborating circumstances, necessary for a conviction for perjury. *Brewer v. State*, 233 So. 2d 779, 1970 Miss. LEXIS 1669 (Miss. 1970).

Although further allegations of the indictment may be proved by a single witness, the falsity of the allegedly perjured statement must be established by the testimony of at least two witnesses or by one witness and corroborating circumstances. *Nash v. State*, 244 Miss. 857, 147 So. 2d 499, 1962 Miss. LEXIS 517 (Miss. 1962).

Where a witness by affidavit made before murder trial stated that the accused had fired the shot and at the trial witness testified he did not know who fired the shot, this was not enough proof to establish perjury. *Tribble v. State*, 210 Miss. 604, 50 So. 2d 148, 1951 Miss. LEXIS 297 (Miss. 1951).

Ordinarily perjury must be proven by the testimony of two witnesses or one witness and corroborating circumstances; where the accused has made conflicting sworn statements, one witness to the falsity of the statement with which he is

charged is sufficient. *Horn v. State*, 186 Miss. 455, 191 So. 282, 1939 Miss. LEXIS 244 (Miss. 1939); *Tribble v. State*, 210 Miss. 604, 50 So. 2d 148, 1951 Miss. LEXIS 297 (Miss. 1951).

If conviction of perjury be sought only on the ground that defendant knew nothing of and was not present at the scene of the transaction about which he gave testimony, it is essential to his conviction that the state should prove by two witnesses or one witness and corroborating circumstances beyond a reasonable doubt arising from the evidence that the defendant was not present at the scene. *Whittle v. State*, 79 Miss. 327, 30 So. 722, 1901 Miss. LEXIS 74 (Miss. 1901).

Where the accused swore that he had not sold liquors to either of several persons named, proof of separate sales to different persons each by a separate witness is not sufficient. Some one sale must be proved by two witnesses or one witness and corroborating circumstances and proof of one sale is not corroborative evidence of another. *Lea v. State*, 64 Miss. 278, 1 So. 235, 1886 Miss. LEXIS 56 (Miss. 1886).

It is sufficient if the falsity be shown by one witness and by the defendant's evidence in his own behalf. *Vance v. State*, 62 Miss. 137, 1884 Miss. LEXIS 34 (Miss. 1884).

9. Need for record or transcript.

A prosecution for perjury without any kind of transcript or verbatim record of the proceedings in question is not per se flawed or reversible. However, in such a situation, the district attorney must make an effort to preserve in some manner the questions asked and the answers given by the defendant. *Smallwood v. State*, 584 So. 2d 733, 1991 Miss. LEXIS 405 (Miss. 1991).

To convict person of perjury alleged to have been committed on trial of case in court of record, production of record in that case, or of duly authenticated transcript thereof, is essential, unless formal proofs of such judicial proceeding are waived or dispensed with by admission or otherwise. *Polk v. State*, 204 Miss. 538, 37 So. 2d 761, 1948 Miss. LEXIS 387 (Miss. 1948).

That alleged perjured testimony was given in duly constituted court cannot be proven by testimony of circuit clerk and court reporter showing organization of court at the term at which the indictment charged that the perjury was committed. *Polk v. State*, 204 Miss. 538, 37 So. 2d 761, 1948 Miss. LEXIS 387 (Miss. 1948).

Under an indictment for perjury, the trial of the cause in which the false swearing is charged to have been committed must be proved by the record if it be in existence. *Whittle v. State*, 79 Miss. 327, 30 So. 722, 1901 Miss. LEXIS 74 (Miss. 1901).

10. —Of conflicting statements.

Proof that accused knowingly and willfully made two mutually contradictory statements on material matter under oath, without more, can support conviction of perjury, but only in certain factual scenarios. *Hogan v. State*, 516 So. 2d 474, 1987 Miss. LEXIS 2889 (Miss. 1987).

Even where accused has made statements under oath which are at variance with or contradict one another, State in usual case is in position to designate on which date he lied, and make proof by showing true facts on that date, because as general rule, it is fact that State is easily capable of showing truth that makes perjury blatant and so deserving of punishment; contradictory statements made by accused in such instances are strong corroborating evidence of perjury. *Hogan v. State*, 516 So. 2d 474, 1987 Miss. LEXIS 2889 (Miss. 1987).

Where State has evidence upon which to allege and prove on which date accused lied in perjury prosecution, it should be specified and charged in indictment and such evidence presented to jury; mutually contradictory statements by accused in such instances serve only as corroboration of state's case; however, where state is unable to offer such evidence, it should be able to proceed on basic question with proof it has, namely, two mutually contradictory statements made under oath. Adoption of this rule necessarily carries with it limitation that it can only be used when state is unable to offer additional proof as to precise date accused lied, and evidence aliunde as to truth of matter

about which accused testified. *Hogan v. State*, 516 So. 2d 474, 1987 Miss. LEXIS 2889 (Miss. 1987).

Where there was no evidence as to the falsity of the statement with which a defendant was charged other than his own conflicting statement as to the identity of one accused of selling intoxicating liquors made on the two trials of such accused, defendant could not be convicted of perjury. *Horn v. State*, 186 Miss. 455, 191 So. 282, 1939 Miss. LEXIS 244 (Miss. 1939).

Where a witness testified on the trial of one for selling intoxicating liquors that she was the person who sold the liquor, and on a second trial testified that he could not swear that she was the person, such witness could not be convicted of perjury since there was no evidence as to the falsity of the statement with which the witness was charged other than his own conflicting statement. *Horn v. State*, 186 Miss. 455, 191 So. 282, 1939 Miss. LEXIS 244 (Miss. 1939).

11. Materiality.

The defendant's statements relating to his having consumed gin during a lunch recess in his trial for domestic violence were material to the proceeding to the extent that they were part of the story that he was under the influence of something that would impair his ability to testify as such assertion, whether true or not, had the potential to delay the jury's investigation of whether he was guilty of the domestic violence charges brought against him. *Hammett v. State*, 797 So. 2d 258, 2001 Miss. App. LEXIS 37 (Miss. Ct. App. 2001).

The defendant's statements relating to his having consumed gin during the lunch recess were material to the proceeding against him as the truth or falsity of his statements regarding whether he had consumed gin had the effect of impeding the jury's investigation of whether he was guilty of the charges brought against him and it made no difference whether the statements in question actually impeded the investigation. *Hammett v. State*, 2000 Miss. App. LEXIS 403 (Miss. Ct. App. Sept. 5, 2000), op. withdrawn, sub. op., 797 So. 2d 258, 2001 Miss. App. LEXIS 37 (Miss. Ct. App. 2001).

Ordinarily, materiality in a perjury case may be shown by offering that portion of the prior proceeding necessary to identify matters there at issue. The trial judge may then consider the alleged perjured testimony in light of the issues and resolve the materiality question. The trial judge in a perjury trial should be sensitive to the possibilities that the presence of and identification of another judge and the district attorney on the side of the prosecution may substantially prejudice the defendant in the eyes of the jury. Nevertheless, such evidence is not, per se, inadmissible. Where the prosecution offers witnesses to prove materiality, reversal is not ordinarily warranted. *Gullett v. State*, 523 So. 2d 296, 1988 Miss. LEXIS 169 (Miss. 1988).

12. Variance.

Fatal variance where indictment charges person with having sworn that "he did not buy certain things," where evidence showed he testified "that he didn't remember whether he bought or not-that he couldn't recollect." *Willoughby v. State*, 101 Miss. 60, 57 So. 361, 1911 Miss. LEXIS 98 (Miss. 1911).

If the indictment charge that the perjury was committed in giving evidence in a cause, proof that a party made a false affidavit will not do unless it be shown that the affidavit was allowed to be used in evidence. *Copeland v. State*, 23 Miss. 257, 1852 Miss. LEXIS 195 (Miss. 1852).

13. Instructions.

In an appeal from a conviction of perjury, the fact that the jury's guilty verdict can be supported by the evidence does not automatically excuse the trial court's failure to give an instruction on the "two witness" rule required in perjury cases. *Hale v. State*, 648 So. 2d 531, 1994 Miss. LEXIS 626 (Miss. 1994).

In a prosecution for perjury, the "two witness" instruction should be given even if the defendant fails to request it. *Hale v. State*, 648 So. 2d 531, 1994 Miss. LEXIS 626 (Miss. 1994).

In a prosecution for perjury, the trial court's failure to instruct the jury in accordance with the "two witness" rule as required in perjury cases constituted revers-

ible error where one specific witness or piece of documentary evidence could not be singled out as having been sufficient to convict the defendant of perjury. *Hale v. State*, 648 So. 2d 531, 1994 Miss. LEXIS 626 (Miss. 1994).

The failure of the court to instruct, either in instructions for the state or in instructions for defendant, as to the quantitative evidence rule in perjury cases constituted reversible error. *Nash v. State*, 244 Miss. 857, 147 So. 2d 499, 1962 Miss. LEXIS 517 (Miss. 1962).

It is unnecessary for an instruction requiring the swearing to be wilfully false to state that it must have been corruptly so since the former implies the latter. *Morgan v. State*, 63 Miss. 162, 1885 Miss. LEXIS 39 (Miss. 1885).

It is unnecessary for an instruction requiring the swearing to be willfully false to state that it must have been corruptly so since the former implies the latter.

Brown v. State, 57 Miss. 424, 1879 Miss. LEXIS 96 (Miss. 1879).

The jury should be informed by instruction that before it can convict the fact that the swearing was false must be shown to its satisfaction by the testimony of two witnesses or by one witness and corroborating circumstances. *Brown v. State*, 57 Miss. 424, 1879 Miss. LEXIS 96 (Miss. 1879).

14. Perjurer as witness in subsequent cause.

The incompetency of a perjurer to become a witness is based upon a verdict of guilty, and since the presumption of innocence extends to an accused in all criminal cases until disproved on a fair and impartial trial, until alleged perjurer is convicted it is not error to permit him to testify as a witness. *Isonhood v. State*, 274 So. 2d 685, 1973 Miss. LEXIS 1611 (Miss. 1973).

RESEARCH REFERENCES

ALR.

Procuring perjury as contempt. 29 A.L.R.2d 1157.

Recantation as defense in perjury prosecution. 64 A.L.R.2d 276.

Statement of belief or opinion as perjury. 66 A.L.R.2d 791.

Conviction of perjury where one or more of elements is established solely by circumstantial evidence. 88 A.L.R.2d 852.

Actionability of conspiracy to give or to procure false testimony or other evidence. 31 A.L.R.3d 1423.

Invalidity of statute or ordinance giving rise to proceeding in which false testimony was received as defense to prosecution for perjury. 34 A.L.R.3d 413.

Offense of perjury as affected by lack of jurisdiction by court or governmental body before which false testimony was given. 36 A.L.R.3d 1038.

Perjury or wilfully false testimony of expert witness as basis for new trial on ground of newly discovered evidence. 38 A.L.R.3d 812.

Rights and duties of attorney in a criminal prosecution where client informs him of intention to present perjured testimony. 64 A.L.R.3d 385.

Incomplete, misleading, or unresponsive but literally true statement as perjury. 69 A.L.R.3d 993.

Perjury conviction as affected by notary's nonobservance of formalities for administration of oath to affiant. 80 A.L.R.3d 278.

Acquittal as bar to prosecution of accused for perjury committed at trial. 89 A.L.R.3d 1098.

Materiality of testimony forming basis of perjury charge as question for court or jury in state trial. 37 A.L.R.4th 948.

Right of defendant in prosecution for perjury to have the "two witnesses, or one witness and corroborating circumstances," rule included in charge to jury-state cases. 41 A.L.R.5th 1.

Two-witness rule in perjury prosecutions under 18 USCA § 1621. 49 A.L.R. Fed. 185.

Am. Jur.

60A Am. Jur. 2d, Perjury §§ 1 et seq.

CJS.

70 C.J.S., Perjury §§ 2 et seq.

Law Reviews.

1987 Mississippi Supreme Court Re-

view, Perjury. 57 Miss. L. J. 518, August, 1987.

§ 97-9-61. Perjury; penalty.

Persons convicted of perjury shall be punished by imprisonment in the penitentiary as follows: For perjury committed on the trial of any indictment for a capital offense or for any other felony, for a term not less than ten years; for perjury committed on any other judicial trial or inquiry, or in any other case, for a term not exceeding ten years.

HISTORY: Codes, Hutchinson's 1848, ch. 64, art. 12, Title 5(2); 1857, ch. 64, art. 205; 1871, § 2661; 1880, § 2922; 1892, § 1244; 1906, § 1319; Hemingway's 1917, § 1052; 1930, § 1083; 1942, § 2316.

Cross References — Registering to vote by mail-in application, see § 23-15-47.

Sanctions under this section for failure to furnish State Tax Commission with correct, true, and complete information to the best of one's knowledge and belief regarding realty transfers, see § 27-3-51.

Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see § 97-43-1 et seq.

RESEARCH REFERENCES

ALR.

Perjury or false swearing as contempt. 89 A.L.R.2d 1258.

Propriety of sentencing judge's consideration of defendant's perjury or lying in pleas or testimony in present trial. 34 A.L.R.4th 888.

Am. Jur.

60A Am. Jur. 2d, Perjury § 103.

CJS.

70 C.J.S., Perjury § 73.

§ 97-9-63. Perjury; subornation of.

Every person who shall unlawfully or corruptly procure any witness, by any means whatever, to commit wilful and corrupt perjury in any case, matter, or proceedings, in or concerning which such witness shall be legally sworn and examined, shall be guilty of subornation of perjury, and shall not thereafter be received as a witness to be sworn in any matter or cause whatever, until the judgment against him be reversed, and shall be punished by imprisonment in the penitentiary not exceeding ten years.

HISTORY: Codes, Hutchinson's 1848, ch. 64, art. 12, Title 5(3); 1857, ch. 64, art. 206; 1871, § 2662; 1880, § 2923; 1892, § 1245; 1906, § 1320; Hemingway's 1917, § 1053; 1930, § 1084; 1942, § 2317.

Cross References — Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see § 97-43-1 et seq.

Requisites of indictment for subornation of perjury, see § 99-7-41.

JUDICIAL DECISIONS

1. In general.

Indictment for subornation of perjury must state circumstances of issue or point of inquiry in which perjury was committed; simple statement in indictment that defendant procured someone to perjure himself is not sufficient; indictment should state name of crime, to make clear materiality of testimony given; and, indictment should allege what facts constitute truth, as well as allegation of falsity of testimony. *Hentz v. State*, 510 So. 2d 515, 1987 Miss. LEXIS 2617 (Miss. 1987).

In prosecution for subornation of perjury in attempting to procure a witness to testify that one Cox, accused of selling

cocaine, did not sell him cocaine, state must show that Cox made the sale to the witness and that accused knew of that fact when he attempted to influence the witness. *Smith v. State*, 107 Miss. 404, 65 So. 642, 1914 Miss. LEXIS 121 (Miss. 1914).

There is a fatal variance between the charge that accused suborned false testimony that witness had not bought liquors from a certain person within two years, and proof that the witness testified that he could not remember when the purchase was made. *Harris v. State*, 103 Miss. 739, 60 So. 769, 1912 Miss. LEXIS 224 (Miss. 1912).

RESEARCH REFERENCES

ALR.

Procuring perjury as contempt. 29 A.L.R.2d 1157.

Admissibility, in subornation of perjury prosecution, of evidence of alleged perjurer's plea of guilty to charge of perjury. 63 A.L.R.2d 825.

Rights and duties of attorney in a criminal prosecution where client informs him of intention to present perjured testimony. 64 A.L.R.3d 385.

Admissibility in criminal case, on issue of defendant's guilt, of evidence that third

person has attempted to influence a witness not to testify or to testify falsely. 79 A.L.R.3d 1156.

Validity, construction, and application of state statutes imposing criminal penalties for influencing, intimidating, or tampering with witness. 8 A.L.R.4th 769.

Criminal liability of attorney for tampering with evidence. 49 A.L.R.5th 619.

Am. Jur.

60A Am. Jur. 2d, Perjury §§ 107 et seq.

§ 97-9-65. Perjury; bribery to procure.

Every person who shall, by the offer of any valuable consideration, attempt, unlawfully and corruptly, to procure any other person to commit wilful and corrupt perjury as a witness in any cause, matter, or proceeding in or concerning which such other person might by law be examined as a witness, shall, upon conviction, be punished by imprisonment in the penitentiary not exceeding five years.

HISTORY: Codes, Hutchinson's 1848, ch. 64, art. 12, Title 5(8); 1857, ch. 64, art. 210; 1871, § 2663; 1880, § 2927; 1892, § 1246; 1906, § 1321; Hemingway's 1917, § 1954; 1930, § 1085; 1942, § 2318.

Cross References — Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see § 97-43-1 et seq.

JUDICIAL DECISIONS

1. In general.

An essential element of this offense is that both the accused and the witness knew that the testimony which the accused wanted the witness to give was false, which element must be charged in the indictment as a fact unless it is a necessary or inescapable inference from other facts charged. *Neeley v. State*, 202

Miss. 736, 32 So. 2d 449, 1947 Miss. LEXIS 336 (Miss. 1947).

An indictment under this section [Code 1942, § 2318] is demurrable if it fail to show the materiality of the testimony corruptly sought. *State v. Booker*, 84 Miss. 187, 36 So. 241, 1904 Miss. LEXIS 21 (Miss. 1904).

RESEARCH REFERENCES

ALR.

Procuring perjury as contempt. 29 A.L.R.2d 1157.

Admissibility in criminal case, on issue of defendant's guilt, of evidence that third person has attempted to influence a witness not to testify or to testify falsely. 79 A.L.R.3d 1156.

Validity, construction, and application of state statutes imposing criminal penalties for influencing, intimidating, or tampering with witness. 8 A.L.R.4th 769.

Am. Jur.

60A Am. Jur. 2d, Perjury §§ 107 et seq.

§ 97-9-67. Picketing or demonstrating in or near courthouse or residence of judge, juror, witness, or court officer.

(1) Whoever, with intent of interfering with, obstructing or impeding the administration of justice, or with the intent of influencing any judge, juror, witness, or court officer, in the discharge of his duty, pickets or parades in or near a building housing a court of the State of Mississippi, or in or near a building or residence occupied or used by such judge, juror, witness or court officer, or which such intent uses any sound-truck or similar device or resorts to any other demonstration in or near any such building or residence, shall be fined not more than one thousand dollars (\$1,000.00) or imprisoned not more than six months, or both.

(2) Nothing in this section shall interfere with or prevent the exercise by any court of the State of Mississippi of its power to punish for contempt.

HISTORY: Codes, 1942, § 2318.7; Laws, 1965, Ex Sess, ch. 6, §§ 1, 2, eff from and after passage (approved June 18, 1965).

Cross References — Picketing interfering with ingress or egress to and from public buildings, etc., see § 97-7-63.

Intentional or wilful obstruction of public streets, etc., see §§ 97-35-23, 97-35-25.

Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see § 97-43-1 et seq.

RESEARCH REFERENCES

ALR.

Picketing court or judge as contempt. 58 A.L.R.3d 1297.

Disruptive conduct of spectators in presence of jury during criminal trial as basis for reversal, new trial, or mistrial. 29 A.L.R.4th 659.

Liability, under statute, of labor union or its membership for torts committed in connection with primary labor activities-state cases. 85 A.L.R.4th 979.

Validity, construction, and application of state or local enactments regulating parades. 80 A.L.R.5th 255.

Validity, construction, and operation of statute or regulation forbidding, regulat-

ing, or limiting peaceful residential picketing. 113 A.L.R.5th 1.

Am. Jur.

48A Am. Jur. 2d, Labor and Labor Relations § 1483.

24 Am. Jur. Proof of Facts 2d 633, Jury Misconduct Warranting New Trial.

Lawyers' Edition.

Governmental regulation of nonlabor picketing as violating freedom of speech or press under Federal Constitution's First Amendment - Supreme Court cases. 101 L. Ed. 2d 1052.

§ 97-9-69. Property levied on; removing without authority.

Any person who shall, without authority of law, remove property of his own or of any other person which he knows has been levied on by virtue of any legal process, upon conviction, shall be punishable by fine, not exceeding five hundred dollars, and by imprisonment, not exceeding six months, in the county jail.

HISTORY: Codes, 1880, § 2982; 1892, § 1224; 1906, § 1300; Hemingway's 1917, § 1033; 1930, § 1064; 1942, § 2296.

Cross References — Lien of executions, see § 13-3-139.

Removal of property subject to lien as larceny, see §§ 97-17-73 et seq.

Selling property previously sold or on which there is a lien, see § 97-19-51.

Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see § 97-43-1 et seq.

JUDICIAL DECISIONS

1. In general.

Crime of obstructing justice is not constituent part of crime of removing property subject to lien, and they are not same offense. *McGraw v. State*, 157 Miss. 675, 128 So. 875, 1930 Miss. LEXIS 350 (Miss. 1930).

Indictment charging defendants with fraudulently moving out of state truck in sheriff's hands under levy made in landlord's lien proceeding held bad for duplicity. *McGraw v. State*, 157 Miss. 675, 128 So. 875, 1930 Miss. LEXIS 350 (Miss. 1930).

RESEARCH REFERENCES

ALR.

What constitutes obstructing or resisting an officer, in the absence of actual force. 44 A.L.R.3d 1018.

Intentional spoliation of evidence, interfering with prospective civil action, as

actionable. 70 A.L.R.4th 984.

Am. Jur.

58 Am. Jur. 2d, Obstructing Justice §§ 9 et seq.

CJS.

67 C.J.S., Obstructing Justice or Gov-

ernmental Administration §§ 1-11, 15-20, 88.

§ 97-9-71. Property subject to seizure; refusing or failing to point out to officers.

If any person shall have in his possession or under his control personal property of any kind subject to seizure by virtue of any legal process in the hands of any state or federal law enforcement officer, as the property of another or as subject to such process, and shall refuse or omit to point out such property to such officer on his demanding it, and to permit him to take possession of it, he shall, upon conviction, be subject to a fine of not less than the value of such property, nor more than double such value, or to imprisonment in the county jail not less than one (1) month nor more than six (6) months, or to both such fine and imprisonment.

HISTORY: Codes, 1880, § 2981; 1892, § 1223; 1906, § 1299; Hemingway's 1917, § 1032; 1930, § 1063; 1942, § 2295; Laws, 1993, ch. 547, § 3, eff from and after passage (approved April 15, 1993).

Cross References — Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see § 97-43-1 et seq.

JUDICIAL DECISIONS

1. In general.

Evidence held sufficient to support conviction of refusing to assist officer serving

writ of replevin. *Cantwell v. State*, 117 Miss. 152, 77 So. 960, 1918 Miss. LEXIS 159 (Miss. 1918).

RESEARCH REFERENCES

ALR.

What constitutes obstructing or resisting an officer, in the absence of actual force. 44 A.L.R.3d 1018.

CJS.

67 C.J.S., Obstructing Justice or Governmental Administration §§ 8-17, 19, 88.

Am. Jur.

58 Am. Jur. 2d, Obstructing Justice §§ 9 et seq.

§ 97-9-72. Fleeing or eluding a law enforcement officer in a motor vehicle; felonies; sanctions; defenses.

(1) The driver of a motor vehicle who is given a visible or audible signal by a law enforcement officer by hand, voice, emergency light or siren directing the driver to bring his motor vehicle to a stop when such signal is given by a law enforcement officer acting in the lawful performance of duty who has a reasonable suspicion to believe that the driver in question has committed a

crime, and who willfully fails to obey such direction shall be guilty of a misdemeanor, and upon conviction shall be punished by a fine not to exceed One Thousand Dollars (\$1,000.00) or imprisoned in the county jail for a term not to exceed six (6) months, or both.

(2) Any person who is guilty of violating subsection (1) of this section by operating a motor vehicle in such a manner as to indicate a reckless or willful disregard for the safety of persons or property, or who so operates a motor vehicle in a manner manifesting extreme indifference to the value of human life, shall be guilty of a felony, and upon conviction thereof, shall be punished by a fine not to exceed Five Thousand Dollars (\$5,000.00), or by commitment to the custody of the Mississippi Department of Corrections for not more than five (5) years, or both.

(3) Any person who is guilty of violating subsection (1) of this section, which violation results in serious bodily injury of another, upon conviction shall be committed to the custody of the Department of Corrections for not less than three (3) nor more than twenty (20) years of imprisonment.

(4) Any person who is guilty of violating subsection (1) of this section, which violation results in the death of another, upon conviction shall be committed to the custody of the Department of Corrections for not less than five (5) nor more than forty (40) years.

(5) It is a defense to prosecution under this section:

(a) That the law enforcement officer was not in uniform or that no law enforcement vehicle used in the attempted stop was clearly marked as a law enforcement vehicle; or

(b) That the driver proceeded in a safe manner to a reasonably near well-lit public place before stopping.

HISTORY: Laws, 2004, ch. 487, § 1, eff from and after July 1, 2004.

Editor's Notes — Laws of 2004, ch. 487, § 2 provides:

“SECTION 2. On or after January 1, 2005, each state, county and local law enforcement agency that conducts emergency response and vehicular pursuits shall adopt written policies and training procedures that set forth the manner in which these operations shall be conducted. Each law enforcement agency may create their own such policies or adopt an existing model. All pursuit policies created or adopted by any law enforcement agency must address situations in which police pursuits cross over into other jurisdictions. Law enforcement agencies which do not comply with the requirements of this provision are subject to the withholding of any state funding or state administered federal funding.”

JUDICIAL DECISIONS

ANALYSIS

1. Constitutionality.

Defendant was properly convicted of vehicular evasion causing death because no constitutional vagueness was shown either on the face of the statute or as applied to defendant's case. *Williams v. State*, 154 So. 3d 64, 2014 Miss. App. LEXIS 338 (Miss. Ct. App. 2014).

1. Constitutionality.
2. Evidence.
3. Indictment.
4. Jury instruction.
5. Sentence.
6. Authority.

2. Evidence.

Defendant was properly convicted of felony fleeing a law enforcement officer and aggravated assault on a law enforcement officer because the arresting officer testified that, based on his observations, he had reasonable suspicion of a crime of domestic violence, the arresting officer and the backup officer testified that, before the pursuit began, they saw defendant run a stop sign, and the arresting officer testified that, during his investigation, defendant threatened to kill him and, as he approached defendant's vehicle after the pursuit, defendant tried to hit him with his vehicle. *Topps v. State*, 227 So. 3d 1177, 2017 Miss. App. LEXIS 572 (Miss. Ct. App. 2017).

Trial court properly denied defendant's motion for a new trial on felony evasion because a deputy observed that defendant's license plate was not illuminated, he obstructed traffic, failed to stop when the deputy activated his lights, drove at reckless speeds moving in and out of traffic, passed motorists on the shoulder of the roadway, could not use the affirmative defense of necessity where he had reasonable alternatives to driving himself to a hospital (his wife and the deputy), the potential harm of defendant's reckless driving was disproportionate to the harm avoided (his alleged asthma episode), and his failure to contemporaneously object to the admission of his prior conviction at trial effectively waived the issue on appeal. *Carter v. State*, 227 So. 3d 416, 2017 Miss. App. LEXIS 523 (Miss. Ct. App. 2017).

Evidence was sufficient to convict defendant of felony fleeing or eluding a law enforcement officer in a motor vehicle because defendant sped up as the officer was pursuing the vehicle; after he lost control of the vehicle and wrecked it, he got out of the vehicle and continued to elude the officer; and he only stopped running when he heard a gunshot. *Grace v. State*, 281 So. 3d 986, 2019 Miss. App. LEXIS 181 (Miss. Ct. App. 2019).

Verdict finding defendant guilty of two counts of armed robbery and one count of felony fleeing or eluding a law enforcement officer in a motor vehicle was not so contrary to the overwhelming weight of

the evidence that to allow it to stand would sanction an unconscionable injustice because defendant knew that his uncle was going to rob the bank, and he rode with his uncle to a bank in another town with full knowledge of why they were going there; and, although defendant did not go into the bank, exhibit the pistol, and demand the money, he participated in the armed robbery by positioning the getaway vehicle outside the bank and driving his uncle away in an attempt to avoid apprehension and arrest. *Grace v. State*, 281 So. 3d 986, 2019 Miss. App. LEXIS 181 (Miss. Ct. App. 2019).

Trial court properly denied defendant's motion for a new trial on felony evasion because a deputy observed that defendant's license plate was not illuminated, he obstructed traffic, failed to stop when the deputy activated his lights, drove at reckless speeds moving in and out of traffic, passed motorists on the shoulder of the roadway, could not use the affirmative defense of necessity where he had reasonable alternatives to driving himself to a hospital—his wife and the deputy—the potential harm of defendant's reckless driving was disproportionate to the harm avoided—his alleged asthma episode—and his failure to contemporaneously object to the admission of his prior conviction at trial effectively waived the issue on appeal. *Carter v. State*, 227 So. 3d 416, 2017 Miss. App. LEXIS 523 (Miss. Ct. App. 2017).

Defendant failed to stop when an officer activated his blue lights, and then defendant ran three stop signs and exceeded the speed limit in a residential area, and thus the evidence demonstrated that he was driving in a manner as to have indicated a reckless or willful disregard for the safety of persons or property; the mere fact that no one was injured by his reckless driving was irrelevant to the conviction for felony flight. *Hobson v. State*, 181 So. 3d 1021, 2015 Miss. App. LEXIS 681 (Miss. Ct. App. 2015).

Evidence supported defendant's conviction for vehicular evasion causing death because defendant's flight from the police was a direct and proximate cause of the victim's death in that defendant, while fleeing from the police, recklessly hit the

victim's vehicle with defendant's vehicle, after blindly running a red light at 60 miles per hour, and killed the victim. Even if it were assumed that the police pursuit was unreasonable, it was a natural and foreseeable response to defendant's flight. *Williams v. State*, 154 So. 3d 64, 2014 Miss. App. LEXIS 338 (Miss. Ct. App. 2014).

Evidence was sufficient to support defendant's conviction for felonious evasion because defendant, when a sheriff's deputy mentioned using a drug-detection dog to sniff around defendant's car while questioning defendant about drugs during a valid traffic stop, jumped into defendant's car and sped away at high speed, despite being shot with a taser, and fled on foot after defendant flipped the car. *Williams v. State*, 126 So. 3d 85, 2013 Miss. App. LEXIS 749 (Miss. Ct. App. 2013).

Following evidence was sufficient to convict defendant of felony eluding: 1) a witness called police to report that a man was in her home and described him and his car; 2) an officer chased a car matching that description; 3) at the end of the chase, the driver exited the vehicle and ran into a house; 3) defendant was found hiding in the house; and 4) the witness who had called police identified defendant at trial as the intruder. *Conner v. State*, 138 So. 3d 158, 2013 Miss. App. LEXIS 226 (Miss. Ct. App. 2013), *aff'd*, 138 So. 3d 143, 2014 Miss. LEXIS 246 (Miss. 2014).

Evidence was legally sufficient to support defendant's conviction for felony fleeing, in violation of Miss. Code Ann. § 97-9-72(2), because a detective testified that after turning on the siren in an unmarked patrol car, defendant momentarily lost control of defendant's vehicle and nearly hit a utility pole, but the vehicle continued to evade the detective. *Tugle v. State*, 68 So. 3d 691, 2010 Miss. App. LEXIS 668 (Miss. Ct. App. 2010), *cert. denied*, 69 So. 3d 767, 2011 Miss. LEXIS 416 (Miss. 2011).

Defendant's conviction for felony eluding of a police officer, in violation of Miss. Code Ann. § 97-9-72(1) and (2), was supported by the evidence because officers testified that defendant drove through their roadblock without stopping and that they both ordered defendant to stop; the

officers had to force defendant onto a dead-end street in order to make defendant stop the car. *Betts v. State*, 10 So. 3d 519, 2009 Miss. App. LEXIS 29 (Miss. Ct. App. 2009).

Where an officer saw a vehicle speeding with an expired tag, he activated his blue lights and defendant led him on high speed chase until he crashed; the officer identified defendant as a former classmate. Defendant's conviction for fleeing a law enforcement officer in a motor vehicle, in violation of Miss. Code Ann. § 97-9-72, was not against the weight of the evidence; therefore, the trial court did not err by denying his motion for judgment notwithstanding the verdict or a new trial. *Cole v. State*, 8 So. 3d 250, 2008 Miss. App. LEXIS 824 (Miss. Ct. App. 2008).

3. Indictment.

State presented the jury with sufficient evidence to find the essential elements of felony fleeing, including testimony that defendant failed to stop when the officer activated his blue lights and siren, and defendant drove over the speed limit, ran a stop sign, passed vehicle in the wrong lane and in a no-passing zone, and made an erratic turn. *Chisholm v. State*, 298 So. 3d 1046, 2020 Miss. App. LEXIS 106 (Miss. Ct. App. 2020).

Underlying crime is not an essential element of fleeing a law officer in a motor vehicle; therefore, there was no need for an indictment to allege such. *Bacon v. State*, 950 So. 2d 250, 2007 Miss. App. LEXIS 117 (Miss. Ct. App. 2007).

In the context of Miss. Code Ann. § 97-9-72, a person's failure to obey a signal to stop a motor vehicle signifies that the person is continuing to operate the motor vehicle; therefore, where an indictment alleged that defendant, after being signaled to stop by an officer, continued to operate his vehicle with a reckless disregard for the safety of others, it was sufficient to allege a violation of Miss. Code Ann. § 97-9-72(2). *Bacon v. State*, 950 So. 2d 250, 2007 Miss. App. LEXIS 117 (Miss. Ct. App. 2007).

4. Jury instruction.

There was no error in failing to give a lesser included offense instruction be-

cause reckless driving was not a lesser included offense of the crime of failing to yield to a law enforcement officer; no element of the crime of reckless driving was included in the crime of fleeing a law-enforcement officer. *Johnson v. State*, 228 So. 3d 933, 2017 Miss. App. LEXIS 112 (Miss. Ct. App.), cert. denied, 229 So. 3d 120, 2017 Miss. LEXIS 379 (Miss. 2017).

Defendant ran from the officer with no explanation, and he dropped a firearm that was later determined to be stolen, and thus the evidence of defendant's unexplained flight was relevant to the charges and probative of guilt, and the instruction given in this regard was not error. *Hobson v. State*, 181 So. 3d 1021, 2015 Miss. App. LEXIS 681 (Miss. Ct. App. 2015).

Defendant was not entitled to a lesser-included offense instruction because defendant, while fleeing from the police, hit the victim's vehicle after blindly running a red light at 60 miles per hour. Further, no reasonable jury would have concluded that the police pursuit was an intervening, superseding cause of the victim's death so as to excuse defendant from criminal liability. *Williams v. State*, 154 So. 3d 64, 2014 Miss. App. LEXIS 338 (Miss. Ct. App. 2014).

Trial court did not err by giving a flight instruction because there was no independent reason or basis for defendant's flight and the evidence that defendant flipped a car and then fled on foot before law enforcement arrived was probative of both whether defendant was purposefully evading pursuing officers and whether, in doing so, defendant was driving recklessly. Because of the probative value of this evidence, neither the evidence, nor the related instruction violated Miss. R.

Evid. 403. *Williams v. State*, 126 So. 3d 85, 2013 Miss. App. LEXIS 749 (Miss. Ct. App. 2013).

5. Sentence.

Defendant's life sentence without the possibility of parole or probation for felony evasion under Miss. Code Ann. § 97-9-72 did not warrant an Eighth Amendment, U.S. Const. amend. VIII, analysis because: (1) the sentence was proper under the habitual offender statute, Miss. Code Ann. § 99-19-83; (2) defendant's current offenses and his prior offenses of possession of a controlled substance, attempted carjacking with a firearm, and aggravated assault with a firearm were grave; (3) there was no gross disproportionality in the sentence; and (4) the sentence fell within the statutory maximum period. *Skinner v. State*, 120 So. 3d 419, 2013 Miss. App. LEXIS 4 (Miss. Ct. App.), cert. denied, 119 So. 3d 328, 2013 Miss. LEXIS 452 (Miss. 2013).

6. Authority.

Circuit court improperly ruled for a family in their action against the Mississippi Department of Wildlife, Fisheries, and Parks (MDWFP) because it erroneously applied the legal standard for reckless disregard under the Mississippi Torts Claim Act; MDWFP officers possessed the discretion to request that boaters pull out of the hazardous and high-traffic area of a river, and the MDWFP possessed the authority to regulate the boating traffic on the river and the discretion to do so in a safe manner. *Miss. Dep't of Wildlife, Fisheries, & Parks v. Webb*, 248 So. 3d 823, 2017 Miss. App. LEXIS 217 (Miss. Ct. App. 2017), rev'd, 248 So. 3d 772, 2018 Miss. LEXIS 127 (Miss. 2018).

§ 97-9-73. Resisting or obstructing arrest; fleeing or eluding law enforcement officer in motor vehicle.

It shall be unlawful for any person to obstruct or resist by force, or violence, or threats, or in any other manner, his lawful arrest or the lawful arrest of another person by any state, local or federal law enforcement officer, and any person or persons so doing shall be guilty of a misdemeanor, and upon conviction thereof, shall be punished by a fine of not more than Five Hundred Dollars (\$500.00), or by imprisonment in the county jail not more than six (6) months, or both.

HISTORY: Codes, 1942, § 2292.5; Laws, 1960, ch. 261, § 1; Laws, 1993, ch. 547, § 4; Laws, 1994, ch. 592, § 5; Laws, 2003, ch. 536, § 1, eff from and after July 1, 2003.

Cross References — Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see § 97-43-1 et seq.

Arrests, generally, see §§ 99-3-1 et seq.

Imposition of standard state assessment in addition to all court imposed fines or other penalties for any misdemeanor violation, see § 99-19-73.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Double jeopardy.

1. In general.

For purposes of defendant's conviction for resisting arrest, it was of no consequence that the charges for public drunkenness and public profanity were later dismissed, as the evidence showed that defendant physically resisted the officer's lawful arrest by pulling his hands away when the officer tried to handcuff him, walking away from the officer, and refusing to submit so much that officers had to take him to the ground to gain control of him. *Harvey v. State*, 195 So. 3d 231, 2016 Miss. App. LEXIS 380 (Miss. Ct. App. 2016).

As there was insufficient evidence to support a disorderly-conduct charge, it followed that a resisting-arrest charge, which was based on defendant's actions relating to a deputy's attempt to arrest defendant for disorderly conduct, could not stand. Because the evidence was insufficient to establish the legality of defendant's arrest, it was also insufficient to establish that he resisted a lawful arrest. *Mastin v. State*, 180 So. 3d 732, 2015 Miss. App. LEXIS 591 (Miss. Ct. App. 2015).

Youth court did not err in adjudicating defendant juvenile a delinquent child for resisting arrest because the officer's actions in arresting defendant for disorderly conduct were lawful as defendant failed to obey the officer's commands to show his hands or to place his hands on the car under circumstances that could lead to a breach of the peace; and the evidence introduced at the delinquency hearing showed that defendant resisted arrest as

he struggled and would not put his arms behind his back, and some of the other officers ultimately tased defendant to gain compliance. *S.M.K.S. v. Youth Court of Union County*, 155 So. 3d 747, 2015 Miss. LEXIS 39 (Miss. 2015).

Thirteen-year-old juvenile was properly found by a youth court to be a delinquent child because the juvenile resisted arrest for disorderly conduct in that the juvenile refused to comply with a police officer's reasonable instructions to put the juvenile's hands on a patrol car, when the officer responded to a report that shots had been fired in the area from a car that matched the description of the car defendant was standing near, and in fact struggled with the officer and other responding officers. *S.M.K.S. v. Youth Court of Union County*, 155 So. 3d 876, 2014 Miss. App. LEXIS 2 (Miss. Ct. App. 2014).

Because, in attempting to prove assault, the State introduced evidence that defendant began swinging at an officer while he was being arrested, and it would have been impossible for defendant to have committed simple assault on a law enforcement officer without committing the crime of resisting arrest, the offense of resisting arrest was a lesser-included offense of the charged crime of simple assault, and the trial judge was authorized to grant the State's request for a resisting-arrest instruction. *Edwards v. State*, 124 So. 3d 105, 2013 Miss. App. LEXIS 700 (Miss. Ct. App. 2013).

Even if a verdict finding defendant guilty of resisting arrest was inconsistent with a verdict of not guilty of simple assault on a police officer, that inconsistency was not grounds for reversal as the evidence was sufficient to sustain the resisting arrest conviction; an officer testi-

fied that after defendant struck another officer in the chest, a “fierce struggle” ensued while officers attempted to place defendant in handcuffs. *Chambers v. State*, 973 So. 2d 266, 2007 Miss. App. LEXIS 692 (Miss. Ct. App.), cert. denied, 973 So. 2d 244, 2007 Miss. LEXIS 699 (Miss. 2007).

When a jury found defendant guilty of resisting arrest, but acquitted him of the charge of aggravated assault on a police officer, the verdict was not necessarily inconsistent because, among other things, the record showed that defendant struck an officer in the chest when the officer tried to arrest defendant. *Chambers v. State*, 2007 Miss. App. LEXIS 108 (Miss. Ct. App. Feb. 27, 2007), op. withdrawn, sub. op., 973 So. 2d 266, 2007 Miss. App. LEXIS 692 (Miss. Ct. App. 2007).

Officer had reasonable suspicion to investigate a suspicious white vehicle following a report of a vehicle theft, and then probable cause to detain its occupants for further questioning in light of their failure to respond and resisting arrest. *Qualls v. State*, 947 So. 2d 365, 2007 Miss. App. LEXIS 21 (Miss. Ct. App. 2007).

Defendant’s conviction for aggravated assault on a law enforcement officer, pursuant to Miss. Code Ann. § 97-3-7(2)(b) was not obtained in violation of the Double Jeopardy Clause as conviction on that charge required proof of at least one element not present in the resisting arrest charge, Miss. Code Ann. § 97-9-73, on which defendant had earlier been convicted. *Powell v. State*, 806 So. 2d 1069, 2001 Miss. LEXIS 271 (Miss. 2001).

Although the maximum sentence for a conviction of resisting arrest under this section is incarceration for six months, the court’s imposition of the five-year probationary period was legal under a reading of § 99-19-25 and *Wilson v. State*, 735 So. 2d 290, 292 (Miss. 1999). *Conner v. State*,

750 So. 2d 1258, 2000 Miss. LEXIS 3 (Miss. 2000).

A defendant did not have the right to resist an unlawful arrest where the arresting officers were acting in good faith on an unlawful warrant erroneously issued by a judge. *Murrell v. State*, 655 So. 2d 881, 1995 Miss. LEXIS 234 (Miss. 1995).

The concept of “self-help” in resisting an arrest should be limited to those situations where the arrest is in fact illegal and the arrestee and arrestee have reason to know that it is, or where the arrest is accompanied by excessive force; there is no right to resist an arrest based upon good faith reliance on a duly issued arrest warrant where the arrestee has no reasonable basis to conclude that the warrant was issued in bad faith. *Murrell v. State*, 655 So. 2d 881, 1995 Miss. LEXIS 234 (Miss. 1995).

In a prosecution for simple assault upon a law enforcement officer, the trial court erred in failing to give an instruction on the lesser included offense of resisting arrest where a reasonable fact-finder could have concluded, based on the evidence presented, that the defendant resisted arrest, but had a reasonable doubt as to whether he “injured” the officer within the meaning of § 97-3-7. *Murrell v. State*, 655 So. 2d 881, 1995 Miss. LEXIS 234 (Miss. 1995).

2. Double jeopardy.

Defendant was not subject to double jeopardy, even though defendant was issued a citation for resisting arrest and was later convicted of simple assault on a law enforcement officer, where a clear reading of the statutes established that the two offenses contained an element that was lacking from the other. *Roncali v. State*, 980 So. 2d 959, 2008 Miss. App. LEXIS 223 (Miss. Ct. App. 2008).

OPINIONS OF THE ATTORNEY GENERAL

All law enforcement officers of State and its political subdivisions are embraced within generic term “state law en-

forcement officers” contained in this section. Ditto, March 15, 1994, A.G. Op. #94-0088.

RESEARCH REFERENCES

ALR.

What constitutes obstructing or resisting an officer, in the absence of actual force. 44 A.L.R.3d 1018.

Modern status of rules as to right to forcefully resist illegal arrest. 44 A.L.R.3d 1078.

Right to resist excessive force used in accomplishing lawful arrest. 77 A.L.R.3d 281.

Reviewability before trial of order denying qualified immunity to defendant sued in state court under 42 USCS § 1983. 49 A.L.R.5th 717.

When does police officer's use of force during arrest become so excessive as to constitute violation of constitutional

rights, imposing liability under Federal Civil Rights Act of 1871 (42 USCS § 1983). 60 A.L.R. Fed. 204.

Am. Jur.

5 Am. Jur. 2d, Arrest §§ 81 et seq.

2A Am. Jur. Pl & Pr Forms (Rev), Arrest, Form 81 (complaint, petition, or declaration – injury to police officer – resistance by arrestee to lawful arrest).

2A Am. Jur. Pl & Pr Forms, Rev, Arrest, Form 81.

CJS.

67 C.J.S., Obstructing Justice or Governmental Administration §§ 1-5.

§ 97-9-75. Resisting service of process.

Any person who knowingly and wilfully opposes or resists any officer or other authorized person in serving or attempting to serve or execute any legal writ or process, shall be guilty of a misdemeanor.

HISTORY: Codes, 1880, § 2975; 1892, § 1221; 1906, § 1297; Hemingway's 1917, § 1030; 1930, § 1061; 1942, § 2293.

Cross References — Prevention of sheriff from serving process, see § 13-3-73.

Levy of executions, see §§ 13-3-113 et seq.

Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see § 97-43-1 et seq.

JUDICIAL DECISIONS

1. In general.

Although an arrestee was found not guilty of violating Miss. Code Ann. § 97-9-75 because a state environmental quality department letter that a deputy sheriff attempted to serve on the arrestee did not qualify as "process" for purposes of § 97-9-75, the deputy was entitled to qualified immunity in the arrestee's 42 U.S.C.S. § 1983 false arrest suit, as the deputy reasonably relied on the advice of the sheriff's department's attorney that the letter constituted process. *Brassell v. Turner*, 468 F. Supp. 2d 854, 2006 U.S. Dist. LEXIS 83676 (S.D. Miss. 2006).

Where an officer made an arrest for a misdemeanor not committed in his presence and without having a warrant in his possession, the charge that the defendant

resisted arrest cannot stand for he had a right to resist in a reasonable manner the unlawful arrest. *Smith v. State*, 208 So. 2d 746, 1968 Miss. LEXIS 1418 (Miss. 1968).

Where two officers went upon the premises of the defendant without a search warrant and purchased intoxicating liquor, this evidence was not obtained by illegal search and was not excludable on the ground of unlawful search and seizure because no search was involved. *Peebles v. State*, 57 So. 2d 263 (Miss. 1952).

An owner who uses reasonable force in resisting an officer who is attempting to search the premises without a valid warrant is not guilty of resisting an officer attempting to execute legal writ of process in violation of this section [Code 1942, § 2293]. *Pettis v. State*, 209 Miss. 726, 48

So. 2d 355, 1950 Miss. LEXIS 433 (Miss. 1950).

Where the sheriff and deputy sheriff were unlawful in arresting a person without a warrant for an alleged misdemeanor not committed in their presence and also were unlawful in invading the home of the owner, the acts of the owner in resisting

entry were not unlawful. *Pettis v. State*, 209 Miss. 726, 48 So. 2d 355, 1950 Miss. LEXIS 433 (Miss. 1950).

Owner may use reasonable force to resist officer attempting to search premises without valid warrant. *Deaton v. State*, 137 Miss. 164, 102 So. 175, 1924 Miss. LEXIS 213 (Miss. 1924).

OPINIONS OF THE ATTORNEY GENERAL

Whether or not employer who refuses process server access to employee would be guilty of misdemeanor depends on particular facts of each case; deputy is required by law to serve civil summons but is not, absent lawful court order to con-

trary, required to serve such summons at individual's place of employment. *Smith*, Sept. 2, 1992, A.G. Op. #92-0571.

No authority is known that exempts school personnel from this provision. *Sherrell*, Feb. 13, 2004, A.G. Op. 04-0047.

RESEARCH REFERENCES

ALR.

Criminal liability for obstructing process as affected by invalidity or irregularity of the process. 10 A.L.R.3d 1146.

What constitutes obstructing or resisting an officer, in the absence of actual force. 44 A.L.R.3d 1018.

Propriety of state or local government health officer's warrantless search-post-camera cases. 53 A.L.R.4th 1168.

Intentional spoliation of evidence, inter-

fering with prospective civil action, as actionable. 70 A.L.R.4th 984.

Am. Jur.

58 Am. Jur. 2d, Obstructing Justice §§ 12 et seq.

CJS.

67 C.J.S., Obstructing Justice or Governmental Administration §§ 1-5.

§ 97-9-77. Wills; alteration, destruction or secretion.

If any person shall wilfully alter or destroy any will or codicil without the consent of the party making the same, or shall wilfully secrete the same after the death of the testator shall be known to him, the person so offending, on conviction, shall be fined, or imprisoned in the county jail, or both; or shall be imprisoned in the penitentiary not exceeding two years.

HISTORY: Codes, *Hutchinson's* 1848, ch. 64, art. 239; 1871, § 2700; 1880, § 2973; 1892, § 1327; 1906, § 1399; *Hemingway's* 1917, § 1142; 1930, § 1174; 1942, § 2417.

Cross References — Wills and testaments, generally, see §§ 91-5-1 et seq.

Will contests, see §§ 91-7-21 et seq.

Penalty for alteration of records, generally, see § 97-11-1.

Malicious mischief, see § 97-17-67.

Falsifying record of will, deed, or other recordable instrument, or judgment, decree, or enrollment thereof, see § 97-21-45.

Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see § 97-43-1 et seq.

JUDICIAL DECISIONS

1. In general.

Where a will has been executed in duplicate, the destruction by testator of that copy which he retains in his possession, with intent to revoke the will, creates a presumption that the testator intends thereby to revoke the will. *Phinizee v. Alexander*, 210 Miss. 196, 49 So. 2d 250, 1950 Miss. LEXIS 337 (Miss. 1950).

Where there are two copies of a will,

both in possession of deceased, the presumption of law would be that by the preservation of one duplicate entire the testator did not intend a revocation of these particular devises, otherwise he would have mutilated both duplicates. *Phinizee v. Alexander*, 210 Miss. 196, 49 So. 2d 250, 1950 Miss. LEXIS 337 (Miss. 1950).

RESEARCH REFERENCES

ALR.

Destruction or cancelation of one copy of will executed in duplicate, as revocation of other copy. 17 A.L.R.2d 805.

What constitutes fraud within statute relating to proof of will "fraudulently" destroyed during testator's lifetime. 23 A.L.R.2d 382.

§ 97-9-79. Misdemeanor; false information.

Any person who shall make or cause to be made any false statement or representation as to his or another person's identity, social security account number or other identifying information to a law enforcement officer in the course of the officer's duties with the intent to mislead the officer shall be guilty of a misdemeanor and upon conviction thereof shall be fined not more than Five Thousand Dollars (\$5,000.00) or imprisoned for a term not to exceed one (1) year, or both.

HISTORY: Laws, 1996, ch. 513, § 8; brought forward without change, Laws, 2014, ch. 457, § 74, eff from and after July 1, 2014.

Cross References — Organized theft or fraud enterprise applicable to conduct proscribed in this section, see § 97-43-3.1.

ARTICLE 3.**OBSTRUCTION OF JUSTICE.**

Sec.	
97-9-101.	Definitions.
97-9-103.	Hindering prosecution or apprehension; definition of "criminal assistance."
97-9-105.	Hindering prosecution in the first degree.
97-9-107.	Hindering prosecution in the second degree.
97-9-109.	Bribing a witness.
97-9-111.	Bribe receiving by a witness.
97-9-113.	Intimidating a witness.
97-9-115.	Tampering with a witness.
97-9-116.	Bribing a judge.
97-9-117.	Bribing a juror.
97-9-119.	Bribe receiving by a juror.

Sec.

97-9-121.	Intimidating a juror.
97-9-123.	Jury tampering.
97-9-125.	Tampering with physical evidence.
97-9-127.	Retaliation against a public servant or witness.
97-9-129.	Sentencing.

§ 97-9-101. Definitions.

The following words and phrases shall have the meanings ascribed unless the context clearly requires otherwise:

(a) “Benefit” means any gain or advantage to the beneficiary, including any gain or advantage to a third person pursuant to the desire or consent of the beneficiary.

(b) “Government” means the state, county, municipality or other political subdivision, agency, branch or department of any of the foregoing, and any corporation or other entity established by law to carry out any governmental function.

(c) “Governmental function” means any activity which a public servant is legally authorized to undertake on behalf of a government.

(d) “Harm” means loss, disadvantage or injury, or anything so regarded by the person affected, including loss, disadvantage or injury to any other person or entity in whose welfare he is interested.

(e) “Juror” means any person who is a member of any jury, including a grand jury, impaneled by any court of this state or by any public servant authorized by law to impanel a jury. The term juror also includes any person who has been summoned or whose name has been drawn to attend as a prospective juror.

(f) “Official proceeding” means any proceeding heard before any legislative, judicial, administrative or other government agency or official authorized to hear evidence under oath.

(g) “Physical evidence” means any article, object, document, record or other thing of physical substance.

(h) “Property” means any real or personal property, including books, records and documents.

(i) “Public servant” means any officer or employee of government, including legislators and judges and any person participating as juror, advisor, consultant or otherwise, in performing a governmental function; but the term does not include witnesses. This term includes persons who have been elected, appointed or designated to become a public servant although not yet occupying that position.

(j) “Testimony” means oral or written statements, documents or any other material that may be offered as evidence in an official proceeding or oral or written statements provided under oath to law enforcement during a felony criminal investigation.

(k) “Threat” means any menace, however communicated, to: (i) cause bodily injury to the person threatened or another or commit any other

criminal offense; (ii) cause damage to property or cause anyone to part with property; (iii) accuse anyone of a criminal offense; (iv) expose a secret or an asserted fact, whether true or false, tending to subject anyone to hatred, contempt or ridicule; (v) impair the credit or business reputation of any person; or (vi) take or withhold action as a public servant or cause a public servant to take or withhold action.

HISTORY: Laws, 2006, ch. 387, § 1; Laws, 2017, ch. 382, § 1, eff from and after July 1, 2017.

Editor's Notes — Laws of 2006, ch. 387, § 16 provides:

"SECTION 16. This act shall be codified under Chapter 9, Title 97, Mississippi Code of 1972, as a separate Article 3 to be entitled "Obstruction of Justice," and shall begin with Section 97-9-101."

JUDICIAL DECISIONS

1. Harm.

While broad, the definition of harm is not vague, and each word and phrase that comprises it is readily understandable to any reasonable person of ordinary intelligence; the term "harm" as used in the retaliation statute encompasses more than just physical or pecuniary harm, and if the Legislature deems it necessary to protect against such harm by criminalizing certain conduct likely to cause it, it has the power to do so as long as the law does not run afoul of constitutional protections. *Wilcher v. State*, 227 So. 3d 890, 2017 Miss. LEXIS 108 (Miss. 2017).

State presented sufficient evidence for the jury to conclude that a deputy did suffer actual harm to his reputation as a result of defendant's knowingly false accusation of rape because the deputy testified that the accusation was known throughout the community, and his professional reputation had been harmed; an investigation of the deputy ensued due to defendant's rape claim, which necessitated the deputy submitting to a blood test to negate the claim. *Wilcher v. State*, 227 So. 3d 890, 2017 Miss. LEXIS 108 (Miss. 2017).

Legislature, which is presumed to know the law, clearly did not intend to imperil the statute and its purpose constitutionally by deliberately excluding from the statute's accompanying "harm" definition an objective-reasonableness standard in

favor of a "completely subjective" one; the retaliation statute and the accompanying statutory "harm" definition will not likely encourage arbitrary law enforcement or provide inadequate notice to potential offenders as to what conduct is prohibited. *Wilcher v. State*, 227 So. 3d 890, 2017 Miss. LEXIS 108 (Miss. 2017).

Implicit in the "harm" definition is reasonableness; meaning whether the loss, disadvantage, or injury as regarded by the victim was reasonable under the circumstances; the terms loss, disadvantage, or injury, and the victim's regard thereof, each can be considered objectively under a reasonable-person standard. *Wilcher v. State*, 227 So. 3d 890, 2017 Miss. LEXIS 108 (Miss. 2017).

Fact that the definition of "harm" contains a subjective element does not render it unconstitutionally vague; the reason for the subjective component to the "harm" definition is that what might be considered a loss, disadvantage, or injury for one person, might not be so considered by another. *Wilcher v. State*, 227 So. 3d 890, 2017 Miss. LEXIS 108 (Miss. 2017).

Word, "loss, disadvantage or injury" are not inherently vague and elastic so as to require guesswork at their meaning; each is a quantifiable concept that does not readily lend itself to the whims or personal predilections of reasonable people. *Wilcher v. State*, 227 So. 3d 890, 2017 Miss. LEXIS 108 (Miss. 2017).

§ 97-9-103. Hindering prosecution or apprehension; definition of “criminal assistance.”

For the purposes of this article, a person “renders criminal assistance” to another if he knowingly:

- (a) Harbors or conceals the other person;
- (b) Warns the other person of impending discovery or apprehension, except that this paragraph (b) does not apply to a warning given in connection with an effort to bring another into compliance with the law;
- (c) Provides or aids in providing the other person with money, transportation, weapon, disguise or other means of avoiding discovery or apprehension;
- (d) Prevents or obstructs, by means of force, deception or intimidation, anyone from performing an act that might aid in the discovery, apprehension, prosecution or conviction of the other person;
- (e) Suppresses, by an act of concealment, alteration or destruction, any physical evidence that might aid in the discovery, apprehension or conviction of the other person;
- (f) Threatens, harasses, or intimidates a witness or a person reasonably expected to be a witness in a criminal prosecution in an effort to prevent the person from testifying, giving evidence or assisting law enforcement in any way;
- (g) Provides false testimony, under oath, to the government about the person’s knowledge or lack of knowledge of any criminal activity or information or investigation;
- (h) Provides false information, under oath, or signs an affidavit with false information exonerating or incriminating another person; or
- (i) Attempts to prevent law enforcement from discovering facts relating to another’s criminal activity or engages in acts designed to interfere with or prevent a law enforcement investigation of another.

HISTORY: Laws, 2006, ch. 387, § 2; Laws, 2017, ch. 382, § 2, eff from and after July 1, 2017.

Joint Legislative Committee Note — Pursuant to Section 1-1-109, the Joint Legislative Committee on Compilation, Revision and Publication of Legislation corrected a typographical error in (i) by substituting “or engages in acts” for “or engaging in acts.” The Joint Committee ratified the correction at the August 15, 2017, meeting of the Committee.

JUDICIAL DECISIONS

1. Sufficiency of evidence

Defendant was properly convicted of attempted accessory after the fact and hindering the prosecution because she knew that her passenger had a gun, heard him say that he planned on killing the

police officers who had pulled their car over, and when the passenger shot one of the officers, defendant offered him a means of escape, she later gave a false description of the passenger to law enforcement and maintained that she did

know his name or whereabouts. Calloway v. State, 281 So. 3d 909, 2019 Miss. App. LEXIS 85 (Miss. Ct. App. 2019).

§ 97-9-105. Hindering prosecution in the first degree.

(1) A person commits the crime of hindering prosecution in the first degree if:

(a) With the intent to hinder the apprehension, prosecution, conviction or punishment of another for conduct constituting a felony, he renders criminal assistance to the other person; or

(b) Prevents or attempts to prevent law enforcement from discovering facts relating to another's criminal activity or engages in acts designed to interfere with, or prevent a law enforcement investigation of another; or

(c) Provides false information, under oath, or signs an affidavit with false information exonerating or incriminating another person.

(2) Hindering prosecution in the first degree is a Class 1 felony.

HISTORY: Laws, 2006, ch. 387, § 3; Laws, 2017, ch. 382, § 3, eff from and after July 1, 2017.

RESEARCH REFERENCES

ALR. Criminal and Civil Liability of Civilians and Police Officers Concerning Recording of Police Actions. 84 A.L.R.6th 89.

§ 97-9-107. Hindering prosecution in the second degree.

(1) A person commits the crime of hindering prosecution in the second degree if, with the intent to hinder the apprehension, prosecution, conviction or punishment of another for conduct constituting a misdemeanor, he renders criminal assistance to the other person.

(2) Hindering prosecution in the second degree is a misdemeanor.

HISTORY: Laws, 2006, ch. 387, § 4, eff from and after July 1, 2006.

RESEARCH REFERENCES

ALR. Criminal and Civil Liability of Civilians and Police Officers Concerning Recording of Police Actions. 84 A.L.R.6th 89.

§ 97-9-109. Bribing a witness.

(1) A person commits the crime of bribing a witness if he intentionally or knowingly offers, confers or agrees to confer any benefit upon a witness or a person he believes will be called as a witness in any official proceeding with intent to:

(a) Influence the testimony of that person;

(b) Induce that person to avoid legal process summoning him to testify;

or

(c) Induce that person to absent himself from an official proceeding to which he has been legally summoned.

(2) Bribing a witness is a Class 1 felony.

HISTORY: Laws, 2006, ch. 387, § 5, eff from and after July 1, 2006.

§ 97-9-111. Bribe receiving by a witness.

(1) A witness or a person believing he will be called as a witness in any official proceeding commits the crime of bribe receiving by a witness if he intentionally or knowingly solicits, accepts or agrees to accept any benefit upon an agreement or understanding that:

(a) His testimony will thereby be influenced;

(b) He will attempt to avoid legal process summoning him to testify; or

(c) He will absent himself from an official proceeding to which he has been legally summoned.

(2) Bribe receiving by a witness is a Class 1 felony.

HISTORY: Laws, 2006, ch. 387, § 6, eff from and after July 1, 2006.

§ 97-9-113. Intimidating a witness.

(1) A person commits the crime of intimidating a witness if he intentionally or knowingly:

(a) Attempts, by use of a threat directed to a witness or a person he believes will be called as a witness in any official proceedings, to:

(i) Influence the testimony of that person;

(ii) Induce that person to avoid legal process summoning him to testify; or

(iii) Induce that person to absent himself from an official proceeding to which he has been legally summoned;

(b) Harasses or intimidates or attempts to threaten, harass or intimidate a witness or a person reasonably expected to be a witness;

(c) Attempts to influence the testimony of a witness or a person reasonably expected to be a witness by rendering criminal assistance to another being investigated for or charged with criminal activity; or

(d) Solicits, encourages or requests a witness to provide false information intended to defeat or defend against an existing criminal charge or to hinder or interfere an ongoing investigation of a criminal act.

(2) Intimidating a witness is a Class 1 felony.

(3) It is not a defense to a prosecution under this section if the actual completion of the threat, harassment or intimidation was prevented from occurring.

HISTORY: Laws, 2006, ch. 387, § 7; Laws, 2017, ch. 382, § 4, eff from and after July 1, 2017.

JUDICIAL DECISIONS

1. Evidence.

The jury reasonably found defendant guilty of witness intimidation because the jury found that the testimony by a witness as to the threatening nature of defendant's gestures toward the witness before the trial to be credible. Furthermore, the witness was the only individual who heard the murder victim's final statements regarding who shot the victim, identified defendant, and was a key state witness. *Manning v. State*, 269 So. 3d 216, 2018 Miss. App. LEXIS 107 (Miss. Ct. App. 2018).

State of Mississippi's failure to include an allegation of an overt act in the indictment created such a considerable variance between defendant's indictment and one of the jury instructions that it warranted a reversal for the constructive amendment of the indictment, the argument was without merit because the omission of an overt act did not change any element of the offense or broaden the grounds upon which defendant could have been found guilty. *Manning v. State*, 269 So. 3d 216, 2018 Miss. App. LEXIS 107 (Miss. Ct. App. 2018).

2. Variance.

Although defendant argued that the

§ 97-9-115. Tampering with a witness.

(1) A person commits the crime of tampering with a witness if he:

(a) Intentionally or knowingly attempts to induce a witness or a person he reasonably believes will be called as a witness in any official proceeding to:

(i) Testify falsely or unlawfully withhold testimony;

(ii) Absent himself from any official proceeding to which he has been legally summoned; or

(b) Solicits, encourages, threatens, harasses or intimidates or attempts to solicit, encourage, threaten, harass or intimidate a witness in an effort to prevent or dissuade the witness from testifying or to provide a false version of events exonerating or incriminating another person of commission of a crime.

(2) Tampering with a witness is a Class 2 felony.

(3) It is not a defense to a prosecution under this section if the actual completion of the threat, harassment or intimidation was prevented from occurring.

HISTORY: Laws, 2006, ch. 387, § 8; Laws, 2017, ch. 382, § 5, eff from and after July 1, 2017.

Joint Legislative Committee Note — Pursuant to Section 1-1-109, the Joint Legislative Committee on Compilation, Revision and Publication of Legislation corrected a typographical error in (1)(a) by substituting “he reasonably believes” for “he reasonable believes.” The Joint Committee ratified the correction at the August 15, 2017, meeting of the Committee.

JUDICIAL DECISIONS

ANALYSIS

1. Indictment.
2. Evidence; sufficiency.
3. Jury instruction.

1. Indictment.

Indictment for a witness-tampering count fairly tracked the language of Miss. Code Ann. § 97-9-115. The use of the word “may” in the indictment was inconsequential, and its use did not alter the substantive meaning of the statute or disadvantage defendant in any defenses he may have had in the case. *Briggs v. State*, 226 So. 3d 59, 2017 Miss. LEXIS 291 (Miss. 2017).

Defendant’s challenge to the indictment, regarding defendant’s charge of tampering with a witness, was without merit as it made no difference whether the indictment read “will” or “may” because the factual basis surrounding the charge, and described in the indictment, dictated that defendant thought, and in fact hoped, that the individual whom defendant contacted would be called as a witness to provide defendant with the alibi which defendant sought. *Briggs v. State*, 225 So. 3d 1253, 2016 Miss. App. LEXIS 326 (Miss. Ct. App. 2016), *aff’d*, 226 So. 3d 59, 2017 Miss. LEXIS 291 (Miss. 2017), in part, 209 So. 3d 430, 2017 Miss. LEXIS 50 (Miss. 2017).

2. Evidence; sufficiency.

Evidence was more than sufficient to support defendant’s conviction for tampering with a witness because a transcript of a telephone call that was made by defendant showed defendant asking the other individual to provide defendant with varying alibis following defendant’s arrest for robbery. *Briggs v. State*, 225 So. 3d 1253, 2016 Miss. App. LEXIS 326 (Miss. Ct. App. 2016), *aff’d*, 226 So. 3d 59, 2017 Miss. LEXIS 291 (Miss. 2017), in part, 209 So. 3d 430, 2017 Miss. LEXIS 50 (Miss. 2017).

3. Jury instruction.

Defendant’s challenge to the jury instruction, regarding defendant’s charge of tampering with a witness, was without merit as it made no difference whether the jury instruction read “will” or “would” because the factual basis surrounding the charge, and described in the indictment, dictated that defendant thought, and in fact hoped, that the individual whom defendant contacted would be called as a witness to provide defendant with the alibi which defendant sought. *Briggs v. State*, 225 So. 3d 1253, 2016 Miss. App. LEXIS 326 (Miss. Ct. App. 2016), *aff’d*, 226 So. 3d 59, 2017 Miss. LEXIS 291 (Miss. 2017), in part, 209 So. 3d 430, 2017 Miss. LEXIS 50 (Miss. 2017).

§ 97-9-116. Bribing a judge.

(1) A person commits the crime of bribing a judge if he intentionally or knowingly offers, confers or agrees to confer any benefit upon a judge with the intent that the judge’s decision, vote, recommendation or other exercise of official discretion in a judicial or administrative proceeding will thereby be influenced.

(2) Bribing a judge is a felony punishable by imprisonment for not less than five (5) years nor more than twenty (20) years and by a fine three (3) times the amount of the bribe but in no case less than Twenty-five Thousand Dollars (\$25,000.00).

HISTORY: Laws, 2008, ch. 428, § 1, *eff from and after July 1, 2008*.

Cross References — Imposition of standard state assessment in addition to all court imposed fines or other penalties for any felony violation, see § 99-19-73.

§ 97-9-117. Bribing a juror.

(1) A person commits the crime of bribing a juror if he intentionally or knowingly offers, confers or agrees or attempts to confer any benefit upon a juror with the intent that the juror's vote, opinion, decision or other action as a juror will thereby be influenced.

(2) Bribing a juror is a Class 1 felony.

HISTORY: Laws, 2006, ch. 387, § 9; Laws, 2017, ch. 382, § 6, eff from and after July 1, 2017.

§ 97-9-119. Bribe receiving by a juror.

(1) A person commits the crime of bribe receiving by a juror if he intentionally or knowingly solicits, accepts or agrees to accept any benefit upon an agreement or understanding that his vote, opinion, decision or other action as a juror will thereby be influenced.

(2) Bribe receiving by a juror is a Class 1 felony.

HISTORY: Laws, 2006, ch. 387, § 10, eff from and after July 1, 2006.

§ 97-9-121. Intimidating a juror.

(1) A person commits the crime of intimidating a juror if he intentionally or knowingly attempts, by the use of a threat, harassment or intimidations to influence a juror's vote, opinion, decision or other action as a juror.

(2) Intimidating a juror is a Class 1 felony.

HISTORY: Laws, 2006, ch. 387, § 11; Laws, 2017, ch. 382, § 7, eff from and after July 1, 2017.

§ 97-9-123. Jury tampering.

(1) A person commits the crime of jury tampering if, with intent to influence a juror's vote, opinion, decision or other action in the case, he intentionally or knowingly attempts to communicate directly or indirectly with a juror other than as part of the proceedings in the trial of the case.

(2) Jury tampering is a Class 2 felony.

HISTORY: Laws, 2006, ch. 387, § 12, eff from and after July 1, 2006.

§ 97-9-125. Tampering with physical evidence.

(1) A person commits the crime of tampering with physical evidence if, believing that an official proceeding is pending or may be instituted, and acting without legal right or authority, he:

(a) Intentionally destroys, mutilates, conceals, removes or alters physical evidence with intent to impair its use, verity or availability in the pending criminal investigation or prospective official proceeding;

(b) Knowingly makes, presents or offers any false physical evidence with intent that it be introduced in the pending or prospective official proceeding;

(c) Intentionally prevents the production of physical evidence by an act of force, intimidation or deception against any person, or threatens, harasses or intimidates a witness or a person he reasonably believes may be a witness in a criminal investigation to not provide physical evidence or to hide, destroy or alter physical evidence; or

(d) Solicits, encourages or assists another person to destroy, hide or conceal evidence of any type if it is reasonably likely the state or federal authorities would use the evidence during the prosecution of a criminal act by the state or federal authorities.

(2) Tampering with physical evidence is a Class 2 felony.

HISTORY: Laws, 2006, ch. 387, § 13; Laws, 2017, ch. 382, § 8, eff from and after July 1, 2017.

JUDICIAL DECISIONS

1. Counterfeit documents.

Defendant's former attorney's testimony that he received a fraudulent certificate of title and a bill of sale from defendant for the stolen vehicle did not violate the attorney-client privilege because when defendant provided the documents to his attorney, there was no expectation of confidentiality or privilege concerning the documents or the fact that defendant provided them. The documents defendant provided were to be presented to the State

as discovery under Miss. Unif. Cir. & County Ct. Prac. R. 9.04(c)(2), the trial court, and the jurors in his defense, and therefore no privilege existed under Miss. R. Evid. 502. In addition, because the documents were counterfeit, defendant committed a crime under Miss. Code Ann. § 97-9-125 (Rev. 2006); by involving his attorney, and any privilege or confidentiality was destroyed. *Hayden v. State*, 972 So. 2d 525, 2007 Miss. LEXIS 646 (Miss. 2007).

§ 97-9-127. Retaliation against a public servant or witness.

(1) A person commits the offense of retaliation if he intentionally or knowingly harms or threatens to harm another by any unlawful act in retaliation for anything lawfully done in the capacity of public servant, witness, prospective witness or informant.

(2) Retaliation is a Class 2 felony.

HISTORY: Laws, 2006, ch. 387, § 14, eff from and after July 1, 2006.

JUDICIAL DECISIONS

ANALYSIS

1. Constitutionality.
2. Construction.
3. Indictment sufficient.
4. Weight of the evidence.
5. Sufficiency of the evidence.

6. Jury instructions.

1. Constitutionality.

While the statute provides for a liberal definition of "harm," the statute as a whole is not vague or too overly broad or indefinite so as to encourage arbitrary and

erratic arrests and convictions; the statute's first element is a scienter requirement, which applies to every other element in the statute and narrows the statute's applicability considerably, and its applicability is narrowed even further by the third element, which requires the harm caused or threatened be by an unlawful act. *Wilcher v. State*, 227 So. 3d 890, 2017 Miss. LEXIS 108 (Miss. 2017).

While broad, the definition of harm is not vague, and each word and phrase that comprises it is readily understandable to any reasonable person of ordinary intelligence; the term "harm" as used in the retaliation statute encompasses more than just physical or pecuniary harm, and if the Legislature deems it necessary to protect against such harm by criminalizing certain conduct likely to cause it, it has the power to do so as long as the law does not run afoul of constitutional protections. *Wilcher v. State*, 227 So. 3d 890, 2017 Miss. LEXIS 108 (Miss. 2017).

Legislature, which is presumed to know the law, clearly did not intend to imperil the statute and its purpose constitutionally by deliberately excluding from the statute's accompanying "harm" definition an objective-reasonableness standard in favor of a "completely subjective" one; the retaliation statute and the accompanying statutory "harm" definition will not likely encourage arbitrary law enforcement or provide inadequate notice to potential offenders as to what conduct is prohibited. *Wilcher v. State*, 227 So. 3d 890, 2017 Miss. LEXIS 108 (Miss. 2017).

2. Construction.

Purpose behind the statute is to encourage individuals to perform public duties without fear of retribution; such services are vital to the essential operations of government, and the State has a compelling interest in protecting those individuals from harm in the performance of those services. *Wilcher v. State*, 227 So. 3d 890, 2017 Miss. LEXIS 108 (Miss. 2017).

Supreme court declined to address defendant's First Amendment vagueness claim because defendant cited no legal

authority and provided no argument in support of her assertion that the statute infringed upon the First Amendment. *Wilcher v. State*, 227 So. 3d 890, 2017 Miss. LEXIS 108 (Miss. 2017).

3. Indictment sufficient.

Indictment clearly contained the elements of the retaliation and sufficiently informed defendant of the charge against him because it charged that he unlawfully threatened a police officer by threatening to assault the officer; the act of threatening to harm a police officer in the future is unlawful. *Young v. State*, 119 So. 3d 309, 2013 Miss. LEXIS 392 (Miss. 2013).

4. Weight of the evidence.

Verdict finding defendant guilty of retaliation was not so contrary to the evidence that to let it stand would sanction an unconscionable injustice, and the evidence did not weigh heavily against the jury's verdict, because defendant threatened to harm an officer by threatening to assault the officer. *Young v. State*, 119 So. 3d 309, 2013 Miss. LEXIS 392 (Miss. 2013).

5. Sufficiency of the evidence.

State presented sufficient evidence for the jury to conclude that a deputy did suffer actual harm to his reputation as a result of defendant's knowingly false accusation of rape because the deputy testified that the accusation was known throughout the community, and his professional reputation had been harmed; an investigation of the deputy ensued due to defendant's rape claim, which necessitated the deputy submitting to a blood test to negate the claim. *Wilcher v. State*, 227 So. 3d 890, 2017 Miss. LEXIS 108 (Miss. 2017).

6. Jury instructions.

Trial court sufficiently instructed the jury on retaliation because its instruction clearly required the State to prove beyond a reasonable doubt that defendant did unlawfully threaten to harm the officer by threatening to assault and/or kill him. *Young v. State*, 119 So. 3d 309, 2013 Miss. LEXIS 392 (Miss. 2013).

§ 97-9-129. Sentencing.

(1) A person who has been convicted of any Class 1 felony under this article shall be sentenced to imprisonment for a term of not more than fifteen (15) years or fined not more than Five Thousand Dollars (\$5,000.00), or both.

(2) A person who has been convicted of any Class 2 felony under this article shall be sentenced to imprisonment for a term of not more than ten (10) years or fined not more than Three Thousand Dollars (\$3,000.00), or both.

(3) A person who has been convicted of any misdemeanor under this article shall be sentenced to confinement in the county jail for a term of not more than one (1) year or fined not more than One Thousand Dollars (\$1,000.00), or both.

HISTORY: Laws, 2006, ch. 387, § 15; Laws, 2017, ch. 382, § 9, eff from and after July 1, 2017.

Index

A

ABANDONED CHILDREN.

Desertion and nonsupport, §97-5-1.

ABANDONMENT.

Children.

Desertion and nonsupport, §97-5-1.

ABORTION.

Abortion-inducing drugs.

Advertising, sale, §97-3-5.

Advertisement.

Drugs or medicine for causing
unlawful abortion, §97-3-5.

Crimes, §§97-3-3 to 97-3-5.

Drug or medicine causing unlawful abortion.

Advertising, sale, §97-3-5.

Manslaughter.

Killing of unborn child.

Provisions not applicable to legal
medical procedures including
abortion, §97-3-37.

Sex crimes against minors.

Maintenance of forensic sample from
abortion on minor less than 14
years of age, §97-5-51.

Unlicensed, practicing physician, §97-3-3.

ACCESSORIES AFTER THE FACT, §97-1-5.

ACCESSORIES BEFORE THE FACT, §97-1-3.

ACCOMPLICES.

Escape.

Aiding escape of felons, §§97-9-27,
97-9-29.

Aiding escapes from officers, §97-9-33.
Inmates of state institutions, §97-9-25.
Prisoners other than felons, §97-9-31.

Human trafficking, §97-3-54.3.

ACQUITTAI.

Libel.

Criminal libel, §97-3-57.

ACTIONS.

Human trafficking.

Damages.

Actions for actual and punitive
damages, §97-3-54.6.

ADOPTION.

Child rape, §97-5-41.

ADVERTISING.

Abortion.

Drugs or instruments for causing
unlawful abortion, §97-3-5.

AFFIDAVITS.

Champerly and maintenance.

Attorney affidavit, §§97-9-17, 97-9-19.

Party affidavit, §97-9-15.

AGENTS.

Champerly and maintenance,
§§97-9-11 to 97-9-23.

AGGRAVATED ASSAULT, §97-3-7.

**AGGRAVATED DOMESTIC
VIOLENCE**, §97-3-7.

AIDING AND ABETTING.

Escape.

Aiding escape of felons, §§97-9-27,
97-9-29.

Aiding escapes from officers, §97-9-33.
Inmates of state institutions, §97-9-25.
Prisoners other than felons, §97-9-31.

Human trafficking, §97-3-54.3.

AIRCRAFT.

Human trafficking.

Forfeitures, §97-3-54.7.

ALCOHOLIC BEVERAGES.

Minors.

Adult allowing party at private
residence or private premises
where minor obtains alcoholic
beverages, §97-5-49.

Social host liability.

Adult allowing party at private
residence or private premises
where minor obtains alcoholic
beverages, §97-5-49.

ALIENS.

Human trafficking.

Passport or other immigration
document.

Destruction, concealment or
confiscation for purpose of
preventing freedom of
movement or ability to travel,
§97-3-54.2.

AMBULANCE CHASING.

Solicitation of business by or for attorney, §§97-9-11 to 97-9-23.

AMERICAN FLAG.

Desecration, §97-7-39.

ANIMALS.

Manslaughter.

Owner of dangerous animal, §§97-3-25, 97-3-45.

ANTI-HUMAN TRAFFICKING ACT,

§§97-3-54 to 97-3-54.13.

ARBITRATION.

Bribery of arbitrator, §97-9-5.

ARMED CARJACKING, §97-3-117.

ARREST.

Drive-by shootings or bombings, §97-3-109.

Obstructing arrest, §97-9-73.

Resisting arrest, §97-9-73.

ARSON.

Murder in commission of arson, §97-3-19.

ASSAULT.

Aggravated assault, §97-3-7.

Court system personnel.

Assault upon, §97-3-7.

Domestic violence.

Simple assault, §97-3-7.

Emergency medical technicians, §97-3-7.

Felonious abuse and/or battery of a child, §97-5-39.

Investigation forms used by law enforcement, §97-3-7.

Judges and court system personnel.

Assault upon, §97-3-7.

Law enforcement officers.

Assault upon, generally, §97-3-7.

Investigations, forms to be used, §97-3-7.

Military personnel.

Assault upon, §97-3-7.

Murder.

Felonious assault and battery, §97-3-19.

Public health personnel.

Assault upon, §97-3-7.

Public officer and employees.

Assault upon statewide elected official, §97-3-7.

Rape.

Assault with intent to ravish, §97-3-71.

ASSAULT —Cont'd

School bus drivers.

Assault upon driver, §97-3-7.

School personnel.

Assault upon, §97-3-7.

Simple assault, §97-3-7.

Stalking, §97-3-107.

Teachers.

Assault upon, §97-3-7.

ASSAULT WITH INTENT TO KILL.

Poisoning with intent to kill or injure, §§97-3-61, 97-3-63.

ASSISTED SUICIDE, §97-3-49.

ASSOCIATIONS.

Human trafficking.

Enterprise liability, §97-3-54.1.

Definition of enterprise, §97-3-54.4.

Injunctions and other relief, §97-3-54.6.

ATTEMPTS TO COMMIT CRIME,

§97-1-7.

Capital offense, §97-1-7.

Carjacking, §97-3-117.

Dual prosecution for committed offense, §97-1-9.

Legislature.

Attempting to prevent meetings, §97-7-45.

Poisoning with intent to kill or injure, §§97-3-61, 97-3-63.

Rape, §97-3-71.

ATTORNEY DISCIPLINE.

Disbarment.

Champerty and maintenance.

False affidavit, §97-9-13.

ATTORNEY GENERAL.

Human trafficking.

Forfeitures.

Process for forfeiture, §97-3-54.7.

ATTORNEYS AT LAW.

Intimidation to obstruct justice, §97-9-55.

B

BAILIFFS.

Circuit courts.

Conversing with jurors, §97-9-57.

Trials.

Circuit courts.

Conversing with jurors, §97-9-57.

BANKS AND FINANCIAL INSTITUTIONS.

Property tax assessments.

Failure to deliver written statement, §97-7-3.

BATTERY.

Sexual battery, §§97-3-95 to 97-3-104.

BILLIARD HALLS.

Minors on premises, §97-5-11.

BLACKMAIL, §97-3-81.

BLACK MARKET CHILD SELLING.

Buying or selling or offering to buy or sell an unborn child, §97-3-52.

BOATS AND OTHER SMALL WATERCRAFT.

Human trafficking.

Forfeitures, §97-3-54.7.

Manslaughter.

Overloading boat, §§97-3-25, 97-3-41.

BOMBS.

Drive-by bombings, §§97-3-109 to 97-3-111.

BOYCOTTS.

Conspiracy to prevent holding public office or discharging duties, §97-7-19.

BRIBERY.

Arbitrators, §97-9-5.

Commercial bribery, §97-9-10.

Compounding or concealing crime, §§97-9-7, 97-9-9.

Escape of prisoners.

Accepting bribe to permit escape, §97-9-39.

Judges, bribing, §97-9-116.

Jurors, §97-9-5.

Perjury.

Bribery to procure perjury, §97-9-65.

Referees, §97-9-5.

BURDEN OF PROOF.

Rape.

Chaste character of victim, §97-3-69.

Treason.

Corroboration requirement, §97-7-69.

BURGLARY.

Murder in commission of burglary, §97-3-19.

C

CAPITAL MURDER, §§97-3-19, 97-3-21.

Sentencing, §97-3-21.

Conspiracy to commit, §97-1-1.

CAPITAL OFFENSES.

Attempts, §97-1-7.

Conspiracy, §97-1-1.

Murder, §§97-3-19, 97-3-21.

Perjury committed on trial of indictment for capital offense.

Punishment, §97-9-61.

CAPITOL COMPLEX.

Defacing capitol building, §97-7-9.

Used for sleeping-rooms, §97-7-7.

CAR CHASES.

Fleeing or eluding law enforcement officer, §97-9-72.

CARJACKING, §§97-3-113 to 97-3-117.

Armed carjacking, §97-3-117.

Attempted carjacking, §97-3-117.

Citation of act, §97-3-113.

Conduct constituting, §97-3-117.

Definitions, §97-3-115.

Sentencing, §97-3-117.

CARRYING FIREARMS OR OTHER WEAPONS.

Church protection act.

Security program to allow persons to carry firearms in church for protection of congregation.

Deadly force, justifiable homicide, §97-3-15.

CHAMPERTY AND MAINTENANCE, §§97-9-11 to 97-9-23.

Attorney affidavit, §97-9-17.

Attorney exceptions, §97-9-23.

Conduct constituting, §97-9-11.

False affidavit, §97-9-19.

Party affidavit, §97-9-15.

Penalty, §97-9-13.

Failure of witness to testify, §97-9-21.

False affidavit, §97-9-19.

Soliciting and stirring up litigation, §97-9-11.

Witness immunity, §97-9-21.

CHILD ABANDONMENT.

Desertion and nonsupport, §97-5-1.

CHILD ABUSE AND NEGLECT.

Condoning child abuse, §97-5-40.

Felonious abuse and/or battery of a child, §97-5-39.

Protection of children from parents convicted of felony child sexual abuse, §97-5-42.

Reports.

Sex crimes against children, mandatory reporting, §97-5-51.

CHILD CARE FACILITIES.

Sex crimes against minors, mandatory reporting, §97-5-51.

CHILD CUSTODY.

Custodial interference, §97-3-51.

Interstate removal of child, §97-3-51.

Noncustodial parent or relative.

Interstate removal of child, §97-3-51.

CHILD HOMICIDE.

Conduct constituting, §97-3-25.

CHILD LABOR.

Enticing child for employment, §97-5-7.

Human trafficking generally, §§97-3-54 to 97-3-54.13.

CHILD PORNOGRAPHY.

Exploitation of children, §97-5-33.

CHILD RAPE.

Cohabiting partner.

Carnal knowledge of child by, §97-5-41.

Sexual battery, §§97-3-95 to 97-3-104.

Statutory rape, §97-3-65.

Step or adopted child.

Carnal knowledge of, §97-5-41.

CHILDREN AND MINORS.

Alcoholic beverages.

Adult allowing party at private residence or private premises where minor obtains alcoholic beverages, §97-5-49.

Birth of child to minor under 16.

Blood samples, §97-5-51.

Mandatory reporting of sex crime against minor, §97-5-51.

Drive-by shootings or bombings.

Juvenile offenders, §97-3-110.

Exploitation of children, §§97-5-31 to 97-5-37.

Fondling of children, §97-5-23.

Homicide.

Child homicide.

Conduct constituting, §97-3-25.

CHILDREN AND MINORS —Cont'd

Human trafficking.

Sexual servitude.

Procuring sexual servitude of a minor, §97-3-54.1.

Inducing minor to commit felony, §97-1-6.

Obscenity.

Dissemination of sexually oriented material to minors, §97-5-27.

Human trafficking generally, §§97-3-54 to 97-3-54.13.

Pool rooms and billiard halls.

Allowing on premises, §97-5-11.

Sex crimes against children.

Mandatory reporting, §97-5-51.

Sexual servitude.

Procuring sexual servitude of a minor, §97-3-54.1.

CHILDREN WITH DISABILITIES.

Fondling of child or vulnerable person, §97-5-23.

CHILD VISITATION.

Child sexual abuse.

Protection of children from parents convicted of felony child sexual abuse.

Standards for visitation, §97-5-42.

CHIROPRACTORS.

Fondling of child or vulnerable person, §97-5-23.

Sexual battery, §§97-3-95 to 97-3-104.

CHURCHES AND OTHER PLACES OF WORSHIP.

Firearms and other weapons.

Church protection act.

Security program to allow persons to carry firearms in church for protection of congregation.

Deadly force, justifiable homicide, §97-3-15.

Mississippi church protection act.

Security program to allow persons to carry firearms in church for protection of congregation.

Deadly force, justifiable homicide, §97-3-15.

CLERGY.

Child abuse or neglect.

Sex crimes against minors, mandatory reporting, §97-5-51.

Fondling.

Child or vulnerable person, §97-5-23.

CLERGY —Cont'd

- Sex crimes against minors,**
 - mandatory reporting,** §97-5-51.
- Sexual battery,** §§97-3-95 to 97-3-104.
 - Fondling of child or vulnerable person,** §97-5-23.

CLOSED HEARINGS.

- Rape shield law,** §97-3-68.

COACHES.

- Fondling of child or vulnerable person,** §97-5-23.
- Sexual battery,** §§97-3-95 to 97-3-104.

CODE OF MILITARY JUSTICE.

- Dishonorable discharge.**
 - Failure to report for active duty,** §97-7-59.

COHABITATION.

- Carnal knowledge of child by cohabitating partner,** §97-5-41.

COLLEGES AND UNIVERSITIES.

- Hazing,** §97-3-105.

COMMERCIAL BRIBERY, §97-9-10.

COMMERCIAL SEXUAL EXPLOITATION.

- Human trafficking,** §§97-3-54 to 97-3-54.13.

COMPUTER CRIMES.

- Exploitation of children.**
 - Pornography,** §97-5-33.

COMPUTERS AND SOFTWARE.

- Exploitation of children.**
 - Pornography,** §97-5-33.
- Human trafficking.**
 - Forfeitures,** §97-3-54.7.

CONCEALMENT OF CHILDREN.

- Contributing to the neglect or delinquency of a child,** §97-5-39.
- Enticing child for concealment,** §97-5-5.
 - Human trafficking generally,** §§97-3-54 to 97-3-54.13.

CONFEDERATE FLAG.

- Flag desecration,** §97-7-39.

CONFESSIONS.

- Treason.**
 - Open court confession,** §97-7-69.

CONFIDENTIALITY OF INFORMATION.

Human trafficking.

- Victim identity,** §97-3-54.6.
- Funding of victim service providers.**
 - Confidentiality provisions applicable,** §97-3-54.13.

CONSPIRACY.

- Conduct constituting,** §97-1-1.
- Conspiracy to defraud state,** §§97-7-11 to 97-7-15.
- Defrauding state,** §§97-7-11 to 97-7-15.
- Human trafficking,** §97-3-54.3.
- Law enforcement officer as co-conspirator.**
 - Unavailability of entrapment as defense,** §97-1-1.
- Public officers and employees.**
 - Conspiracy to prevent holding public office or discharging duties,** §§97-7-17, 97-7-19.

CONSPIRACY TO DEFRAUD STATE, §§97-7-11 to 97-7-15.

Defeating or preventing prosecution of just claim due state, §97-7-13.

Obtaining public funds fraudulently, §97-7-11.

Parties to crime, §97-7-15.

CONTEMPT.

Bailiffs.

- Circuit court trials.**
- Conversing with jurors,** §97-9-57.

CONTRACT KILLERS.

Criminal prosecution as principals, §97-3-19.

CORPORATIONS.

Champerty and maintenance, §§97-9-11 to 97-9-23.

Charters.

- Forfeiture.**
 - Human trafficking.**
 - Enterprise liability.**
 - Injunctions and other relief,** §97-3-54.6.

Human trafficking.

- Enterprise liability,** §97-3-54.1.
- Definition of enterprise,** §97-3-54.4.
- Injunctions and other relief,** §97-3-54.6.

CORRECTIONAL OFFICERS.

Sexual battery by correctional personnel, §97-3-104.

COTTON.

Robbery.

Cotton receipts, §97-3-83.

COUNSELORS.

Fondling of child or vulnerable person, §97-5-23.

Sexual battery, §§97-3-95 to 97-3-104.

COUNTIES.

Impersonating county officer or employee, §§97-7-43, 97-7-44.

COURTS.

Assault and battery.

Judges and court system personnel.

Assault upon, §97-3-7.

Picketing or demonstrating near residence of court officer, §97-9-67.

Public records and papers.

Stealing, concealing, destroying, etc., §97-9-3.

CRIMES.

Abortion, §§97-3-3 to 97-3-5.

Advocating violent overthrow of government, §97-7-71.

Aggravated assault, §97-3-7.

Aggravated domestic violence, §97-3-7.

Alcoholic beverages.

Adult allowing party at private residence or private premises where minor obtains alcoholic beverages, §97-5-49.

Assault, §97-3-7.

Assisted suicide, §97-3-49.

Babies, buying or selling, §97-3-52.

Blackmail, §97-3-81.

Bombs.

Drive-by bombings, §§97-3-109 to 97-3-111.

Bribery.

Judge, bribing, §97-9-116.

Capitol complex, §§97-7-7, 97-7-9.

Carjacking, §§97-3-113 to 97-3-117.

Champerty and maintenance, §§97-9-11 to 97-9-23.

Child abuse and neglect.

Contributing to the neglect or delinquency of a child, §97-5-39.

Felonious and/or battery of a child, §97-5-39.

CRIMES —Cont'd

Child abuse and neglect —Cont'd

Reports of.

Sex crimes against children, mandatory reporting, §97-5-51.

Classification of crimes of violence, §97-3-2.

Court forms and legal process.

Sell or distribution of simulated legal documents, §97-9-1.

Crimes of violence, defined, §97-3-2.

Criminal sexual assault protection order.

Sexual battery conviction.

Violation of order, §97-3-101.

Statutory rape conviction.

Violation of order, §97-3-65.

Custodial interference, §97-3-51.

Desertion and nonsupport, §§97-5-1, 97-5-3.

Domestic violence.

Violation of protective order, §97-3-7.

Drive-by bombings, §§97-3-109 to 97-3-111.

Drive-by shootings, §§97-3-109 to 97-3-111.

Dual prosecution for attempts and committed offense, §97-1-9.

Enticing children for illegal and immoral purposes, §§97-5-5, 97-5-7.

Human trafficking generally, §§97-3-54 to 97-3-54.13.

Escape.

General provisions, §§97-9-25 to 97-9-49.

Execution of judgments.

Refusal to point out property subject to seizure, §97-9-71.

Removal of levied property without authority, §97-9-69.

Exploitation of children, §§97-5-31 to 97-5-37.

Extortion, §97-3-82.

False confinement.

Sending sane person to psychiatric facility, §97-3-13.

False identification, §97-9-79.

Federal or state donated food commodities.

Obtaining fraudulently or unauthorized disposition, §97-7-41.

Firearms and other weapons.

Drive-by shootings, §§97-3-109 to 97-3-111.

CRIMES —Cont'd

Flag desecration, §97-7-39.

Fondling.

Child or vulnerable person, §97-5-23.

Student by school employee, §97-5-24.

Grand jury.

Disclosing facts relating to indictment,
§97-9-53.

Hazing, §97-3-105.

Homicide.

General provisions, §§97-3-15 to
97-3-47.

Human trafficking, §§97-3-54 to
97-3-54.13.

Identification.

False identification, §97-9-79.

Involuntary manslaughter, §§97-3-25,
97-3-33, 97-3-35.

Judge, bribing, §97-9-116.

Kidnapping, §§97-3-1, 97-3-53.

Abduction for purposes of marriage,
§97-3-1.

Legislature.

General provisions, §§97-7-45 to
97-7-57.

Libel, §§97-3-55, 97-3-57.

Manslaughter.

General provisions, §§97-3-25 to
97-3-47.

Mayhem, §97-3-59.

Military affairs.

Failure to report for active duty,
§97-7-59.

Public drill or parade without special
license, §97-7-61.

Obstruction of justice, §§97-9-101 to
97-9-129.

**Obstruction of legislative
government**, §§97-7-45 to 97-7-57.

Perjury.

Generally, §§97-9-59 to 97-9-63.

Picketing.

Interfering with access to government
buildings, §97-7-63.

**Poisoning with intent to kill or
injure**, §§97-3-61, 97-3-63.

Pool rooms or billiard halls.

Allowing minors on premises,
§97-5-11.

Pregnant woman.

Intentional injury to, §97-3-37.

Property taxes.

Assessments, §§97-7-1 to 97-7-5.

CRIMES —Cont'd

Protective orders.

Criminal sexual assault protection
order.

Sexual battery conviction.

Violation of order, §97-3-101.

Statutory rape conviction.

Violation of order, §97-3-65.

Public officers and employees.

Conspiracy to prevent holding public
office or discharging duties,
§§97-7-17, 97-7-19.

Public records.

Court records and public papers.

Stealing, concealing, destroying, etc.,
§97-9-3.

Recordation of documents.

False instrument offered for recording.

Public servants.

Offering false instruments for
recording against public
servants, §97-7-73.

**Refrigerators and box-type
containers.**

Abandonment without removing
latches, §97-5-9.

Resisting or obstructing arrest,
§97-9-73.

Resisting service of process, §97-9-75.

Robbery, §§97-3-73 to 97-3-83.

Sex crimes against children.

Mandatory reporting, §97-5-51.

Sexual battery, §§97-3-95 to 97-3-104.

Sexual involvement of school

employees with student, §97-5-24.

Simple assault, §97-3-7.

Stalking, §97-3-107.

State of Mississippi.

Conspiracy to defraud state, §§97-7-11
to 97-7-15.

Subversive activities.

Advocating violent overthrow of
government, §97-7-71.

**Supplemental nutritional assistance
program (SNAP).**

Fraudulent use of food coupons,
§97-7-42.

Telephones and telegraphs.

Destroying, injuring, etc., licensed
communication systems, §97-7-31.

Terrorism.

Making terroristic threats, §97-7-75.

Treason, §§97-7-67 to 97-7-71.

Trees and timber, §§97-3-89 to 97-3-93.

Unborn child.

Buying or selling or offering to buy or
sell, §97-3-52.

CRIMES —Cont'd

War.

Destroying, injuring, tampering with property to hinder war efforts, §97-7-29.

Wills or codicils.

Alteration, destruction or secretion, §97-9-77.

CRIMES OF VIOLENCE, §97-3-2.

CRIMINAL FORFEITURES.

Drive-by shootings or bombings.

Seizure of motor vehicles, §§97-3-110, 97-3-111.

CUSTODIAL INTERFERENCE,

§97-3-51.

D

DAMAGES.

Human trafficking.

Actions for actual and punitive damages, §97-3-54.6.

Punitive damages.

Human trafficking.
Actions for actual and punitive damages, §97-3-54.6.

DAY CARE CENTERS.

Sex crimes against minors, mandatory reporting, §97-5-51.

DEADLY FORCE.

Justifiable homicide, §97-3-15.

DEATH PENALTY.

Bribery.

Compounding or concealing crime, §97-9-7.

Capital murder and other capital crimes, §97-3-21.

Treason, §97-7-67.

DEFAMATION.

Criminal libel, §§97-3-55, 97-3-57.

DEFENSES.

Criminal libel.

Truth as defense, §97-3-57.

Human trafficking.

Enterprise liability, §97-3-54.1.

Undercover operatives.

Use of undercover operatives not defense, §97-3-54.5.

Victims of human trafficking, §§97-3-54.1, 97-3-54.6.

Libel.

Criminal libel, §97-3-57.

DEFENSES —Cont'd

Rape.

Statutory rape, §97-3-65.

Sexual battery, §97-3-99.

Statutory rape, §97-3-65.

DEFENSIVE FORCE.

Justifiable homicide, §97-3-15.

DEFINED TERMS.

Act.

Human trafficking, §97-3-54.4.

Actor.

Human trafficking, §97-3-54.4.

Adult.

Adult allowing party at private residence or private premises where minor obtains alcoholic beverages, §97-5-49.

Alcoholic beverage.

Adult allowing party at private residence or private premises where minor obtains alcoholic beverages, §97-5-49.

Beer.

Adult allowing party at private residence or private premises where minor obtains alcoholic beverages, §97-5-49.

Benefit.

Obstruction of justice, §97-9-101.

Blackmail.

Human trafficking, §97-3-54.4.

Bodily harm.

Felonious abuse and/or battery of a child, §97-5-39.

Caretaker.

Mandatory reporting of sex crimes against children, §97-5-51.

Carjacking, §97-3-115.

Child.

Abortion, §97-3-4.

Exploitation of children, §97-5-31.

Felonious abuse and/or battery of a child, §97-5-39.

Interstate removal by noncustodial parent or relative, §97-3-51.

Clergy member.

Mandatory reporting of sex crimes against children, §97-5-51.

Coerce.

Human trafficking, §97-3-54.4.

Coercion.

Human trafficking, §97-3-54.4.

Commercial image processor.

Mandatory reporting of sex crimes against children, §97-5-51.

DEFINED TERMS —Cont'd

Commercial sexual activity.

Human trafficking, §97-3-54.4.

Computer.

Exploitation of children, §97-5-31.

Course of conduct.

Stalking, §97-3-107.

Court order.

Interstate removal of child by
noncustodial parent or relative,
§97-3-51.

Credible threat.

Stalking, §97-3-107.

Crime of violence, §97-3-2.

Dating relationship.

Domestic violence, §97-3-7.

Dwelling.

Justifiable homicide, §97-3-15.

Enterprise.

Human trafficking, §97-3-54.4.

Felon.

Justifiable homicide, §97-3-15.

Financial harm.

Human trafficking, §97-3-54.4.

Forced labor or services.

Human trafficking, §97-3-54.4.

Government.

Obstruction of justice, §97-9-101.

Governmental function.

Obstruction of justice, §97-9-101.

Harm.

Obstruction of justice, §97-9-101.

Health care practitioner.

Mandatory reporting of sex crimes
against children, §97-5-51.

Juror.

Obstruction of justice, §97-9-101.

Labor.

Human trafficking, §97-3-54.4.

Light spirit product.

Adult allowing party at private
residence or private premises
where minor obtains alcoholic
beverages, §97-5-49.

Light wine.

Adult allowing party at private
residence or private premises
where minor obtains alcoholic
beverages, §97-5-49.

Maintain.

Human trafficking, §97-3-54.4.

Mandatory reporter.

Mandatory reporting of sex crimes
against children, §97-5-51.

Mentally defective person.

Sexual battery, §97-3-97.

DEFINED TERMS —Cont'd

Mentally incapacitated person.

Sexual battery, §97-3-97.

Minors.

Adult allowing party at private
residence or private premises
where minor obtains alcoholic
beverages, §97-5-49.

Human trafficking, §97-3-54.4.

Motor vehicle.

Carjacking, §97-3-115.

Murder, §97-3-19.

Obtain.

Extortion, §97-3-82.

Human trafficking, §97-3-54.4.

Official proceeding.

Obstruction of justice, §97-9-101.

Party.

Adult allowing party at private
residence or private premises
where minor obtains alcoholic
beverages, §97-5-49.

Pecuniary damages.

Human trafficking, §97-3-54.4.

Physical evidence.

Obstruction of justice, §97-9-101.

Physically helpless person.

Sexual battery, §97-3-97.

Private premises.

Adult allowing party at private
residence or private premises
where minor obtains alcoholic
beverages, §97-5-49.

Private residence.

Adult allowing party at private
residence or private premises
where minor obtains alcoholic
beverages, §97-5-49.

Producing.

Exploitation of children, §97-5-31.

Property.

Extortion, §97-3-82.

Obstruction of justice, §97-9-101.

Property of another.

Extortion, §97-3-82.

Public official.

Extortion, §97-3-82.

Public servant.

Obstruction of justice, §97-9-101.

Reasonable person.

Stalking, §97-3-107.

Renders criminal assistance.

Obstruction of justice, §97-9-103.

Serious bodily harm.

Felonious abuse and/or battery of a
child, §97-5-39.

DEFINED TERMS —Cont'd

Serious harm.

Human trafficking, §97-3-54.4.

Service.

Human trafficking, §97-3-54.4.

Sex crime against a minor.

Mandatory reporting of sex crimes
against children, §97-5-51.

Sexual explicit conduct.

Exploitation of children, §97-5-31.

Sexual intercourse.

Rape, §97-3-65.

Sexually-explicit performance.

Human trafficking, §97-3-54.4.

Sexually oriented material.

Human trafficking, §97-3-54.4.

Sexual penetration.

Sexual battery, §97-3-97.

Simulated.

Exploitation of children, §97-5-31.

Strangle.

Domestic violence, §97-3-7.

Teaching or child care provider.

Mandatory reporting of sex crimes
against children, §97-5-51.

Testimony.

Obstruction of justice, §97-9-101.

This act.

Human trafficking, §97-3-54.4.

Threat.

Obstruction of justice, §97-9-101.

Trafficked person.

Human trafficking, §97-3-54.4.

Unborn child, §97-3-37.

Venture.

Human trafficking, §97-3-54.4.

Victim.

Human trafficking, §97-3-54.6.

Violent crime.

Accessories after the fact, §97-1-5.

Visual depiction.

Exploitation of children, §97-5-31.

When necessarily committed.

Justifiable homicide, §97-3-15.

Wine.

Adult allowing party at private
residence or private premises
where minor obtains alcoholic
beverages, §97-5-49.

DEMONSTRATIONS.

**Interfering with access to
government buildings, §97-7-63.**

**Judges, jurors, witnesses or court
officers, §97-9-67.**

DESERTION AND NONSUPPORT.

Abandonment of child under age six,
§97-5-1.

Child under age sixteen, §97-5-3.

Criminal desertion or nonsupport,
§97-5-3.

**DISABILITIES, INDIVIDUALS
WITH.**

**Fondling of child or vulnerable
person, §97-5-23.**

DISCIPLINE OF CHILDREN.

**Felonious abuse and/or battery of
child.**

Permissible discipline, §97-5-39.

DISCRIMINATION.

**Human trafficking and commercial
sexual exploitation victims.**

Funding of victim service providers.

Discrimination prohibited,
§97-3-54.12.

DISORDERLY CONDUCT.

Legislature.

Disturbing proceedings, §97-7-47.

DISSOLUTION.

Human trafficking.

Enterprise liability.

Injunctions and other relief,
§97-3-54.6.

DISTRICT ATTORNEYS.

Assault upon, §97-3-7.

Human trafficking.

Forfeitures.

Process for forfeiture, §97-3-54.7.

DOMESTIC VIOLENCE.

Aggravated domestic violence,
§97-3-7.

Multiple convictions, §97-3-7.

Protective orders.

Violation.

Criminal protection orders, §97-3-7.

Simple domestic violence.

Assault offense, §97-3-7.

Strangling.

Aggravated domestic violence, §97-3-7.

Suspended sentences.

Counseling or treatment, §97-3-7.

**DRIVE-BY BOMBINGS, §§97-3-109 to
97-3-111.**

Conduct constituting, §97-3-109.

Forfeiture of motor vehicles,
§§97-3-110, 97-3-111.

Juvenile offenders, §97-3-110.

DRIVE-BY BOMBINGS —Cont'd

Sentencing, §97-3-109.

DRIVE-BY SHOOTINGS, §§97-3-109 to 97-3-111.

Conduct constituting, §97-3-109.

Forfeiture of motor vehicles, §§97-3-110, 97-3-111.

Juvenile offenders, §97-3-110.

Sentencing, §97-3-109.

DRIVING UNDER THE INFLUENCE.

Manslaughter, §§97-3-25, 97-3-47.

DRUG INDUCED RAPE, §97-3-65.

DUTY TO RETREAT.

Justifiable homicide, §97-3-15.

E

ELUDING LAW ENFORCEMENT OFFICER.

In motor vehicle, §97-9-72.

EMERGENCY MEDICAL SERVICES.

Assault upon personnel, §97-3-7.

EMERGENCY MEDICAL TECHNICIANS.

Assault upon personnel, §97-3-7.

ENCOURAGEMENT OF LITIGATION, §§97-9-11 to 97-9-23.

ENTRAPMENT.

Law enforcement officer as co-conspirator.

Unavailability of entrapment as defense, §97-1-1.

ESCAPE, §§97-9-25 to 97-9-49.

Bribery.

Accepting bribe to permit escape, §97-9-39.

Inmates and prisoners.

Accepting bribe to permit escape, §97-9-39.

Aiding escape of felons, §97-9-29.

Aiding escapes from law enforcement officers, §97-9-33.

Aiding prisoners other than felons, §97-9-31.

Capture after term expires and imprisoned until tried, §97-9-43.

Concealing or harboring escaped prisoner, §97-9-41.

Conveying articles useful for escape, §§97-9-27, 97-9-31.

ESCAPE —Cont'd

Inmates and prisoners —Cont'd

Permitting escape, §97-9-35.

Prison convict serving less than life term, §§97-9-45, 97-9-47.

Private persons having custody of prisoner arrested on suspicion, §97-9-37.

Refusal of officer, jailer, etc., to arrest or confine, §97-9-39.

Refusal to receive prisoners at jail, §97-9-39.

Rescuing prisoners from custody, §97-9-29.

State institutions, §97-9-25.

Suffering an escape, §97-9-39.

Wilful failure to return to jail after being entrusted to leave, §§97-9-45, 97-9-49.

Jails and jailers.

Refusal to receive prisoners at jail, §97-9-39.

Recapture after term expires, §97-9-43.

State mental institutions.

Escape of inmates, §97-9-25.

EUTHANASIA.

Assisted suicide, §97-3-49.

EVIDENCE.

Bribery.

Commercial bribery, §97-9-10.

Child abuse and neglect.

Felonious abuse and/or battery of a child.

Admissibility of physician's report, §97-5-39.

Contributing to the neglect or delinquency of a child.

Admissibility of physician's report, §97-5-39.

Fraud and deceit.

False statements to federal authorities as to denial of constitutional rights.

Corroboration requirement, §§97-7-35, 97-7-37.

Obstruction of justice.

Tampering with physical evidence, §97-9-125.

Rape.

Corroboration requirement, §97-3-69.

Victim's past sexual history, §§97-3-68, 97-3-69.

Tampering with physical evidence, §97-9-125.

EVIDENCE —Cont'd

Treason.

Corroboration requirement, §97-7-69.

EXECUTION OF JUDGMENTS.

Failure to point out property subject to seizure, §97-9-71.

Removal of levied property without authority, §97-9-69.

EXPLOITATION OF CHILDREN,

§§97-5-31 to 97-5-37.

Construction with other criminal statutes, §97-5-37.

Definitions, §97-5-31.

Penalties, §97-5-35.

Prohibited conduct, §97-5-33.

EXPLOSIVES.

Murder by detonation of bomb or explosive device, §97-3-19.

EXTORTION, §97-3-82.

Blackmail, §97-3-81.

Public officials, §97-3-82.

Reputation.

Definition of property includes reputation, §97-3-82.

F

FALSE PERSONATION.

Public officer or employee, §§97-7-43, 97-7-44.

FALSE SWEARING.

Federal authorities as to denial of constitutional rights, §§97-7-35, 97-7-37.

FAMILY PROTECTION SPECIALISTS.

Assault upon, §97-3-7.

FAMILY THERAPISTS.

Sexual battery, §§97-3-95 to 97-3-104.

FELONY HOMICIDE, §97-3-27.

FETUS.

Human being includes unborn child at every stage of gestation, §97-3-37.

Intentionally injuring pregnant woman.

Injury resulting to fetus, §97-3-37.

FINES.

Abortion.

Advertisement or sale of drugs or instruments, §97-3-5.

FINES —Cont'd

Accessories after the fact, §97-1-5.

Aggravated assault, §97-3-7.

Arrests.

Resisting or obstructing arrest, §97-9-73.

Attempts, §97-1-7.

Baby buying or selling, §97-3-52.

Bailiffs.

Contempt.

Conversing with jurors, §97-9-57.

Bribery.

Arbitrators, §97-9-5.

Commercial bribery, §97-9-10.

Escape of prisoners.

Accepting bribe to permit escape, §97-9-39.

Judges, §97-9-116.

Jurors, §97-9-5.

Referees, §97-9-5.

Capital murder.

Conspiracy to commit, §97-1-1.

Capitol complex.

Defacing capitol building, §97-7-9.

Used for sleeping-rooms, §97-7-7.

Carjacking, §97-3-117.

Champerty and maintenance.

Failure of witness to testify, §97-9-21.

Child abuse and neglect, reports of.

Condoning child abuse, §97-5-40.

Sex crimes against minors, mandatory reporting, §97-5-51.

Conspiracy, §97-1-1.

Prevent holding public office or discharging duties, §§97-7-17, 97-7-19.

Contributing to the neglect or delinquency of a child, §97-5-39.

Court forms and legal process.

Sell or distribution of simulated legal documents, §97-9-1.

Custodial interference, §97-3-51.

Desertion and nonsupport.

Child under age sixteen, §97-5-3.

Disorderly conduct.

Disturbing legislative proceedings, §97-7-47.

Domestic violence, §97-3-7.

Violation of protective order, §97-3-7.

Drive-by shootings or bombings, §97-3-109.

Enticing child for concealment, prostitution or marriage, §97-5-5.

Enticing child for employment, §97-5-7.

FINES —Cont'd

Escape.

Aiding escapes from officers, §97-9-33.

Aiding prisoners other than felons, §97-9-31.

Concealing or harboring escaped prisoner, §97-9-41.

Conveying articles useful for escape, §97-9-31.

Inmates of state institutions, §97-9-25.

Permitting escape, §97-9-35.

Private persons having custody of prisoner arrested on suspicion, §97-9-37.

Refusal of officer, jailer, etc., to arrest or confine, §97-9-39.

Execution of judgments.

Failure to point out property subject to seizure, §97-9-71.

Removal of levied property without authority, §97-9-69.

Exploitation of children, §97-5-35.

Extortion, §97-3-82.

False confinement.

Sending sane person to psychiatric facility, §97-3-13.

False identification, §97-9-79.

False personation.

Public officer or employee, §§97-7-43, 97-7-44.

Flag desecration, §97-7-39.

Fondling of child or vulnerable person, §97-5-23.

Food donations.

Federal or state donated food commodities.

Obtaining fraudulently or unauthorized disposition, §97-7-41.

Fraud and deceit.

Conspiracy to defraud state, §§97-7-11 to 97-7-15.

False statements to federal authorities as to denial of constitutional rights, §§97-7-33 to 97-7-37.

Fraudulent statements and representations, §97-7-10.

Grand jury.

Disclosing facts relating to indictment, §97-9-53.

Hazing, §97-3-105.

Human trafficking, §97-3-54.1.

Impersonation.

Public officer or employee, §§97-7-43, 97-7-44.

FINES —Cont'd

Inducing minor to commit felony, §97-1-6.

Intimidation.

Obstruction of justice, §97-9-55.

Judges, bribing, §97-9-116.

Legislature.

Disturbing proceedings, §97-7-47.

Manslaughter, §97-3-25.

Military affairs.

Failure to report for active duty, §97-7-59.

Public drill or parade without special license, §97-7-61.

Murder.

Conspiracy to commit, §97-1-1.

Obscenity.

Dissemination of sexually oriented material to minors, §97-5-27.

Public display of sexually oriented materials, §97-5-29.

Obstruction of justice, §97-9-129.

Picketing.

Demonstrating near courthouse or residence of court officers, §97-9-67.

Interfering with access to government buildings, §97-7-63.

Pool rooms or billiard halls.

Allowing minors on premises, §97-5-11.

Pregnant woman.

Intentional injury to, §97-3-37.

Property tax collection.

List of taxable property, §§97-7-1 to 97-7-5.

Public records.

Court records and public papers.

Stealing, concealing, destroying, etc., §97-9-3.

Rape.

Statutory rape, §97-3-65.

Recordation of documents.

False instrument offered for recording.

Public servants.

Offering false instruments for recording against public servants, §97-7-73.

Resisting or obstructing arrest, §97-9-73.

Sex crimes against minors, mandatory reporting, §97-5-51.

Sexual battery, §97-3-101.

Simple assault, §97-3-7.

Stalking, §97-3-107.

FINES —Cont'd

Statutory rape, §97-3-65.

Supplemental nutritional assistance program (SNAP).

Fraudulent use of food coupons,
§97-7-42.

Telegraph and telephone companies.

Destroying, injuring, etc., licensed
communication systems, §97-7-31.

Threats and intimidation.

By letter or notice, §97-3-85.

Whitecapping, §97-3-87.

Trees and timber.

Cutting and rafting from state lands,
§97-7-65.

Tree spiking, §97-3-89.

**Unborn child, buying or selling or
offering to buy or sell**, §97-3-52.

Wills.

Alteration, destruction or secretion,
§97-9-77.

FIREARMS AND OTHER WEAPONS.

Carrying.

Church protection act.

Security program to allow persons to
carry firearms in church for
protection of congregation.

Deadly force, justifiable homicide,
§97-3-15.

Church protection act.

Security program to allow persons to
carry firearms in church for
protection of congregation.

Deadly force, justifiable homicide,
§97-3-15.

Drive-by shootings, §§97-3-109 to
97-3-111.

Seizure of firearms, §97-3-110.

**Felonious abuse and/or battery of a
child.**

Deadly weapon used on child,
§97-5-39.

Human trafficking.

Forfeitures, §97-3-54.7.

Robbery.

Use of deadly weapon, §97-3-79.

**FIREFIGHTERS AND FIRE
DEPARTMENTS.**

Assault upon fireman, §97-3-7.

FLAG DESECRATION, §97-7-39.

FLAGS.

Desecration of flag, §97-7-39.

**FLEEING OR ELUDING LAW
ENFORCEMENT OFFICER.**

In motor vehicle, §97-9-72.

FONDLING.

Child or vulnerable person, §97-5-23.

Student by school employee,
§97-5-24.

FOOD DONATIONS.

**Federal or state donated food
commodities.**

Obtaining fraudulently or
unauthorized disposition,
§97-7-41.

FORCE.

**Conspiracy to prevent holding
public office or discharging
duties**, §97-7-17.

Deadly force.

Justifiable homicide, §97-3-15.

Defensive force.

Us of, §97-3-15.

FOREIGN CORPORATIONS.

Certificate of authority.

Revocation.

Human trafficking.

Enterprise liability.

Injunctions and other relief,
§97-3-54.6.

FORFEITURES.

Human trafficking.

Assets, forfeiture and disposition of
proceeds, §97-3-54.7.

FORNICATION.

School employee and student,
§97-5-24.

Teacher and pupil, §97-5-24.

FRATERNITIES.

Hazing, §97-3-105.

FRAUD.

Conspiracy to defraud state,
§§97-7-11 to 97-7-15.

Constitutional rights.

False statements to federal
authorities, §§97-7-33 to 97-7-37.

**Federal or state donated food
commodities.**

Obtaining fraudulently or
unauthorized disposition,
§97-7-41.

**Fraudulent statements and
representations**, §97-7-10.

FRAUD —Cont'd

Legislature.

Altering bills or resolutions, §§97-7-49, 97-7-51.

Property tax assessments.

False list of taxable property, §97-7-5.

Supplemental nutritional assistance program (SNAP).

Fraudulent use of food coupons, §97-7-42.

Wills.

Alteration, destruction or secretion, §97-9-77.

FUGITIVES.

Escape, §§97-9-25 to 97-9-49.

G

GRAND JURY.

Indictments.

Disclosing facts, §97-9-53.

GUARDIANSHIPS AND CONSERVATORSHIPS.

Fondling of child or vulnerable person, §97-5-23.

Sexual battery, §§97-3-95 to 97-3-104.

GUILTY PLEAS.

Rape.

Assault with intent to ravish, §97-3-71.

H

HABITUAL OR REPEAT OFFENDERS.

Carjacking, §97-3-117.

Court forms and legal process.

Sell or distribution of simulated legal documents, §97-9-1.

Desertion and nonsupport.

Child under age sixteen, §97-5-3.

Exploitation of children, §97-5-35.

Fondling of child or vulnerable person, §97-5-23.

Hazing, §97-3-105.

Sexual battery, §97-3-101.

Supplemental nutritional assistance program (SNAP).

Fraudulent use of food coupons, §97-7-42.

HARASSMENT.

Child sexual abuse.

Protection of children from parents convicted of felony child sexual abuse, §97-5-42.

Stalking, §97-3-107.

HAZING, §97-3-105.

HEALTH.

Public health personnel.

Assault upon personnel, §97-3-7.

HEALTH CARE PROVIDERS.

Children, sex crimes against, mandatory reporting, §97-5-51.

Sex crimes against minors, mandatory reporting, §97-5-51.

HEARINGS.

Human trafficking.

Forfeitures.

Procedure for forfeiture, §97-3-54.7.

HEAT OF PASSION KILLING.

Manslaughter, §§97-3-25, 97-3-35.

HITMEN.

Criminal prosecution as principals, §97-3-19.

HOMICIDE, §§97-3-15 to 97-3-47.

Capital murder, §§97-3-19, 97-3-21.

Child homicide.

Conduct constituting, §97-3-25.

Death following duels fought out of state, §97-3-23.

Excusable homicide, §97-3-17.

Justifiable homicide, §97-3-15.

Manslaughter.

Child homicide.

Conduct constituting, §97-3-25.

Criminal negligence, §§97-3-25, 97-3-39 to 97-3-43.

Culpable negligence, §97-3-47.

Driving while intoxicated, §97-3-47.

Drunken doctor or medical personnel, §97-3-39.

Felony murder, §97-3-27.

Involuntary manslaughter, §§97-3-25, 97-3-33, 97-3-35.

Misdemeanor homicide, §97-3-29.

Negligent operation of motor vehicle, §97-3-47.

Overloading boat or vessel, §§97-3-25, 97-3-41.

Owner of dangerous animal, §97-3-45.

HOMICIDE —Cont'd

Manslaughter —Cont'd

Sentencing, §97-3-25.

Steamboat or railroad engine.

Ignorant or negligent management,
§§97-3-25, 97-3-43.

Tree spiking, §97-3-93.

Unborn child, §97-3-37.

Unnecessary force to repel felony or
unlawful act, §97-3-31.

Murder.

Attempted murder, §97-1-7.

Capital murder, §97-3-19.

Conspiracy to commit, §97-1-1.

Penalty, §97-3-21.

Commission of a felony, §97-3-19.

Conduct constituting, §97-3-19.

Conspiracy to commit murder, §97-1-1.

Dueling.

Death following duels fought out of
state, §97-3-23.

Elected official, §97-3-19.

Felonious assault and battery,
§97-3-19.

Felony murder, §97-3-19.

First degree murder, §97-3-19.

Penalty, §97-3-21.

Killing by bomb or explosive device,
§97-3-19.

Killing peace officer or fireman,
§97-3-19.

Penalty, §97-3-21.

Second degree murder, §97-3-19.

Penalty, §97-3-21.

Retreat.

Duty to retreat, §97-3-15.

Self-defense.

Justifiable homicide, §97-3-15.

HOSPITALS AND OTHER HEALTH CARE FACILITIES.

**Sex crimes against minors,
mandatory reporting, §97-5-51.**

HUMAN SERVICES DEPARTMENT.

Family protection specialists.

Assault upon, §97-3-7.

**HUMAN TRAFFICKING, §§97-3-54 to
97-3-54.13.**

Aiding and abetting, §97-3-54.3.

Commercial sexual activity.

Subjecting to, recruiting, enticing, etc,
§97-3-54.1.

Conspiring to violate act, §97-3-54.3.

Damages.

Actions for actual and punitive
damages, §97-3-54.6.

HUMAN TRAFFICKING —Cont'd

Definitions, §97-3-54.4.

Victim, §97-3-54.6.

Enterprise liability, §97-3-54.1.

Definition of enterprise, §97-3-54.4.

Injunctions and other relief,
§97-3-54.6.

Forfeitures, §97-3-54.7.

Injunctions, §97-3-54.6.

Involuntary servitude.

Procuring involuntary servitude,
§97-3-54.1.

Minors.

Procuring sexual servitude of a minor,
§97-3-54.1.

Passports.

Destruction, concealment or
confiscation for purpose of
preventing freedom of movement
or ability to travel, §97-3-54.2.

Prison terms, §§97-3-54.1, 97-3-54.2.

Prohibited acts, §§97-3-54.1, 97-3-54.2.

Reports.

Minor as trafficked person, reasonable
cause to suspect, §97-3-54.1.

Short title of act, §97-3-54.

**Statewide human trafficking
coordinator.**

Duties, §97-3-54.9.

Position created, §97-3-54.9.

Undercover operatives.

Use not defense to offense, §97-3-54.5.

Victims.

Committee to coordinate state's
response to victims, §97-3-54.11.

Confidentiality of identity, §97-3-54.6.

Defense to human trafficking,
§§97-3-54.1, 97-3-54.6.

Funding of victim service providers.

Administration of fund, §97-3-54.11.

Committee to coordinate state's
response to victims, §97-3-54.11.

Confidentiality provisions applicable,
§97-3-54.13.

Creation of fund, §97-3-54.11.

Disclosure of physical location of
shelter, §97-3-54.13.

Discrimination prohibited,
§97-3-54.12.

Distribution of money, §97-3-54.11.

Eligibility requirements for
distributions, §97-3-54.12.

Establishment of program,
§97-3-54.10.

Private funding permissible,
§§97-3-54.11, 97-3-54.12.

HUMAN TRAFFICKING —Cont'd

Victims —Cont'd

- Funding of victim service providers —Cont'd
 - Qualification for funds, §97-3-54.12.
 - Rules promulgation, §97-3-54.10.
- Relief for victims of human trafficking fund, §97-3-54.8.
- Restitution, §97-3-54.6.

HUSBAND AND WIFE.

Drug induced rape, §97-3-65.

Rape.

Drug induced rape, §97-3-65.

Sexual battery, §97-3-99.

I

IDENTIFICATION.

False identification, §97-9-79.

IMMUNITY.

Bribery.

Commercial bribery, §97-9-10.

Champerly and maintenance.

Witness immunity for compelled testimony, §97-9-21.

School employees.

Sexual involvement of school personnel with student.

Persons reporting, §97-5-24.

Sexual involvement of school personnel with student.

Persons reporting, §97-5-24.

IMPERSONATION.

Public officer or employee, §§97-7-43, 97-7-44.

INCEST.

Sexual battery, §§97-3-95 to 97-3-104.

INDICTMENTS.

Accessories after the fact, §97-1-5.

Accessories before the fact, §97-1-3.

Disclosing facts relating to indictment, §97-9-53.

INFLUENCE PEDDLING.

Legislature, §97-7-57.

INFORMANTS.

Murder of informant, §97-3-19.

INJUNCTIONS.

Human trafficking, §97-3-54.6.

Stalking, §97-3-107.

INTENT.

Poisoning with intent to kill or injure, §§97-3-61, 97-3-63.

INTENT —Cont'd

Rape.

Assault with intent to ravish, §97-3-71.

Tree spiking.

Tampering with intent to injure or harass owner, §97-3-89.

INTERFERENCE WITH INVESTIGATIONS.

Obstruction of justice, generally, §97-9-55.

INTIMIDATION.

Blackmail, §97-3-81.

Extortion, §97-3-82.

Hazing, §97-3-105.

Judges, §97-9-55.

Jurors, §§97-9-55, 97-9-121.

Obstruction of justice, §97-9-55.

Officers of the court, §97-9-55.

Robbery.

Threatening letter demanding money or property, §97-3-81.

Threat to injure person or relative at another time, §97-3-77.

Stalking, §97-3-107.

Threats by letter or notice, §§97-3-85, 97-3-89.

Tree spiking, §§97-3-89 to 97-3-93.

Whitecapping, §§97-3-87, 97-3-89.

Witnesses, §§97-9-55, 97-9-113, 97-9-115.

Rendering criminal assistance, elements of offense, §97-9-103.

Tampering with physical evidence, §97-9-125.

INVOLUNTARY MANSLAUGHTER.

Killing in the heat of passion, §97-3-35.

Killing trespasser, §97-3-33.

Sentencing, §97-3-33.

INVOLUNTARY SERVITUDE.

Human trafficking, §§97-3-54 to 97-3-54.13.

J

JAILS.

Assault upon officers, §97-3-7.

Prison labor.

Work release.

Willful failure to return to jail, §97-9-49.

JAILS —Cont'd

Work release.

Willful failure to return to jail,
§97-9-49.

JUDGES.

Assault and battery.

Judges and court system personnel.

Assault upon, §97-3-7.

Bribing a judge, §97-9-116.

Intimidation to obstruct justice,
§97-9-55.

Picketing or demonstrating.

Near residence, §97-9-67.

JURISDICTION.

Child abuse and neglect.

Felonious abuse and/or battery of a
child.

Criminal prosecution, §97-5-39.

**Contributing to the neglect or
delinquency of a child.**

Criminal prosecution, §97-5-39.

JURY AND JURY TRIAL.

Bribery.

Bribing juror, §§97-9-5, 97-9-117.

Juror receiving bribe, §97-9-119.

Intimidation of juror, §§97-9-55,
97-9-121.

Jury tampering, §97-9-123.

Obstruction of justice.

Bribe receiving by a juror, §97-9-119.

Bribing a juror, §§97-9-5, 97-9-117.

Court officer conversing with juror,
§97-9-57.

Intimidating juror, §§97-9-55,
97-9-121.

Jury tampering, §97-9-123.

**Picketing or demonstrating near
residence of juror, §97-9-67.**

Tampering, §97-9-123.

JUSTIFIABLE HOMICIDE, §97-3-15.

JUVENILE OFFENDERS.

Drive-by bombings.

Seizure of motor vehicle, §§97-3-110,
97-3-111.

Drive-by shootings.

Seizure of motor vehicle, §§97-3-110,
97-3-111.

K

KIDNAPPING, §97-3-53.

Abduction for purposes of marriage,
§97-3-1.

KIDNAPPING —Cont'd

Custodial interference, §97-3-51.

**Murder in commission of
kidnapping, §97-3-19.**

Punishment, §97-3-53.

L

LARCENY.

Robbery, §§97-3-73 to 97-3-83.

LAW ENFORCEMENT OFFICERS.

Assault investigations.

Forms to be used, §97-3-7.

Assault upon, §97-3-7.

Capital murder.

Killing public safety personnel,
§97-3-19.

Conspiracy.

Officer as co-conspirator.

Unavailability of entrapment as
defense, §97-1-1.

**Fleeing or eluding law enforcement
officer in motor vehicle, §97-9-72.**

Human trafficking.

Forfeitures.

Disposition of proceeds, §97-3-54.7.

Recordation of documents.

False instrument offered for recording.

Public servants.

Offering false instruments for
recording against public
servants, §97-7-73.

LEGISLATURE.

Assault upon legislator, §97-3-7.

Attempting to prevent meetings,
§97-7-45.

Bills or resolutions.

Altering after passage, §97-7-51.

Altering before passage, §97-7-49.

Bribery, §§97-7-53, 97-7-55.

Legislative members, §§97-7-53,
97-7-55.

Crimes and offenses.

Obstruction of legislative process,
§§97-7-45 to 97-7-57.

Disturbing proceedings, §97-7-47.

Influence peddling, §97-7-57.

Lobbying.

Influence peddling, §97-7-57.

Preventing meetings, §97-7-45.

LETTERS.

**Threatening letter demanding
money or property, §97-3-81.**

LETTERS —Cont'd

Threats and intimidation by letter or notice, §97-3-85.

LICENSES AND PERMITS.

Human trafficking.

Enterprise liability.

Injunctions and other relief, §97-3-54.6.

Military affairs.

Special license for public drill or parade, §97-7-61.

LIFE IMPRISONMENT WITHOUT PAROLE.

Capital murder, §97-3-21.

LIGHT SPIRIT PRODUCTS.

Adult allowing party at private residence or private premises where minor obtains alcoholic beverages, §97-5-49.

LIGHT WINE AND BEER.

Adult allowing party at private residence or private premises where minor obtains alcoholic beverages, §97-5-49.

Minors.

Adult allowing party at private residence or private premises where minor obtains alcoholic beverages, §97-5-49.

LOBBYISTS AND LOBBYING.

Legislature.

Influence peddling, §97-7-57.

M

MANSLAUGHTER, §§97-3-25 to 97-3-47.

Child homicide.

Conduct constituting, §97-3-25.

Criminal negligence, §§97-3-25, 97-3-39 to 97-3-43.

Culpable negligence, §97-3-47.

Driving while intoxicated, §97-3-47.

Drunken doctor or medical personnel, §97-3-39.

Felony murder, §97-3-27.

Involuntary manslaughter, §§97-3-25, 97-3-33, 97-3-35.

Misdemeanor homicide, §97-3-29.

Negligent operation of motor vehicle, §97-3-47.

Overloading boat or vessel, §§97-3-25, 97-3-41.

MANSLAUGHTER —Cont'd

Owner of dangerous animal, §97-3-45.

Sentencing, §97-3-25.

Steamboat or railroad engine.

Ignorant or negligent management, §§97-3-25, 97-3-43.

Tree spiking, §97-3-93.

Unborn child, §97-3-37.

Unnecessary force to repel felony or unlawful act, §97-3-31.

MARRIAGE.

Abduction for purposes of marriage, §97-3-1.

Enticing child for marriage, §97-5-5.

Human trafficking generally, §§97-3-54 to 97-3-54.13.

MASS MURDER.

Capital murder, §97-3-19.

MAYHEM, §97-3-59.

MENTAL HEALTH.

Fondling of vulnerable person, §97-5-23.

MERCY KILLING.

Assisted suicide, §97-3-49.

MILITARY.

Assault of military personnel, §97-3-7.

MINISTERS.

Sexual battery, §§97-3-95 to 97-3-104.

Fondling of child or vulnerable person, §97-5-23.

MISSISSIPPI CARJACKING ACT, §§97-3-113 to 97-3-117.

MISSISSIPPI CHURCH PROTECTION ACT.

Security program to allow persons to carry firearms in church for protection of congregation.

Deadly force, justifiable homicide, §97-3-15.

MONEY.

Human trafficking.

Forfeitures, §97-3-54.7.

MOTOR VEHICLES.

Drive-by shootings or bombings.

Seizure of motor vehicles, §§97-3-110, 97-3-111.

Forfeiture.

Drive-by shootings or bombings, §§97-3-110, 97-3-111.

MOTOR VEHICLES —Cont'd

Human trafficking.

Forfeitures, §97-3-54.7.

MOTOR VEHICLE THEFT.

Carjacking, §§97-3-113 to 97-3-117.

MUNICIPALITIES.

Impersonating municipal officer or employee, §§97-7-43, 97-7-44.

MURDER, §§97-3-19 to 97-3-23.

Attempted murder, §97-1-7.

Capital murder, §97-3-19.

Conspiracy to commit, §97-1-1.

Penalty, §97-3-21.

Commission of a felony, §97-3-19.

Conduct constituting, §97-3-19.

Conspiracy to commit murder, §97-1-1.

Dueling.

Death following duels fought out of state, §97-3-23.

Elected official, §97-3-19.

Felonious assault and battery, §97-3-19.

Felony murder, §97-3-19.

First degree murder, §97-3-19.
Penalty, §97-3-21.

Killing by bomb or explosive device, §97-3-19.

Killing peace officer or fireman, §97-3-19.

Penalty, §97-3-21.

Second degree murder, §97-3-19.
Penalty, §97-3-21.

N

NATIONAL GUARD.

Assault of member, §97-3-7.

NEGLIGENCE.

Culpable negligence, §§97-3-25, 97-3-47.

Manslaughter.

Negligent operation of vehicle, §§97-3-25, 97-3-47.

NEGOTIABLE INSTRUMENTS.

Human trafficking.

Forfeitures, §97-3-54.7.

Robbery, §97-3-83.

NOTICE.

Criminal forfeitures.

Motor vehicles used in drive-by shootings or bombings, §97-3-111.

O

OBSCENITY AND PORNOGRAPHY.

Child pornography.

Exploitation of children, §97-5-33.

Dissemination of sexually oriented material to minors, §97-5-27.

Human trafficking generally, §§97-3-54 to 97-3-54.13.

Exploitation of children, §97-5-33.

Public display of sexually oriented material, §97-5-29.

OBSTRUCTION OF JUSTICE,

§§97-9-101 to 97-9-129.

Bribing a judge, §97-9-116.

Court officer conversing with juror, §97-9-57.

Definitions, §97-9-101.

Evidence tampering, §97-9-125.

Hindering prosecution.

First degree, §97-9-105.

Rendering criminal assistance.

What constitutes, §97-9-103.

Second degree, §97-9-107.

Intimidating judge, juror, witness, etc., §§97-9-55, 97-9-113, 97-9-115, 97-9-121.

Rendering criminal assistance, elements of offense, §97-9-103.

Judges.

Bribing a judge, §97-9-116.

Jurors.

Bribery.

Bribing a juror, §§97-9-5, 97-9-117.

Receipt of bribe by juror, §97-9-119.

Intimidating a juror, §97-9-121.

Jury tampering, §97-9-123.

Penalties, §97-9-129.

Picketing or demonstrating,

§§97-9-63, 97-9-67.

Retaliation against public servant or witness, §97-9-127.

Tampering with a witness, §97-9-115.

Rendering criminal assistance, elements of offense, §97-9-103.

Tampering with physical evidence, §97-9-125.

Witnesses.

Bribery.

Bribing witness, §97-9-109.

Receipt of bribe by witness, §97-9-111.

Intimidating a witness, §97-9-113.

Rendering criminal assistance, elements of offense, §97-9-103.

OBSTRUCTION OF JUSTICE

—Cont'd

Witnesses —Cont'd

Retaliation against public servant or witness, §97-9-127.

Tampering with a witness, §97-9-115.

P

PARADES.

Court officers.

Restrictions on picketing and parades near residence of court officer, §97-9-67.

Military affairs.

Special license for public drill or parade, §97-7-61.

PARENT AND CHILD.

Alcoholic beverages.

Adult allowing party at private residence or private premises where minor obtains alcoholic beverages, §97-5-49.

Fondling of child or vulnerable person, §97-5-23.

Sexual battery, §§97-3-95 to 97-3-104.

PAROLE.

Good time, forfeiture.

Prison escapees, §97-9-45.

PARTNERSHIPS.

Champerty and maintenance, §§97-9-11 to 97-9-23.

Human trafficking.

Enterprise liability, §97-3-54.1.
Definition of enterprise, §97-3-54.4.
Injunctions and other relief, §97-3-54.6.

PAYMENT FOR PROSECUTION, §§97-9-11 to 97-9-23.

PERJURY, §§97-9-59 to 97-9-63.

Bribery to procure perjury, §97-9-65.

Conduct constituting, §97-9-59.

Obstruction of justice.

Rendering criminal assistance, what constitutes, §97-9-103.

Penalty, §§97-9-61 to 97-9-65.

Subornation of perjury, §97-9-63.

Subornation of perjury, §97-9-63.

PERSONAL PROPERTY.

Human trafficking.

Forfeitures, §97-3-54.7.

PHOTOGRAPHS.

Film processors.

Sex crimes against minors, mandatory reporting, §97-5-51.

PHYSICAL THERAPISTS.

Fondling of child or vulnerable person, §97-5-23.

Sex crimes against minors, mandatory reporting, §97-5-51.

Sexual battery, §§97-3-95 to 97-3-104.

PHYSICIAN-PATIENT PRIVILEGE.

Child abuse and neglect.

Privilege inapplicable, §97-5-39.

PHYSICIANS AND SURGEONS.

Abortion.

Generally, §§97-3-3 to 97-3-5.

Unlicensed, practicing physician, §97-3-3.

Children and minors.

Sex crimes against minors, mandatory reporting, §97-5-51.

Fondling of child or vulnerable person, §97-5-23.

Manslaughter.

Unintentional homicide by drunken doctor, §§97-3-25, 97-3-39.

Privileged communications.

Child abuse and neglect.

Privilege inapplicable, §97-5-39.

Sex crimes against minors, mandatory reporting, §97-5-51.

Sexual battery, §§97-3-95 to 97-3-104.

PICKETING.

Interfering with access to government buildings, §97-7-63.

Judges, jurors, witnesses or court officers, §97-9-67.

POISONING CHILD.

Felonious abuse and/or battery of a child, §97-5-39.

POISONING WITH INTENT TO KILL OR INJURE, §§97-3-61, 97-3-63.

POLICE.

Human trafficking.

Forfeitures.

Disposition of proceeds, §97-3-54.7.

Recording of documents.

False instrument offered for recording.
Public servants.

Offering false instruments for recording against public servants, §97-7-73.

POOL ROOMS.

Allowing minors on premises,
§97-5-11.

PREGNANCY.

Intentional injury to pregnant
woman, §97-3-37.

Miscarriage.

Unlicensed, practicing physician,
§97-3-3.

PRESUMPTIONS.

Children and minors.

Birth of child to minor under 16.
Sex crimes against minor, §97-5-51.

Rape.

Chaste character of victim, §97-3-69.

PRISONS AND PRISONERS.

**Civilians with supervisory or
custodial authority.**

Sexual acts with offenders, prohibited,
§97-3-104.

Correctional officers.

Sexual battery by correctional
personnel, §97-3-104.

Escape of prisoners, §§97-9-25 to
97-9-49.

Murder by prisoner under sentence
of life imprisonment, §97-3-19.

Sexual battery by correctional
personnel, §97-3-104.

PRISON TERMS.

Abduction.

Taking for purposes of marriage,
§97-3-1.

Abortion.

Advertisement or sale of drugs or
instruments, §97-3-5.

Accessories after the fact, §97-1-5.

Advocating violent overthrow of
government, §97-7-71.

Aggravated assault, §97-3-7.

Aggravated domestic violence,
§97-3-7.

Arrests.

Resisting or obstructing arrest,
§97-9-73.

Assisted suicide, §97-3-49.

Attempts.

Murder, §97-1-7.

Baby buying or selling, §97-3-52.

Bailiffs.

Contempt.
Conversing with jurors, §97-9-57.

Bribery.

Arbitrators, §97-9-5.

PRISON TERMS —Cont'd

Bribery —Cont'd

Commercial bribery, §97-9-10.
Compounding or concealing crime,
§§97-9-7, 97-9-9.

Judges, §97-9-116.

Jurors, §97-9-5.

Legislative member, §§97-7-53,
97-7-55.

Perjury, §97-9-65.

Referees, §97-9-5.

Capital murder, §97-3-21.

Conspiracy to commit, §97-1-1.

Capitol complex.

Defacing capitol building, §97-7-9.
Used for sleeping-rooms, §97-7-7.

Carjacking, §97-3-117.

Champerly and maintenance,
§§97-9-13, 97-9-21.

Child abuse and neglect.

Condoning child abuse, §97-5-40.
Enticing child for concealment,
prostitution or marriage, §97-5-5.
Enticing child for employment,
§97-5-7.

Exploitation of children, §97-5-35.

Felonious abuse and/or battery of a
child, §97-5-39.

Protection of children from parents
convicted of felony child sexual
abuse, §97-5-42.

Sex crimes against minors, mandatory
reporting, §97-5-51.

Child homicide, §97-3-25.

Child rape.

Cohabiting partner, §97-5-41.
Step or adopted child, §97-5-41.

Conspiracy, §97-1-1.

**Conspiracy to prevent holding
public office or discharging
duties, §§97-7-17, 97-7-19.**

**Contributing to the neglect or
delinquency of a child, §97-5-39.**

Court forms and legal process.

Sale or distribution of simulated legal
documents, §97-9-1.

Custodial interference, §97-3-51.

Desertion and nonsupport.

Abandonment of child under age six,
§97-5-1.

Child under age sixteen, §97-5-3.

Disorderly conduct.

Disturbing legislative proceedings,
§97-7-47.

Domestic violence, §97-3-7.

Violation of protective order, §97-3-7.

PRISON TERMS —Cont'd

Drive-by shootings or bombings, §97-3-109.

Drug induced rape, §97-3-65.

Enticing child for concealment, prostitution or marriage, §97-5-5.

Enticing child for employment, §97-5-7.

Escape.

Aiding escape of felons, §§97-9-27, 97-9-29.

Aiding escapes from officers, §97-9-33.

Aiding prisoners other than felons, §97-9-31.

Concealing or harboring escaped prisoner, §97-9-41.

Conveying articles useful for escape, §§97-9-27, 97-9-31.

Inmates of state institutions, §97-9-25.

Penitentiary inmates serving less than life term, §97-9-47.

Permitting escape, §97-9-35.

Private persons having custody of prisoner arrested on suspicion, §97-9-37.

Refusal of officer, jailer, etc., to arrest or confine, §97-9-39.

Wilful failure to return to jail after being entrusted to leave, §97-9-49.

Execution of judgments.

Refusal to point out seized property, §97-9-71.

Removal of levied property without authority, §97-9-69.

Exploitation of children, §97-5-35.

Extortion, §97-3-82.

False confinement.

Sending sane person to psychiatric facility, §97-3-13.

False identification, §97-9-79.

False personation.

Public officer or employee, §§97-7-43, 97-7-44.

Flag desecration, §97-7-39.

Fleeing or eluding law enforcement officer in motor vehicle, §97-9-72.

Fondling of child or vulnerable person, §97-5-23.

Food donations.

Federal or state donated food commodities.

Obtaining fraudulently or unauthorized disposition, §97-7-41.

Fraud and deceit.

Altering legislative bills or resolutions, §§97-7-49, 97-7-51.

PRISON TERMS —Cont'd

Fraud and deceit —Cont'd

False statements to federal authorities as to denial of constitutional rights, §§97-7-33 to 97-7-37.

Fraudulent statements and representations, §97-7-10.

Hazing, §97-3-105.

Homicide.

Child homicide, §97-3-25.

Human trafficking, §§97-3-54.1, 97-3-54.2.

Impersonation.

Public officer or employee, §§97-7-43, 97-7-44.

Inducing minor to commit felony, §97-1-6.

Intimidation.

Obstruction of justice, §97-9-55.

Judges, bribing, §97-9-116.

Kidnapping, §97-3-53.

Abduction for purpose of marriage, §97-3-1.

Legislature.

Altering bills or resolutions, §§97-7-49, 97-7-51.

Bribery, §§97-7-53, 97-7-55.

Disturbing proceedings, §97-7-47.

Influence peddling, §97-7-57.

Preventing or attempting to prevent meetings, §97-7-45.

Manslaughter, §97-3-25.

Mayhem, §97-3-59.

Military affairs.

Failure to report for active duty, §97-7-59.

Public drill or parade without special license, §97-7-61.

Murder, §97-3-21.

Conspiracy to commit, §97-1-1.

Obscenity.

Dissemination of sexually oriented material to minors, §97-5-27.

Public display of sexually oriented materials, §97-5-29.

Obstruction of justice, §97-9-129.

Perjury, §§97-9-61 to 97-9-65.

Bribery to procure perjury, §97-9-65.

Subornation of perjury, §97-9-63.

Picketing.

Demonstrating near courthouse or residence of court officers, §97-9-67.

Interfering with access to government buildings, §97-7-63.

PRISON TERMS —Cont'd

Pregnant woman.

Intentional injury to, §97-3-37.

Public records.

Court records and public papers.

Stealing, concealing, destroying, etc., §97-9-3.

Rape.

Assault with intent to ravish, §97-3-71.

Drug induced rape, §97-3-65.

Statutory rape, §97-3-65.

Recordation of documents.

False instrument offered for recording.

Public servants.

Offering false instruments for recording against public servants, §97-7-73.

Resisting or obstructing arrest,

§97-9-73.

Robbery, §97-3-75.

Use of deadly weapon, §97-3-79.

Sex crimes against minors, mandatory reporting, §97-5-51.

Sexual battery, §97-3-101.

Simple assault, §97-3-7.

Stalking, §97-3-107.

Statutory rape, §97-3-65.

Subornation of perjury, §97-9-63.

Suicide.

Assisted suicide, §97-3-49.

Supplemental nutritional assistance program (SNAP).

Fraudulent use of food coupons, §97-7-42.

Telephone and telegraph companies.

Destroying, injuring, etc., licensed communication systems, §97-7-31.

Terrorism.

Making terroristic threats, §97-7-75.

Threats and intimidation.

By letter or notice, §97-3-85.

Whitecapping, §97-3-87.

Treason, §97-7-67.

Trees and timber.

Cutting and rafting from state lands, §97-7-65.

Tree spiking, §§97-3-89, 97-3-91.

Unborn child, buying or selling or offering to buy or sell, §97-3-52.

Wills.

Alteration, destruction or secretion, §97-9-77.

PROFESSIONAL COUNSELORS.

Fondling of child or vulnerable

person, §97-5-23.

PROFESSIONAL COUNSELORS

—Cont'd

Sexual battery, §§97-3-95 to 97-3-104.

PROPERTY.

Human trafficking.

Forfeitures, §97-3-54.7.

PROPERTY TAXES.

Assessments.

Failure to deliver by banker, §97-7-3.

Failure to deliver taxable property list, §97-7-1.

False list of taxable property, §97-7-5.

Collection of taxes.

Crimes and offenses.

Failure or refusal to deliver list of taxable property, §§97-7-1, 97-7-3.

False list of taxable property, §97-7-5.

PROSTITUTION.

Enticing child for prostitution, §97-5-5.

Human trafficking generally, §§97-3-54 to 97-3-54.13.

Human trafficking.

Commercial sexual activity.

Subjecting to, recruiting, enticing, etc, minors, §97-3-54.1.

Generally, §§97-3-54 to 97-3-54.13.

PROTECTIVE ORDERS.

Criminal sexual assault protection order.

Sexual battery conviction, §97-3-101.

Statutory rape conviction, §97-3-65.

Domestic violence.

Violations.

Criminal protection orders, §97-3-7.

Stalking conviction when order in effect, §97-3-107.

PSYCHIATRISTS.

Fondling of child or vulnerable person, §97-5-23.

Sex crimes against minors, mandatory reporting, §97-5-51.

Sexual battery, §§97-3-95 to 97-3-104.

PSYCHOLOGISTS.

Child abuse or neglect.

Sex crimes against minors, mandatory reporting, §97-5-51.

Fondling of child or vulnerable person, §97-5-23.

Sex crimes against minors, mandatory reporting, §97-5-51.

PSYCHOLOGISTS —Cont'd

Sexual battery, §§97-3-95 to 97-3-104.

PUBLICATION OF NOTICE.

Human trafficking.

Forfeitures.

Procedure for forfeiture, §97-3-54.7.

PUBLIC FUNDS.

Human trafficking victims.

Relief for victims of human trafficking fund, §97-3-54.8.

Relief for victims of human trafficking fund, §97-3-54.8.

Victims of human trafficking and commercial sexual exploitation fund, §97-3-54.11.

PUBLIC LANDS.

Trees and timber.

Cutting and rafting from state lands, §97-7-65.

PUBLIC OFFICERS AND EMPLOYEES.

Assault upon statewide elected official, §97-3-7.

Extortion by public officials, §97-3-82.

False personation, §§97-7-43, 97-7-44.

Fraud and deceit.

False statements to federal authorities as to denial of constitutional rights, §§97-7-33 to 97-7-37.

Impersonation, §§97-7-43, 97-7-44.

Recordation of documents.

False instrument offered for recording.
Public servants.

Offering false instruments for recording against public servants, §97-7-73.

Sexual involvement of school employee with student, §97-5-24.

PUNCHING A CHILD.

Felonious abuse and/or battery of a child, §97-5-39.

PUNITIVE DAMAGES.

Human trafficking.

Actions for actual and punitive damages, §97-3-54.6.

R

RABBIS.

Sexual battery, §§97-3-95 to 97-3-104.

Fondling of child or vulnerable person, §97-5-23.

RAILROADS.

Manslaughter.

Ignorant or negligent management of railroad engine, §§97-3-25, 97-3-43.

Robbery.

Railroad tickets, §97-3-83.

RAILROAD TICKETS.

Robbery, §97-3-83.

RAPE, §§97-3-65 to 97-3-71.

Adopted child, carnal knowledge of, §97-5-41.

Assault with intent to ravish, §97-3-71.

Cohabiting partner, carnal knowledge of live-in partner's child, §97-5-41.

Corroboration requirement, §97-3-69.

Drug induced rape, §97-3-65.

Murder in commission of rape, §97-3-19.

Presumption of chaste character, §97-3-69.

Protective orders.

Criminal sexual assault protection order.

Statutory rape conviction, §97-3-65.

Sexual battery, §§97-3-95 to 97-3-104.

Statutory rape, §97-3-65.

Stepchild, carnal knowledge of, §97-5-41.

Victim's past sexual history, §97-3-68.

RAPE SHIELD LAW.

Relevance of victim's past behavior, §97-3-68.

REAL PROPERTY.

Human trafficking.

Forfeitures, §97-3-54.7.

RECORDATION OF DOCUMENTS.

False instrument offered for recording.

Public servants.

Offering false instruments for recording against public servants, §97-7-73.

RECORDS.

Human trafficking.

Forfeitures, §97-3-54.7.

REFEREES.

Bribery of court referee, §97-9-5.

REFRIGERATORS.

Abandonment without removing latches, §97-5-9.

RELATIVES.

Fondling of child or vulnerable person, §97-5-23.

Sexual battery, §§97-3-95 to 97-3-104.

RELIGION.

Church protection act.

Security program to allow persons to carry firearms in church for protection of congregation.

Deadly force, justifiable homicide, §97-3-15.

Mississippi church protection act.

Security program to allow persons to carry firearms in church for protection of congregation.

Deadly force, justifiable homicide, §97-3-15.

REPORTS.

Child abuse and neglect.

Sex crimes against children, mandatory reporting, §97-5-51.

Human trafficking.

Minor as trafficked person, reasonable cause to suspect, §97-3-54.1.

School principals.

Sexual involvement of school employee with student.

Duty to report, failure, §97-5-24.

Schools and education.

Sexual involvement of school employee with student.

Duty to report, failure, §97-5-24.

School superintendents.

Sexual involvement of school employee with student.

Duty to report, failure, §97-5-24.

Sex crimes against children,

mandatory reporting, §97-5-51.

Sexual involvement of school

employee with student, §97-5-24.

REPUTATION.

Extortion.

Definition of property includes reputation, §97-3-82.

RESTITUTION.

Human trafficking.

Victim restitution, §97-3-54.6.

ROBBERY, §§97-3-73 to 97-3-83.

Conduct constituting, §97-3-73.

Extortion, §97-3-82.

Murder in commission of robbery, §97-3-19.

Negotiable instruments, §97-3-83.

ROBBERY —Cont'd

Railroad tickets, §97-3-83.

Threatening letter demanding money or property, §97-3-81.

Threat to injure person or relative at another time, §97-3-77.

Use of deadly weapon, §97-3-79.

Warehouse receipts, §97-3-83.

S

SABOTAGE.

Destroying, injuring, tampering with property to hinder war efforts, §97-7-29.

SCHOOL BUSES.

Assault upon driver, §97-3-7.

Drivers.

Assault upon, §97-3-7.

SCHOOL EMPLOYEES.

Assault upon, §97-3-7.

Sexual involvement of school

employee with student, §97-5-24.

Required report, §97-5-24.

Failure to file, criminal penalty, §97-5-24.

Immunity, §97-5-24.

SCHOOL PRINCIPALS.

Reports.

Sexual involvement of school employee with student.

Duty to report, failure, immunity, §97-5-24.

Sexual involvement of school employee with student.

Duty to report, failure, immunity, §97-5-24.

SCHOOLS AND EDUCATION.

Assault and battery.

School personnel.

Assault upon, §97-3-7.

Child abuse or neglect.

Sex crimes against minors, mandatory reporting, §97-5-51.

Compulsory school attendance law.

School attendance officers.

Assault upon an officer, §97-3-7.

Discipline.

Felonious abuse and/or battery of child.

Permissible discipline, §97-5-39.

Reports.

Sexual involvement of school employee with student, §97-5-24.

SCHOOLS AND EDUCATION

—Cont'd

School attendance officers.

Assault upon an officer, §97-3-7.

Sex crimes against minors,

mandatory reporting, §97-5-51.

Sexual involvement of school employee with student.

Reports, §97-5-24.

SCHOOL SUPERINTENDENTS.

Reports.

Sexual involvement of school employee with student.

Duty to report, failure, immunity, §97-5-24.

Sexual involvement of school employee with student.

Duty to report, failure, immunity, §97-5-24.

SCOUT LEADERS.

Fondling of child or vulnerable person, §97-5-23.

Sexual battery, §§97-3-95 to 97-3-104.

SECURITIES.

Human trafficking.

Forfeitures, §97-3-54.7.

SELF-DEFENSE.

Defensive force, use, §97-3-15.

Drive-by shooting or bombing, §97-3-109.

Felonious abuse and/or battery of a child, §97-5-39.

Justifiable homicide, §97-3-15.

Manslaughter.

Unreasonable force to repel felony or unlawful act, §§97-3-25, 97-3-31.

SELF-INCRIMINATION.

Champerly and maintenance.

Witness immunity for compelled testimony, §97-9-21.

SENTENCING.

Arrests.

Resisting or obstructing arrest, §97-9-73.

Assisted suicide, §97-3-49.

Bribery.

Arbitrators, §97-9-5.

Commercial bribery, §97-9-10.

Compounding or concealing crime, §§97-9-7, 97-9-9.

Escape of prisoners.

Accepting bribe to permit escape, §97-9-39.

SENTENCING —Cont'd

Bribery —Cont'd

Jurors, §97-9-5.

Legislative member, §§97-7-51, 97-7-53.

Perjury, §97-9-65.

Referees, §97-9-5.

Capital murder, §97-3-21.

Conspiracy to commit, §97-1-1.

Carjacking, §97-3-117.

Champerly and maintenance, §§97-9-13, 97-9-21.

Child abuse and neglect.

Condoning child abuse, §97-5-40.

Felonious abuse and/or battery of a child, §97-5-39.

Conspiracy.

Public office.

Conspiracy to prevent holding public office or discharging duties, §§97-7-17, 97-7-19.

Contributing to the neglect or delinquency of a child, §97-5-39.

Court forms and legal process.

Sell or distribution of simulated legal documents, §97-9-1.

Custodial interference, §97-3-51.

Desertion and nonsupport.

Abandonment of child under age six, §97-5-1.

Child under age sixteen, §97-5-3.

Disorderly conduct.

Disturbing legislative proceedings, §97-7-47.

Domestic violence.

Condition for suspended sentence, §97-3-7.

Drive-by shootings or bombings, §97-3-109.

Drug induced rape, §97-3-65.

Enticing child for concealment, prostitution or marriage, §97-5-5.

Enticing child for employment, §97-5-7.

Escape.

Aiding escape of felons, §§97-9-27, 97-9-29.

Aiding escapes from officers, §97-9-33.

Aiding prisoners other than felons, §97-9-31.

Concealing or harboring escaped prisoner, §97-9-41.

Conveying articles useful for escape, §§97-9-27, 97-9-31.

Inmates of state institutions, §97-9-25.

SENTENCING —Cont'd

Escape —Cont'd

- Permitting escape, §97-9-35.
- Private persons having custody of prisoner arrested on suspicion, §97-9-37.
- Refusal of officer, jailer, etc., to arrest or confine, §97-9-39.
- Suffering an escape, §97-9-39.
- Wilful failure to return to jail after being entrusted to leave, §97-9-49.

Execution of judgments.

- Failure to point out property subject to seizure, §97-9-71.
- Removal of levied property without authority, §97-9-69.

Exploitation of children, §97-5-35.

Extortion, §97-3-82.

False identification, §97-9-79.

False personation.

- Public officer or employee, §§97-7-43, 97-7-44.

Flag desecration, §97-7-39.

Fleeing or eluding law enforcement officer in motor vehicle, §97-9-72.

Fondling of child or vulnerable person, §97-5-23.

Food donations.

- Federal or state donated food commodities.
- Obtaining fraudulently or unauthorized disposition, §97-7-41.

Fraud and deceit.

- Altering legislative bills or resolutions, §§97-7-49, 97-7-51.
- Conspiracy to defraud state, §§97-7-11 to 97-7-15.
- False statements to federal authorities as to denial of constitutional rights, §§97-7-33 to 97-7-37.

Impersonation.

- Public officer or employee, §§97-7-43, 97-7-44.

Intimidation.

- Obstruction of justice, §97-9-55.

Kidnapping, §97-3-53.

Legislature.

- Altering bills or resolutions, §§97-7-49, 97-7-51.
- Bribery, §§97-7-53, 97-7-55.
- Disturbing proceedings, §97-7-47.
- Influence peddling, §97-7-57.
- Preventing or attempting to prevent meetings, §97-7-45.

SENTENCING —Cont'd

Libel, §97-3-55.

Manslaughter.

- Tree spiking, §§97-3-89, 97-3-93.

Military affairs.

- Failure to report for active duty, §97-7-59.
- Public drill or parade without special license, §97-7-61.

Murder, §97-3-21.

- Conspiracy to commit, §97-1-1.

Perjury, §§97-9-61 to 97-9-65.

- Bribery to procure perjury, §97-9-65.
- Subornation of perjury, §97-9-63.

Picketing.

- Demonstrating near courthouse or residence of court officers, §97-9-67.
- Interfering with access to government buildings, §97-7-63.

Public records.

- Court records and public papers.
- Stealing, concealing, destroying, etc., §97-9-3.

Rape.

- Drug induced rape, §97-3-65.
- Statutory rape, §97-3-65.

Resisting or obstructing arrest, §97-9-73.

Resisting service of process, §97-9-75.

Robbery, §97-3-75.

- Use of deadly weapon, §97-3-79.

Sexual battery, §97-3-101.

Stalking, §97-3-107.

Statutory rape, §97-3-65.

Subornation of perjury, §97-9-63.

Suicide.

- Assisted suicide, §97-3-49.

Supplemental nutritional assistance program (SNAP).

- Fraudulent use of food coupons, §97-7-42.

Telephone and telegraph companies.

- Destroying, injuring, etc., §97-7-31.

Threats and intimidation.

- By letter or notice, §97-3-85.
- Whitecapping, §97-3-87.

Treason, §97-7-69.

Trees and timber.

- Cutting or rafting from state lands, §97-7-65.

Tree spiking, §§97-3-89, 97-3-91.

Unborn child, buying or selling or offering to buy or sell, §97-3-52.

Wills or codicils.

- Alteration, destruction or secretion, §97-9-77.

SERIAL MURDERS.

Capital murder, §97-3-19.

**SERVICE OF NOTICE, PROCESS
AND OTHER PAPERS.**

Human trafficking.

Forfeitures.

Procedure for forfeiture, §97-3-54.7.

Resisting process, §97-9-75.

**SEX OFFENDER REGISTRATION
AND NOTIFICATION.**

Stalking conviction by person
required to register, §97-3-107.

SEX OFFENDERS.

Stalking conviction by person
required to register, §97-3-107.

SEX OFFENSES.

Children, sex crimes against.

Mandatory reporting, §97-5-51.

Exploitation of children, §§97-5-31 to
97-5-37.

Construction with other criminal
statutes, §97-5-37.

Definitions, §97-5-31.

Penalties, §97-5-35.

Prohibited conduct, §97-5-33.

Incest.

Sexual battery, §§97-3-95 to 97-3-104.

Protective orders.

Criminal sexual assault protection
order.

Sexual battery conviction, §97-3-101.

Statutory rape conviction, §97-3-65.

Sexual battery, §§97-3-95 to 97-3-104.

Sodomy.

Murder in commission of unnatural
intercourse, §97-3-19.

SEXUAL BATTERY, §§97-3-95 to
97-3-104.

Conduct constituting, §97-3-95.

Construction with other criminal
statutes, §97-3-104.

Criminal sexual assault protection
order, §97-3-101.

Defense, §97-3-99.

Mentally defective person, defined,
§97-3-97.

Mentally incapacitated person,
defined, §97-3-97.

Murder in commission of sexual
battery, §97-3-19.

Other criminal statutes not
amended, repealed or modified,
§97-3-103.

SEXUAL BATTERY —Cont'd

Physically helpless person, defined,
§97-3-97.

Sentencing, §97-3-101.

Sexual penetration, defined, §97-3-97.

SEXUAL EXPLOITATION OF

CHILDREN, §§97-5-31 to 97-5-37.

Construction with other criminal
statutes, §97-5-37.

Definitions, §97-5-31.

Penalties, §97-5-35.

Prohibited conduct, §97-5-33.

**SEXUAL INVOLVEMENT OF
SCHOOL EMPLOYEE WITH
STUDENT**, §97-5-24.

Required reports, §97-5-24.

Failure to file, criminal penalty,
§97-5-24.

Immunity of persons making,
§97-5-24.

SHIELD LAW.

Rape shield law.

Relevance of victim's past behavior,
§97-3-68.

SHOOTING INTO DWELLING.

Drive-by shooting, §97-3-109.

SIMPLE ASSAULT, §97-3-7.

SIMULATED LEGAL DOCUMENTS,
§97-9-1.

SLAVERY.

Human trafficking, §§97-3-54 to
97-3-54.13.

SOCIAL SECURITY NUMBER.

False identification, §97-9-79.

SOCIAL WORKERS.

Assault upon, §97-3-7.

SODOMY.

Murder in commission of unnatural
intercourse, §97-3-19.

**SOLICITATION OF BUSINESS BY
OR FOR ATTORNEY**, §§97-9-11 to
97-9-23.

SORORITIES.

Hazing, §97-3-105.

SPANKING.

Domestic violence.

Reasonable discipline of a child not to
constitute, §97-3-7.

STALKING, §97-3-107.

STAND YOUR GROUND.

Self-defense.

Justifiable homicide, §97-3-15.

STARVATION.

Felonious abuse and/or battery of a child, §97-5-39.

STATE DEPARTMENTS AND AGENCIES.

Impersonating state officer or employee, §§97-7-43, 97-7-44.

STATE MENTAL INSTITUTIONS.

Escape of inmates, §97-9-25.

STATE OF MISSISSIPPI.

Conspiracy to defraud state, §§97-7-11 to 97-7-15.

STATUTORY RAPE, §97-3-65.

Sexual battery, §§97-3-95 to 97-3-104.

STEAMBOATS.

Manslaughter.

Ignorant or negligent management of vessel, §§97-3-25, 97-3-43.

STEPCHILDREN.

Child rape, §97-5-41.

STIRRING UP LITIGATION,

§§97-9-11 to 97-9-23.

STRANGLING.

Assault, §97-3-7.

Domestic violence.

Aggravated domestic violence, §97-3-7.

Felonious abuse and/or battery of a child, §97-5-39.

SUBORNATION OF PERJURY,

§97-9-63.

SUICIDE.

Assisted suicide, §97-3-49.

SUMMONS.

Simulated legal documents.

Sell or distribution prohibited, §97-9-1.

SUPPLEMENTAL NUTRITIONAL ASSISTANCE PROGRAM (SNAP).

Fraud.

Fraudulent use, §97-7-42.

T

TAMPERING.

Timber, trees and saw logs, §§97-3-89 to 97-3-93.

TEACHERS.

Assault upon teacher, §97-3-7.

Child abuse or neglect.

Sex crimes against minors, mandatory reporting, §97-5-51.

Fondling of child or vulnerable person, §97-5-23.

Fornication with pupil, §97-5-24.

Sex crimes against minors, mandatory reporting, §97-5-51.

Sexual battery, §§97-3-95 to 97-3-104.

Sexual involvement with student, §97-5-24.

Required report, §97-5-24.

Failure to file, criminal penalty, §97-5-24.

Immunity of persons making, §97-5-24.

TELECOMMUNICATIONS.

Human trafficking.

Forfeitures, §97-3-54.7.

TERRORISM.

Making terroristic threats, §97-7-75.

THEFT.

Carjacking, §§97-3-113 to 97-3-117.

Motor vehicles.

Carjacking, §§97-3-113 to 97-3-117.

THREATS.

By letter or notice, §97-3-85.

Extortion, §97-3-82.

Intimidating judge, juror, etc., to obstruct justice, §97-9-55.

Robbery, §97-3-77.

Threatening letter demanding money or property, §97-3-81.

Stalking, §97-3-107.

Whitecapping, §97-3-87.

Witnesses.

Tampering with physical evidence, §97-9-125.

Threat, harassment or intimidation of witness, §§97-9-103, 97-9-115.

TORTURE.

Felonious abuse and/or battery of a child, §97-5-39.

TRAFFICKING OF PERSONS,

§§97-3-54 to 97-3-54.13.

TREASON, §§97-7-67 to 97-7-71.

Advocating violent overthrow of government, §97-7-71.

Corroboration requirement, §97-7-69.

Death penalty, §97-7-67.

TREASON —Cont'd

Evidentiary proof, §97-7-69.

Prison term, §97-7-65.

Testimony of witnesses, §97-7-69.

TREES AND TIMBER.

Public lands.

Cutting and rafting from state lands,
§97-7-65.

Spiking trees, §§97-3-89 to 97-3-93.

Tree spiking.

Manslaughter, §97-3-93.

Tampering causing injury, §97-3-91.

Tampering with intent to injure or
harass owner, §97-3-89.

TREE SPIKING, §§97-3-89 to 97-3-93.

TRESPASS.

Killing trespasser involuntarily,
§§97-3-25, 97-3-33.

Public lands.

Cutting and rafting timber, §97-7-65.

TRIAL.

Child abuse and neglect.

Contributing to the neglect or
delinquency of a child, §97-5-39.

Felonious abuse and/or battery of a
child, §97-5-39.

**Contributing to the neglect or
delinquency of a child**, §97-5-39.

Escape of prisoners.

Recapture of escapee after term
expires.

Imprisonment until tried, §97-9-43.

TRUANCY.

School attendance officers.

Assault upon, §97-3-7.

U

UNBORN CHILD.

**Buying or selling or offering to buy
or sell an unborn child**, §97-3-52.

Human being includes, §97-3-37.

Killing child or mother, §§97-3-25,
97-3-37.

UNDERCOVER MISSIONS.

Human trafficking.

Use of undercover operatives not
defense to offense, §97-3-54.5.

**UNLAWFUL ENCOURAGEMENT OF
LITIGATION**, §§97-9-11 to 97-9-23.

UNNATURAL INTERCOURSE.

Murder in commission of offense,
§97-3-19.

V

VANDALISM.

Capitol complex.

Defacing capitol building, §97-7-9.

VENUE.

Human trafficking.

Forfeitures.

Procedure for forfeiture, §97-3-54.7.

Stalking prosecution, §97-3-107.

VICTIMS OF CRIME.

Human trafficking.

Confidentiality of identity, §97-3-54.6.

Defense to human trafficking,
§97-3-54.6.

Relief for victims of human trafficking
fund, §97-3-54.8.

Restitution, §97-3-54.6.

VOLUNTARY MANSLAUGHTER.

**Killing without malice in the heat of
passion**, §97-3-35.

W

WAR.

**Destroying, injuring, tampering
with property to hinder war
efforts**, §97-7-29.

WHITECAPPING, §97-3-87.

WITNESSES.

Bribery.

Bribe receiving by a witness,
§97-9-111.

Bribing a witness, §97-9-109.

Champerty and maintenance.

Immunity for compelled testimony,
§97-9-21.

Intimidation, §§97-9-55, 97-9-113,
97-9-115.

Rendering criminal assistance,
elements of offense, §97-9-103.

Tampering with physical evidence,
§97-9-125.

Murder of witness, §97-3-19.

Obstruction of justice.

Bribery.

Bribe receiving by a witness,
§97-9-111.

Bribing a witness, §97-9-109.

Intimidating a witness, §97-9-113.

Retaliation against public servant or
witness, §97-9-127.

INDEX

WITNESSES —Cont'd

Obstruction of justice —Cont'd

Tampering with a witness, §97-9-115.

Rendering criminal assistance,
elements of offense, §97-9-103.

Picketing or demonstrating near residence of witness, §97-9-67.

WITNESSES —Cont'd

Retaliation against public servant or witness, §97-9-127.

Tampering with a witness, §97-9-115.

Rendering criminal assistance,
elements of offense, §97-9-103.

